



11-1-1989

Chrismon v. Guilford County and Hall v. City of Durham: Redefining Contract Zoning and Approving Conditional Use Zoning in North Carolina

Louis W. Doherty

Follow this and additional works at: <http://scholarship.law.unc.edu/nclr>



Part of the [Law Commons](#)

Recommended Citation

Louis W. Doherty, *Chrismon v. Guilford County and Hall v. City of Durham: Redefining Contract Zoning and Approving Conditional Use Zoning in North Carolina*, 68 N.C. L. REV. 177 (1989).

Available at: <http://scholarship.law.unc.edu/nclr/vol68/iss1/13>

This Comments is brought to you for free and open access by Carolina Law Scholarship Repository. It has been accepted for inclusion in North Carolina Law Review by an authorized administrator of Carolina Law Scholarship Repository. For more information, please contact law_repository@unc.edu.

COMMENT

Chrismon v. Guilford County and Hall v. City of Durham: Redefining Contract Zoning and Approving Conditional Use Zoning in North Carolina

Zoning law has a short history in the United States, originating around the turn of this century.¹ The United States Supreme Court approved a basic form of zoning in 1926 when a local government divided its village into districts and stipulated the types of buildings and property uses permissible in each district.² Since this ruling, cities, counties, and developers have sought procedures to increase flexibility in zoning, especially in transition areas between differently zoned districts.³ Some commentators have proposed "conditional zoning," a procedure whereby a zoning authority may place some conditions on a landowner's rezoning request to limit the effects of rezoning on neighboring properties.⁴ Two North Carolina writers have proposed "conditional use zoning," an innovative practice whereby a zoning authority may create conditional use dis-

1. See *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (noting that zoning laws began around 25 years earlier).

2. *Id.* at 397.

3. Two North Carolina authors illustrate a potential problem with traditional zoning: For example, perhaps a lot zoned "residential" adjoining a "commercial area" should not reasonably be "residential," but rezoning it commercial (with all legal uses permitted) would only aggravate the land-use problem. But if the rezoning was accompanied by certain conditions or use limitations, or both, a rezoning could perhaps not only offer a reasonable use for the property but also solve a land-use relationship problem.

S. DAVENPORT & P. GREEN, SPECIAL USE AND CONDITIONAL USE DISTRICTS: A WAY TO IMPOSE MORE SPECIFIC ZONING CONTROLS 13 (N.C. Inst. Gov't., 1980), quoted in *Chrismon v. Guilford County*, 322 N.C. 611, 619, 370 S.E.2d 579, 584 (1988). When this pamphlet was published, Mr. Davenport was assistant director of the Greensboro Planning Department, and Professor Green was a faculty member at the Institute of Government, The University of North Carolina at Chapel Hill. *Id.* at v.

The North Carolina Supreme Court noted that "[c]omprehensive zoning systems, though effective in preserving the character of ongoing uses, are often criticized for not allowing for the degree of flexibility needed to allow local officials to respond appropriately to 'constantly shifting conditions and public needs.'" *Chrismon*, 322 N.C. at 617-18, 370 S.E.2d at 583 (quoting Brough, *Flexibility Without Arbitrariness in the Zoning System: Observations on North Carolina Special Exception and Zoning Amendment Cases*, 53 N.C.L. REV. 925, 925 (1975)). The court also stated that "the 'all or nothing' approach of traditional zoning techniques is insufficient in today's world of rapid industrial expansion and pressing urban and rural social and economic problems." *Id.* at 622, 370 S.E.2d at 586. Another writer critical of basic "Euclidian" zoning observed that the "simple pattern" of districts is "incapable of accommodating the whole complex of land uses, and it cannot be tailored to the specific needs of a community without the creation of an unwieldy number and variety of districts." R. ANDERSON, 2 AMERICAN LAW OF ZONING § 9.17, at 153 (3d ed. 1986).

4. Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968) (proposing conditional zoning); see also Comment, *Toward a Strategy for Utilization of Contract and Conditional Zoning*, 51 J. URB. L. 94, 95-96 (1973) (noting the need for greater flexibility in land use regulation and expressing approval of conditional zoning). Shapiro suggests that conditional zoning may best serve the public interest: "If a parcel of land is ripe for more intensive development and the landowner can achieve his purposes with a lesser use than allowed by the proposed classification, a zoning authority should be able to request conditions to minimize the effects of the zoning change." Shapiro, *supra*, at 277. For further discussion of conditional zoning and consideration of cases approving the practice, see *infra* notes 58-67 and accompanying text.

tricts in which property has no uses available "as of right" but requires a conditional use permit for any use.⁵ The North Carolina Supreme Court recently opened the door for greater adaptability in zoning amendments in two cases, *Chrismon v. Guilford County*⁶ and *Hall v. City of Durham*.⁷

In *Chrismon* the court followed the North Carolina legislature's lead and approved conditional use zoning, which allows cities and counties to create conditional use districts, to rezone property to such a district upon a landowner's request, and to restrict the uses of that property to those permitted under a separately approved conditional use permit.⁸ In both *Chrismon* and *Hall* the court narrowed the definition of contract zoning previously applied in North Carolina, holding that contract zoning occurs only when a zoning authority and a landowner reach a bilateral agreement.⁹ As a result of these decisions, zoning law in North Carolina has undergone significant adjustments in three areas: first, the factors that determine whether spot zoning has a reasonable basis and therefore may be upheld;¹⁰ second, the situations that will result in a finding of contract zoning;¹¹ and, third, the approval of conditional use zoning.¹²

This Comment begins by defining the relevant zoning terms and doctrines¹³ and then reviews the *Chrismon* and *Hall* decisions.¹⁴ The Comment describes how those decisions significantly affected the North Carolina zoning law,¹⁵ paying particular attention to (1) how the court redefined contract zoning while retaining prohibitions on careless practices once thought to be included in contract zoning,¹⁶ and (2) how the conditional use zoning practice differs from conditional zoning.¹⁷ The Comment then considers some questions that remain unanswered after *Chrismon* and *Hall*.¹⁸ The Comment concludes that the ad-

5. S. DAVENPORT & P. GREEN, *supra* note 3, at 6-7. A conditional use district is a zoning district that has no uses listed as being permitted "as of right." Uses permitted "as of right" are property uses automatically granted to the landowner without further approval from the zoning authority. A conditional use district only lists conditional uses, and a landowner must obtain a conditional use permit in order to use his property for one of the conditional uses. For a further description of conditional use zoning, see *infra* notes 68-79 and accompanying text.

6. 322 N.C. 611, 370 S.E.2d 579 (1988).

7. 323 N.C. 293, 372 S.E.2d 564 (1988).

8. *Chrismon*, 322 N.C. at 614-17, 370 S.E.2d at 582-83; Act of July 4, 1985, ch. 607, 1985 N.C. Sess. Laws 776 (codified at N.C. GEN. STAT. §§ 153A-342, 160A-382 (1987)).

9. *Hall*, 323 N.C. at 298-99, 372 S.E.2d at 568; *Chrismon*, 322 N.C. at 634-35, 370 S.E.2d at 592-93. For further discussion of contract zoning, see *infra* notes 43-52 & 160-206 and accompanying text.

10. See *infra* notes 152-59 and accompanying text.

11. See *infra* notes 160-206 and accompanying text.

12. See *infra* notes 207-25 and accompanying text.

13. See *infra* notes 19-79 and accompanying text.

14. See *infra* notes 80-151 and accompanying text.

15. See *infra* notes 152-225 and accompanying text.

16. See *infra* notes 160-206 and accompanying text. The court retained prohibitions against "insufficiently analyzed rezoning," a doctrine that has existed but has not been named. The supreme court has held that a zoning authority must consider all uses available for property rezoned to a general use district. *Allred v. City of Raleigh*, 277 N.C. 530, 544-45, 178 S.E.2d 432, 440-41 (1971). This Comment proposes that this concept be called "insufficiently analyzed rezoning." See *infra* notes 53-57 and accompanying text.

17. See *infra* notes 207-25 and accompanying text.

18. See *infra* notes 226-74 and accompanying text.

justment to the definition of contract zoning provides much-needed clarity without sacrificing restrictions on zoning that are not thoroughly examined. It also concludes that the concept of conditional use zoning places North Carolina in the forefront of developing flexibility devices. However, serious questions remain after *Chrismon* about the practical application of conditional use zoning.

I. DEFINITIONS OF ZONING TERMINOLOGY

A. General Use District

In delegating zoning power to cities and counties,¹⁹ the North Carolina legislature specifically authorized cities and counties to create "general use districts, in which a variety of uses are permissible in accordance with general standards."²⁰ The city or county zoning ordinance describes each general use district by listing the uses permitted for all property within that district. Thus, each landowner knows which uses are "permitted as of right"²¹ for her property and the neighboring properties. In addition to these permitted uses, the general use district also may list conditional uses. These conditional uses are available to individual tracts upon the issuance of a conditional use permit, to be granted if the property meets certain enumerated conditions.²²

When applying for rezoning from one general use district to another, the applicant requests the rezoning of the property to allow all uses permitted in another zone. For example, the applicant may request rezoning from a residential district to a commercial district or from a residential district with low density restrictions to a district with higher density restrictions.²³ Before granting the rezoning request, the zoning authority must consider all of the uses that will be permitted as of right under the new zoning classification and must determine the appropriateness of each use for that parcel of land.²⁴

19. The power to zone is a legislative power vested in the general assembly, but the state legislature has delegated this authority to municipalities and counties. *Allred*, 277 N.C. at 540, 178 S.E.2d at 437; *Zopfi v. City of Wilmington*, 273 N.C. 430, 433-34, 160 S.E.2d 325, 330 (1968); N.C. GEN. STAT. § 153A-340 (1987) (granting to counties the authority to zone); N.C. GEN. STAT. § 160A-382 (1987) (granting zoning authority to cities).

20. N.C. GEN. STAT. § 153A-342 (1987) (granting districting authority to counties); N.C. GEN. STAT. § 160A-382 (1987) (granting similar authority to cities).

21. See *Woodhouse v. Board of Comm'rs*, 299 N.C. 211, 214-15, 261 S.E.2d 882, 885 (1980) (uses "permitted by right" in a general use district); S. DAVENPORT & P. GREEN, *supra* note 3, at 7 ("uses by right").

22. See *Woodhouse*, 299 N.C. at 215-16, 261 S.E.2d at 885-86. See also zoning ordinances cited *infra* note 25.

23. See, e.g., *Hall v. City of Durham*, 323 N.C. 293, 295-96, 372 S.E.2d 564, 566-67 (1988). Applicant's property was divided between two districts—a C-1 district (neighborhood commercial) and a R-20 district (single-family residential). The applicant requested rezoning of its property to a C-4(D) district (heavy commercial). Uses permitted in a C-4(D) district, but not in C-1 or R-20, included adult entertainment, drive-in theaters, crematoria, warehouses, mobile home sales lots, and correctional institutions.

24. If the zoning authority rezones the property without considering all of those uses, the rezoning may be invalidated because it constitutes "insufficiently analyzed rezoning." See *infra* notes 53-57 and accompanying text.

B. Conditional Use Permits

In addition to uses permitted as of right, a zoning ordinance may provide for conditional uses in a given general use district. These conditional uses are permissible for property within that district upon the issuance of a conditional use permit.²⁵ The city council or county board of commissioners may determine whether to grant a conditional use permit, but the statutes also allow the city council or county board of commissioners to delegate this permitting authority to the board of adjustment for the city or county.²⁶

Because conditional use permits have been allowed in general use districts for many years, an extensive case law has developed concerning when the council or board must grant such a permit and how the decisions will be reviewed in the courts.²⁷ As a result of this case law, a zoning authority has less discretion when deciding whether to grant a conditional use permit than it has when deciding to rezone property to a different general use district: "When an applicant [for a conditional use permit] has produced competent, material, and substantial evidence tending to establish the existence of the facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it."²⁸ This *prima facie* entitlement to a conditional use permit shifts the burden to the zoning authority to show sufficient reason why it denied a permit.²⁹ Conditional use permit decisions, unlike "legislative" decisions to rezone property to a new district, are considered quasi-judicial.³⁰ Therefore, a heightened standard of review applies when the courts review the decision.³¹ On appeal of a conditional use permit decision, the trial court "sits in the posture of an appellate court. The trial court does not review the sufficiency of evidence

25. See, e.g., GREENSBORO, N.C. CODE OF ORDINANCES §§ 30-202-203 (May 11, 1989); Guilford County, N.C., Zoning Ordinance § 6-17 (1988) (examples of conditional use districts); see also *Woodhouse*, 299 N.C. at 214-15, 261 S.E.2d at 885 (ordinance allowing both permitted uses as of right and conditional uses); *Harts Book Stores, Inc. v. City of Raleigh*, 53 N.C. App. 753, 755-57, 281 S.E.2d 761, 762-63 (1981) (example of a special use ordinance). State statutes grant such permitting authority provided that the zoning ordinance includes the specific conditions and procedures required for the granting of a conditional use permit. N.C. GEN. STAT. §§ 153A-340, 160A-381 (1987).

26. N.C. GEN. STAT. §§ 153A-340, 160A-381 (1987).

27. See *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980) (describing the scope of judicial review); *Woodhouse*, 299 N.C. at 216-19, 261 S.E.2d at 886-88 (once an applicant for a permit shows that the request and the property in question meet all of the conditions imposed in the ordinance, the board may not deny the permit without sufficient reason supported by evidence); *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974) (establishing when an applicant is entitled to a conditional use permit).

28. *Humble Oil & Ref. Co.*, 284 N.C. at 468, 202 S.E.2d at 136; see also *Woodhouse*, 299 N.C. at 218-21, 261 S.E.2d at 887-89 (reviewing decisions of other states on the standards for granting or denying conditional and special use permits).

29. *Humble Oil & Ref. Co.*, 284 N.C. at 468, 202 S.E.2d at 136 ("A denial of the permit should be based upon findings *contra* which are supported by competent, material, and substantial evidence appearing in the record.").

30. *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 625-26, 265 S.E.2d at 382-83; *Humble Oil & Ref. Co.*, 284 N.C. at 469, 202 S.E.2d at 136-37 ("When a board of aldermen, a city council, or zoning board [of adjustment] hears evidence to determine the existence of facts and conditions upon which the ordinance expressly authorizes it to issue a special use permit, it acts in a quasi-judicial capacity.").

31. *Coastal Ready-Mix Concrete Co.*, 299 N.C. at 625-27, 265 S.E.2d at 382-83.

presented to it but reviews that evidence presented to the town board."³² The trial court must ensure that the permit decision is "supported by competent, material and substantial evidence in the whole record."³³ Thus, the decision to grant or deny a conditional use permit is subject to more searching review than a legislative decision to rezone property to a different zoning district. The city council, county board of commissioners, or the board of adjustment must be careful to "follow the procedures specified in the ordinance," conduct all hearings in accordance with "fair-trial standards," and compile a thorough record showing sufficient reasons for the grant or denial of a conditional use permit.³⁴

C. *Spot Zoning*

The North Carolina Supreme Court's decision in *Blades v. City of Raleigh*³⁵ established the foundation for spot zoning. In *Blades* the Raleigh City Council, after considering a developer's request, rezoned a parcel of five acres from one residential district to another residential district allowing higher density and a broader range of uses.³⁶ The five-acre plot and surrounding area originally had been zoned single-family residential,³⁷ but the applicant wanted a zoning change so that he could build twenty luxury apartments on the five-acre site.³⁸ When neighbors challenged the zoning amendment, the supreme court invalidated the City Council's decision, holding that the zoning change constituted impermissible spot zoning.³⁹ The court defined spot zoning as a zoning amendment that changed the zoning restrictions for a small tract of land so that the small tract was either burdened by or relieved from restrictions that existed for the land surrounding it.⁴⁰ From this definition, two requirements for spot zoning emerged: (1) a small tract of land that is rezoned, and (2) zoning restric-

32. *Id.* at 626-27, 265 S.E.2d at 383. The trial court, and any appellate court thereafter, reviews this quasi-judicial decision by:

- (1) Reviewing the record for errors in law,
- (2) Insuring that procedures specified by law in both statute and ordinance are followed,
- (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
- (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
- (5) Insuring that decisions are not arbitrary and capricious.

Id. at 626, 265 S.E.2d at 383.

33. *Id.*

34. *Humble Oil & Ref. Co.*, 284 N.C. at 471, 202 S.E.2d at 138; *see also supra* note 32 (outlining quasi-judicial review).

35. 280 N.C. 531, 187 S.E.2d 35 (1972).

36. *Id.* at 536-40, 187 S.E.2d at 37-40.

37. *Id.* at 535, 187 S.E.2d at 37.

38. *Id.* at 538, 187 S.E.2d at 39.

39. *Id.* at 551, 187 S.E.2d at 46.

40. *Id.* at 549, 187 S.E.2d at 45. The court gave the following definition of spot zoning:

A zoning ordinance, or amendment, which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned, so as to impose upon the small tract greater restrictions than those imposed upon the larger area, or so as to relieve the small tract from restrictions to which the rest of the area is subjected, is called "spot zoning."

Id.

tions for the small tract different from those that exist for the surrounding land. In addition, the *Blades* court held that spot zoning is legal only if there is a "reasonable basis" for the distinction in the zoning restrictions between the small tract and the surrounding area.⁴¹

The *Blades* spot zoning definition seems to have caused few problems. The only significant question is whether there is a reasonable basis for the distinction in zoning classifications for the small tract and the surrounding area.⁴² If a reasonable basis is lacking, the trial court must invalidate the zoning amendment. The doctrine of spot zoning gives protection to neighbors of these small tracts and allows courts to give closer review to a zoning authority's legislative decision to rezone such property to a different zoning district.

D. Contract Zoning and its Development in North Carolina

The doctrine of contract zoning, like the doctrine of spot zoning, allows courts to scrutinize more closely a zoning authority's decision to rezone property. There is some debate about the exact definition of contract zoning, but at the very least it prohibits zoning authorities from entering contracts or agreements requiring the zoning authority to rezone property.⁴³ Unfortunately, many courts only apply the term "contract zoning" to a challenged rezoning after determining that the rezoning was invalid, and thus it is difficult to estab-

41. *Id.* In *Blades* the court found that there was no reasonable basis for allowing the small tract to be rezoned to a higher density allowing apartments while the surrounding neighborhood was zoned single-family residential. *Id.* Thus, the zoning amendment was invalidated because it constituted impermissible spot zoning. *Id.* at 551, 187 S.E.2d at 46.

42. North Carolina courts have found both reasonable and unreasonable distinctions in spot zoning cases. Although the court did not find a reasonable basis in *Blades*, later that same year, the supreme court found a reasonable basis for a distinction in zoning restrictions involving a 25 acre tract when the Town of Tarboro showed that changing conditions in the area had created a need for commercial uses. *Allgood v. Town of Tarboro*, 281 N.C. 430, 442-44, 189 S.E.2d 255, 263-64 (1972). Curiously, although *Allgood* was decided three months after *Blades*, the court only briefly mentioned *Blades* and did not cite *Blades* for the definition of spot zoning. See also *Lathan v. Union County Bd. of Comm'rs*, 47 N.C. App. 357, 357-60, 267 S.E.2d 30, 31-32 (where 11 acres were rezoned from single-family residential to light industrial allowing the owners to expand their mill operation previously operated as a non-conforming use, the court found no reasonable basis for distinguishing this property as industrial while the surrounding area remained residential), *cert. denied*, 301 N.C. 92, 273 S.E.2d 298 (1980); *infra* text accompanying notes 97-98 & 112-14 (in *Chrismon* the court of appeals found no reasonable basis for the spot zoning, but the supreme court reversed upon a finding that there was a reasonable basis for the spot zoning).

43. D. MANDELKER, *LAND USE LAW* § 6.59 (1982) ("The term 'contract zoning' should probably only be applied to a true bilateral contract between the landowner and the municipality."); see Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 978-980 & nn.119-129 (1987) (listing various definitions given in court decisions, zoning treatises, and law review articles). One writer asserts:

The term *contract zoning* can only be properly applied to a situation in which the property owner provides consideration to the local governing body in the form of an enforceable promise to do or not to do a certain thing in regard to his property in return for the zoning legislation which he seeks or an enforceable promise by the city for such legislation. In this procedure the landowner's promise is not effective until the passage of the legislation.

Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.J. 825, 831 (1972).

lish a precise definition.⁴⁴ The contract zoning doctrine, however, is based on the principle that zoning authorities cannot bargain away their police powers⁴⁵ or "contract away the exercise of [their] zoning powers."⁴⁶

During the late 1970s and early 1980s the North Carolina courts developed an unusual and broad definition of contract zoning. Interpreting the North Carolina Supreme Court's decision in *Allred v. City of Raleigh*,⁴⁷ both the state supreme court and court of appeals had held that contract zoning occurs when a zoning authority considers a developer's proposal while making a rezoning decision pertaining to the developer's land.⁴⁸ The court of appeals had gone as far as stating that "[i]f the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan this is *contract zoning* and is illegal."⁴⁹ The courts had been concerned that a zoning authority might not consider all of the uses that would be permitted as of right in the new zoning classification after hearing a developer's proposed plans.⁵⁰ Using these principles, however, the court of appeals so easily found contract zoning in subsequent cases⁵¹ that city councils and county boards of aldermen were afraid even to hear developers' requests before making zoning amendments.⁵²

44. Wegner, *supra* note 43, at 979-80. "Care must be taken" in analyzing the contract zoning cases, especially in jurisdictions that approve of some form of conditional zoning but prohibit contract zoning, because "[a]n examination of the cases supports the . . . view" that the terminology "was adopted for purposes of describing the ultimate disposition of the case." *Id.* at 979 & n.124. One writer asserts that the use of the contract zoning and conditional zoning terms in the decisions "is little more than a semantic game." Kramer, *Contract Zoning—Old Myths and New Realities*, 34 LAND USE L. & ZONING DIG. 4, 4 (1982).

45. *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 601, 421 N.E.2d 818, 821, 439 N.Y.S.2d 326, 329 (1981).

46. *Attman/Glazer P.B. Co. v. Mayor & Aldermen of Annapolis*, 314 Md. 675, 685, 552 A.2d 1277, 1282 (1989); see also *Riverchase Homeowners Protective Ass'n v. City of Hoover*, 531 So. 2d 645, 648-49 (Ala. 1988) ("Zoning of properties by a municipality, being legislative in character, cannot be bargained or sold.") (quoting *Haas v. City of Mobile*, 289 Ala. 16, 19, 265 So. 2d 564, 566 (1972)).

47. 277 N.C. 530, 178 S.E.2d 432 (1971).

48. *Blades v. City of Raleigh*, 280 N.C. 531, 551, 187 S.E.2d 35, 46 (1972) (see *infra* notes 176-84 and accompanying text for discussion of the contract zoning aspect of this decision); *Willis v. Union County*, 77 N.C. App. 407, 409-10, 335 S.E.2d 76, 77 (1985).

49. *Willis*, 77 N.C. App. at 409, 335 S.E.2d at 77 (emphasis added), quoted in *Alderman v. Chatham County*, 89 N.C. App. 610, 618, 366 S.E.2d 885, 890, cert. denied, 323 N.C. 171, 373 S.E.2d 103 (1988).

50. *Blades*, 280 N.C. at 550, 187 S.E.2d at 46; *Alderman*, 89 N.C. App. at 619, 366 S.E.2d at 891 ("There was no determination that the Board based its rezoning on the basis that the site was suitable for all uses permitted under MH District Zoning.")

51. See, e.g., *Alderman*, 89 N.C. App. at 619, 366 S.E.2d at 891; *Hall v. City of Durham*, 88 N.C. App. 53, 58-59, 362 S.E.2d 791, 794-96 (1987), *aff'd on other grounds*, 323 N.C. 293, 298, 372 S.E.2d 564, 567-68 (1988) (disagreeing with the court of appeals finding of contract zoning, but invalidating the amendment on other grounds); *Godfrey v. Union County Bd. of Comm'rs*, 61 N.C. App. 100, 102-05, 300 S.E.2d 273, 274-76 (1983); see also *Nelson v. City of Burlington*, 80 N.C. App. 285, 290, 341 S.E.2d 739, 742 (1986) (neighbors challenged a rezoning on contract zoning grounds and the court held that because the applicant had presented pictures of its proposed shopping center, "there was sufficient evidence that the City Council relied on the assurances of [the applicant] that it would use the property in a certain way rather than making a determination that all uses under the [new district] were permissible and that therefore summary judgment [for the city] was improper").

52. S. DAVENPORT & P. GREEN, *supra* note 3, at 12-13; see *infra* note 189.

E. *Insufficiently Analyzed Rezoning*

"Insufficiently analyzed rezoning" is a term proposed in this Comment for an as yet undenominated rezoning practice. Although the North Carolina courts have cited *Allred v. City of Raleigh* as a precedent for contract zoning,⁵³ *Allred* probably should have been interpreted as prohibiting another practice instead. The term "contract zoning" was never used in *Allred*.⁵⁴ The court did, however, invalidate the city's zoning amendment because the justices were not convinced that the council members had considered all of the uses that would be available to the landowner under the new zoning classification.⁵⁵ The justices believed instead that the council had based its decision to rezone the property solely on its approval of the developer's plans to build apartments.⁵⁶ Because the court did not denominate this invalid zoning practice,⁵⁷ this Comment proposes the term "insufficiently analyzed rezoning," which occurs when a zoning authority not only hears a landowner's proposed development plans, but relies on those plans and fails to consider and to approve the tract for all of the uses that will be permitted as of right under the new zoning classification.

F. *Conditional Zoning*

While spot zoning and contract zoning have provided courts with ways to protect neighbors of rezoned property from legislative abuses, courts and legislators in several states have approved conditional zoning as a method for allowing greater flexibility in zoning.⁵⁸ Conditional zoning allows cities and counties to apply conditions on rezoning in certain circumstances.

A 1960 case from New York was one of the first to allow a board to impose conditions on rezoning. In *Church v. Town of Islip*⁵⁹ the Court of Appeals of New York upheld a rezoning from residential to business when the property owner consented to certain conditions regarding the use and appearance of the lot.⁶⁰ The court concluded that reasonable restrictions should not make a zoning amendment invalid, reasoning that "[t]o meet [the] increasing needs of [the county's] own population explosion, and at the same time to make as gradual

53. See, e.g., *Blades*, 280 N.C. at 549-51, 187 S.E.2d at 46 (court stated that the amendment "runs afoul of the rule stated in *Allred*" and later held that the amendment was invalid because it constituted contract zoning); *Hall*, 88 N.C. App. at 58, 362 S.E.2d at 794 ("The basic principles of law concerning rezoning and the prohibition against contract zoning are set forth and explained in *Allred* . . . and *Blades* . . ."), *aff'd on other grounds*, 323 N.C. at 298, 372 S.E.2d at 567-68 (disagreeing with the court of appeals, finding of contract zoning, but invalidating the amendment on other grounds); *Willis*, 77 N.C. App. at 409-10, 335 S.E.2d at 77.

54. See *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971).

55. *Id.* at 544, 178 S.E.2d at 440. See *infra* notes 166-75 and accompanying text for further discussion of the *Allred* decision.

56. *Allred*, 277 N.C. at 545, 178 S.E.2d at 440.

57. See *id.* at 544-45, 178 S.E.2d at 440-41.

58. See cases cited *infra* notes 59 & 65; see also Shapiro, *supra* note 4, at 277 (proposing conditional zoning); Wegner, *supra* note 43, at 978 n.119 (listing articles discussing conditional zoning).

59. 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

60. *Id.* at 257, 168 N.E.2d at 681, 203 N.Y.S.2d at 867. The landowner consented to restrictions on the percentage of the lot that could be covered by a building as well as obligations requiring him to erect a fence and plant shrubbery. *Id.*

and as little of an annoyance as possible the change from residence to business on the main highways, the Town Board imposes conditions."⁶¹

Although *Church* is cited as permitting conditional zoning, it is significant to note that one of the premises of this decision—as well as most subsequent conditional zoning cases—is that the town could have rezoned the lot to the new district without imposing any conditions.⁶² Any of the uses permitted in the business district would have been suitable for this lot, but the town imposed the conditions for the benefit of the neighbors in order to make the change from residential to business as inoffensive as possible.⁶³ The court recognized the absurdity of allowing neighbors to overturn a zoning amendment on grounds that the conditions imposed made the zoning decision illegal when, in fact, those conditions were imposed on behalf of those neighbors.⁶⁴

Since the *Church* decision, other jurisdictions have also approved some form of conditional zoning,⁶⁵ but generally there are limitations on the flexibility of this procedure. First, courts have distinguished valid conditional zoning from invalid contract zoning.⁶⁶ Secondly, the United States Supreme Court has held that in certain instances, placing conditions on zoning amendments or permits can constitute an unconstitutional taking of property.⁶⁷

G. Conditional Use Districts and Conditional Use Zoning

Two authors, Stephen Davenport and Philip Green, have proposed using

61. *Id.* at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.

62. *Id.* ("Since the Town Board could have, presumably, zoned this [tract] for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation.")

63. *See id.*

64. *See id.*

65. *See, e.g.,* *Cross v. Hall County*, 238 Ga. 709, 235 S.E.2d 379 (1977); *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963); *State ex rel. Myhre v. City of Spokane*, 70 Wash. 2d 207, 422 P.2d 790 (1967); *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d, 174 N.W.2d 533 (1970); *see also* *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 599-603, 421 N.E.2d 818, 821-22, 439 N.Y.S.2d 326, 328-30 (1981) (the court reviewed its *Church* decision and again approved conditional zoning). In many of these decisions, the courts have based their approval of conditional zoning on the same premise stated in *Church*: the rezoning to a new district would be permissible without the conditions, and the conditions are imposed on behalf of the neighbors. *See, e.g., Cross*, 238 Ga. at 713, 235 S.E.2d at 382 (conditional zoning upheld when the conditions are imposed "to ameliorate the effects of the zoning change"); *Bucholz*, 174 Neb. at 874, 120 N.W.2d at 278 (neighbors were not harmed because "everything that is to be done under the agreement could be done without such an agreement"); *Collard*, 52 N.Y.2d at 600-01, 421 N.E.2d at 821, 439 N.Y.S.2d at 329 ("if it is initially proper to change a zoning classification without the imposition of restrictive conditions," then imposing conditions should not automatically invalidate the rezoning).

66. *See, e.g., Cross*, 238 Ga. at 713, 235 S.E.2d at 382-83 (conditional zoning is generally valid but it is invalid "where the zoning board is motivated to allow the change by the conditions offered or proposed by the rezoning applicant, so that the rezoning is granted as a consequence of the conditions rather than as an exercise of legislative discretion"); *Collard*, 52 N.Y.2d at 601, 421 N.E.2d at 821-22, 439 N.Y.S.2d at 329-30 ("absent proof of a contract purporting to bind the local legislature in advance to exercise its zoning authority in a bargained-for manner," conditional zoning is permissible); *Zupancic*, 46 Wis. 2d at 30, 174 N.W.2d at 538 (when a zoning authority "makes an agreement with a landowner to rezone," this is invalid contract zoning, but when the city is not obligated to rezone, conditions and agreements do not constitute "contract zoning in the true sense and [do] not vitiate the zoning if it is otherwise valid").

67. *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 837 (1987); *see also Collard*, 52 N.Y.2d at 602-03, 421 N.E.2d at 822, 439 N.Y.S.2d at 330 (court should invalidate the zoning amendment if the conditions imposed are unreasonable).

conditional use districts in North Carolina.⁶⁸ No uses are permitted as of right for property in a conditional use district; the landowner must apply for and receive a conditional use permit before he is authorized to use his property for any purpose.⁶⁹ The legislature only recently granted authority to cities and counties to create such districts throughout North Carolina,⁷⁰ stipulating that property may be placed in a conditional use district only when the property owner applies for such a rezoning.⁷¹ The legislation also provided, as the designers of the conditional use district concept had envisioned, that uses in a conditional use district "are permitted only upon the issuance of a . . . conditional use permit."⁷²

The technique of rezoning to a conditional use district is called conditional use zoning.⁷³ The creators of the conditional use district concept suggest that zoning ordinances be amended to provide for a whole new set of districts.⁷⁴ "For simplicity," they suggest that "these districts duplicate exactly the existing

68. See S. DAVENPORT & P. GREEN, *supra* note 3, at 6-7.

69. Most landowners probably will submit applications for a rezoning to a conditional use district and for a conditional use permit at the same time. See, e.g., *Chrismon*, 322 N.C. at 614-15, 370 S.E.2d at 581-82.

70. The zoning statutes were amended in 1985 to allow conditional use districts. Act of July 4, 1985, ch. 607, 1985 N.C. Sess. Laws 776 (codified at N.C. GEN. STAT. §§ 153A-342, 160A-382 (1987)). These statutes now specifically authorize cities and counties to create zoning districts that may include, but shall not be limited to, general use districts, in which a variety of uses are permissible in accordance with general standards . . . and special use districts or conditional use districts, in which uses are permitted only upon the issuance of a special use permit or a conditional use permit.

N.C. GEN. STAT. § 153A-342 (1987) (granting districting authority to counties); see also *id.* § 160A-382 (same authority granted to cities). The terms "conditional use district" and "special use district" are the creations of Mr. Davenport and Professor Green. See S. DAVENPORT & P. GREEN, *supra* note 3, at 6-7. Several localities lobbied for and were granted authority to use conditional use districts by special acts passed by the legislature more than a decade before the legislature granted that authority state-wide. See Act of May 8, 1973, ch. 381, 1973 N.C. Sess. Laws 445-47 (Winston Salem and Forsyth County); Act of May 14, 1973, ch. 485, 1973 N.C. Sess. Laws 665-66 (Surry County); Act of April 11, 1974, ch. 1283, 1973 N.C. Sess. Laws, 2d sess. 461 (Charlotte and Mecklenburg County). Other cities and some commentators believed that such authority was already implicit within the standard zoning act provisions. Green, *Two Major Zoning Decisions: Chrismon v. Guilford County and Hall v. City of Durham*, 34 LOCAL GOVERNMENT LAW BULLETIN 2 (N.C. Inst. of Gov't., Nov. 1988); see also S. DAVENPORT & P. GREEN, *supra* note 3, at 9 (noting that conditional use district ordinances had been enacted in Greensboro, Statesville, and Guilford County without any special statutory provision). This assumption turned out to be correct as the North Carolina Supreme Court approved conditional use zoning in *Chrismon* even though the case arose before the 1985 statutory provisions for conditional use districts and even though Guilford County had no special legislative provisions. *Chrismon*, 322 N.C. at 619-22, 370 S.E.2d at 584-86 (quoting S. DAVENPORT & P. GREEN, *supra* note 3, at 9, and concluding that authority for such a practice was included in the general zoning statutes).

71. N.C. GEN. STAT. § 160A-382 (1987) ("Property may be placed in a special use district or conditional use district only in response to a petition by the owners of all the property to be included."); see also *id.* § 153A-342 (same limitation for counties); S. DAVENPORT & P. GREEN, *supra* note 3, at 14 (noting that one system in use provides that the process must be initiated by the applicant).

72. N.C. GEN. STAT. § 153A-342 (1987) (granting districting authority to counties); see also *id.* § 160A-382 (same authority granted to cities).

73. The *Chrismon* court adopted this term. 322 N.C. at 614-17, 370 S.E.2d at 581-83. The creators of the conditional use district concept also used the terms "CUD procedure" (conditional use district procedure), "CUD technique," "CUD system," and "CUD approach." S. DAVENPORT & P. GREEN, *supra* note 3, at 6, 7, 17 & 20.

74. S. DAVENPORT & P. GREEN, *supra* note 3, at 7.

set of districts, except that they are denominated [Conditional] Use Districts.”⁷⁵ Thus, for each general use district, there would be a corresponding conditional use district in which no uses are permitted as of right and in which conditional use permits are required for any use.⁷⁶ Conditional use permits for property in a conditional use district “can be issued allowing any of the uses permitted (either as permitted uses or as [conditional] uses) in the counterpart [general use] district.”⁷⁷ Thus, if a general use district, for example an R-10 district, permits fifteen uses as of right and provides for eight other enumerated conditional uses, then the corresponding conditional use district, CU-R-10, would have no uses permitted as of right, but would have a list of twenty-three conditional uses representing the fifteen permitted uses from the general use district that would now be conditional uses plus the eight conditional uses. If the owner applies for and receives rezoning to a conditional use district and obtains a conditional use permit, but later wants to have another use allowed for her property, she must return to the zoning authority to seek rezoning to another district—either a general use district or another conditional use district—or seek an amendment to her conditional use permit.⁷⁸ Mr. Davenport and Professor Green also assert that another feature of a conditional use district application is that a developer may present his plans to the zoning authority as it makes the decision, which some people believed was not allowed in rezoning decisions involving different general use districts under the extension of contract zoning in North Carolina.⁷⁹

II. NEW DEVELOPMENTS: *CHRISMON AND HALL*

A. *Chrismon v. Guilford County*

The situation that provoked the lawsuit in *Chrismon v. Guilford County*⁸⁰ began in 1948 when Bruce Clapp began a business adjacent to his home in rural Guilford County, North Carolina, storing grain and selling fertilizer and agricultural chemicals to local farmers.⁸¹ Subsequently, in 1964, Guilford County adopted a zoning ordinance that zoned Mr. Clapp’s property and many acres surrounding his property as “A-1 Agricultural.”⁸² In an A-1 Agricultural district, drying and storing grain were uses specifically listed in the zoning ordinance as permitted as of right.⁸³ However, the remaining part of Mr. Clapp’s business, involving the sale and distribution of “lime, fertilizer, pesticides, and other agricultural chemicals,” was not listed as a use permitted as of right in this

75. *Id.* The authors suggested Special Use Districts for use in conjunction with special use permits and Conditional Use Districts for use in conjunction with conditional use permits. *Id.* at 6-8.

76. *Id.* at 7.

77. *Id.*

78. *Id.* at 8; see also N.C. GEN. STAT. §§ 153A-342 & 160A-382 (in conditional use districts, “uses are permitted only upon the issuance of a . . . conditional use permit”); Green, *supra* note 70, at 2 (describing the landowner’s options).

79. S. DAVENPORT & P. GREEN, *supra* note 3, at 8; see *supra* notes 47-52 and *infra* notes 166-90 and accompanying texts.

80. 322 N.C. 611, 370 S.E.2d 579 (1988).

81. *Id.* at 613, 370 S.E.2d at 581.

82. *Id.*

83. *Id.* at 613-14, 370 S.E.2d at 581.

district.⁸⁴ Because Mr. Clapp's business predated the zoning ordinance, he was allowed to continue selling chemicals and fertilizer as a "nonconforming use" "so long as [the sales] were not expanded."⁸⁵ Mr. Clapp continued to sell chemicals and to conduct the rest of his business until 1980, when he moved some of his business across the street and expanded his operation.⁸⁶ His neighbors, the plaintiffs, objected to this expansion, whereupon the County Inspections Department notified him that he no longer had the benefit of the nonconforming use because he had expanded the sales of agricultural chemicals.⁸⁷

Pursuant to information provided to him by the Inspections Department, Mr. Clapp applied to have the tracts on which he was operating his business rezoned from A-1 Agricultural to a Conditional Use Industrial District (CU-M-2).⁸⁸ At the same time, he applied for a conditional use permit.⁸⁹ Although there were eighty-six uses permitted as of right in the general use M-2 Industrial district,⁹⁰ the only use he wanted to take advantage of was the sale of agricultural chemicals; all of his other operations were permissible under the then existing zoning classification.⁹¹ After appropriate notice and a public hearing in which several people spoke in favor of the rezoning and indicated that farmers in the vicinity benefited from Mr. Clapp's business,⁹² the Guilford County Board of Commissioners voted to rezone the tracts to CU-M-2 and approved Mr. Clapp's application for a conditional use permit.⁹³

The Chrismons filed suit seeking a declaratory judgment that the zoning amendment "was unlawful and therefore void."⁹⁴ The trial court found that Mr. Clapp's sale of agricultural chemicals was "compatible with the agricultural needs of the surrounding area" and that the rezoning was neither spot zoning nor contract zoning.⁹⁵ Thus, the trial court concluded that the county had not

84. *Id.* at 614, 370 S.E.2d at 581.

85. *Id.*

86. *Id.*

87. *Id.* Mr. Clapp owned several small tracts. The tract to which he expanded his business was across the street from his residence and the original site of the business. It was also adjacent to the Chrismon's property. The Chrismons purchased their property from Mr. Clapp in 1969 and built their home there. *Id.*

88. *Id.* at 614-15, 370 S.E.2d at 581-82.

89. *Id.* at 615, 370 S.E.2d at 582. In the application for the conditional use permit, Mr. Clapp specified the uses he wished to make of his land. *Id.*

90. Petition for Discretionary Review at 5, *Chrismon* (No. 232PA87) ("[I]f the subject property had been rezoned to the general purpose district of M-2 the County Commissioners would have had to determine that all eighty-six (86) uses permitted in an M-2 district would be appropriate for the subject property."); *see also* Record at 39-46, *Chrismon* (No. 232PA87) (table listing the uses permitted in each district in Guilford County at that time). Among the uses permitted as of right in an M-2 district were chemical manufacturing, machinery manufacturing, textile manufacturing, tobacco manufacturing, motor freight transportation and warehousing, fuel dealerships, and automobile repair shops. *Id.*

91. *Chrismon*, 322 N.C. at 613-15, 370 S.E.2d at 581-82.

92. *Id.* at 615, 370 S.E.2d at 582. The board also received a petition signed by 88 persons favoring the rezoning. *Id.* The North Carolina Supreme Court added that while "it was the Chrismons alone who lived next door to the operation, we do note that it was the Chrismons, and no one else, who spoke up against the rezoning." *Id.* at 630, 370 S.E.2d at 590.

93. *Id.* at 615, 370 S.E.2d at 582.

94. *Id.* at 613, 370 S.E.2d at 581.

95. *Id.* at 615, 370 S.E.2d at 582.

acted arbitrarily and upheld the rezoning.⁹⁶

The North Carolina Court of Appeals reversed, holding that the rezoning was illegal spot zoning because it could find no reasonable basis for rezoning this small tract of land with restrictions different from those that applied to the land immediately surrounding it.⁹⁷ As an alternative ground for its holding, the court of appeals found that the zoning amendment was illegal and void because it constituted contract zoning.⁹⁸ Significantly, the court based its finding of contract zoning on the fact that the county had not considered and approved the tract for all of the uses permitted in a general use M-2 Industrial district and held that the requirements of valid rezoning are "not satisfied by the finding of a reasonable basis for a zoning change in the particular use or uses which the applicant intends to apply the rezoned property."⁹⁹

The North Carolina Supreme Court reversed.¹⁰⁰ The supreme court approved conditional use zoning,¹⁰¹ even though this case arose before the legislature had given all counties and cities the express authority to use conditional use districts.¹⁰² Citing several commentators, the court asserted that conditional use zoning is "exceedingly valuable" because it gives zoning authorities "greater flexibility in balancing conflicting demands."¹⁰³

In *Chrismon* the supreme court contended that it was joining a growing number of jurisdictions that allow conditional use zoning.¹⁰⁴ Despite its citation of cases and statutes from a large number of states,¹⁰⁵ however, the court did not

96. *Id.*

97. *Chrismon v. Guilford County*, 85 N.C. App. 211, 216-18, 354 S.E.2d 309, 312-13 (1987), *rev'd*, 322 N.C. 611, 370 S.E.2d 579 (1988). The court of appeals considered three factors in determining whether there was a reasonable basis for the rezoning: (1) whether there had been changes in the area that necessitated rezoning; (2) the characteristics of the area rezoned; and (3) the zoning classification and development of nearby land. *Id.* For a discussion of spot zoning, see *supra* notes 35-42 and accompanying text.

98. *Id.* at 219, 354 S.E.2d at 314. For discussion of contract zoning, see *supra* notes 43-52 and accompanying text.

99. *Id.* at 218, 354 S.E.2d at 314. The uses permitted in a general use M-2 zoning district "include, among other things, manufacturing facilities of virtually any kind, fuel oil dealerships, waste recycling facilities, and public utility storage depots." *Chrismon*, 322 N.C. at 619 n.2, 370 S.E.2d at 584 n.2.

100. *Chrismon*, 322 N.C. at 639-40, 370 S.E.2d at 596.

101. *Id.* at 618-22, 370 S.E.2d at 583-86. For a definition of conditional use zoning, see *supra* notes 68-79 and accompanying text.

102. Act of July 4, 1985, ch. 607, 1985 N.C. Sess. Laws 776 (codified at N.C. GEN. STAT. §§ 153A-342, 160A-382 (1987)). This rezoning occurred December 20, 1982. *Chrismon*, 322 N.C. at 615, 370 S.E.2d at 582.

103. *Chrismon*, 322 N.C. at 618, 370 S.E.2d at 584. One of the passages cited by the court explained that:

Conditional zoning is an outgrowth of the need for compromise between the interests of the developer seeking appropriate zoning changes for his tract, and the neighboring landowner whose property interests would suffer if the most intensive use permitted by the new classification were instituted. In an attempt to reconcile these conflicting pressures, the municipality will authorize the proposed change but minimize its adverse effects by imposing conditions.

Id. (quoting Shapiro, *supra* note 4, at 280).

104. *Id.* at 620-21, 370 S.E.2d at 585.

105. In a footnote, the court cited cases and statutes from fifteen other states. *Id.* at 620 n.3, 370 S.E.2d at 585 n.3. Some of these cases are discussed below, but it is important to note that the form of conditional zoning approved in other jurisdictions differs from the practice approved in this case.

join a growing trend. Many of the cases cited are cases that approve of conditional zoning, not conditional use zoning. Conditional zoning occurs when the rezoning of property to a new district would be reasonable and completely permissible, but the zoning authority imposes conditions on the rezoning in order to ameliorate the effects of the rezoning on neighbors.¹⁰⁶ Conditional use zoning, on the other hand, appears to be unique to North Carolina and occurs when a zoning authority rezones property to a conditional use district in which no uses are permitted as of right and in which a landowner must have a conditional use permit approving every use for which she uses her property.¹⁰⁷

The *Chrismon* court was convinced that conditional use zoning would be a valuable addition to zoning alternatives,¹⁰⁸ but the court cautioned that the practice could be "easily abused."¹⁰⁹ Thus, the court explained that "conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest."¹¹⁰ The court also warned that a conditional use rezoning amendment also should not "constitute illegal spot zoning or illegal contract zoning."¹¹¹

On the issue of spot zoning, the court disagreed with the court of appeals. The court found a reasonable basis for the rezoning and thus concluded that this rezoning was not illegal spot zoning.¹¹² After listing several factors that courts should consider in determining whether a zoning amendment constitutes invalid spot zoning,¹¹³ the court decided that there was a reasonable justification for the rezoning in this case because of the degree of public benefit created by the zoning

Compare the definition of conditional zoning, *supra* notes 58-67 and accompanying text, with the definition of conditional use zoning, *supra* notes 68-79 and accompanying text. The court cited a Wisconsin case in this footnote, but the case cited had nothing to do with conditional zoning. *See* Howard v. Village of Elm Grove, 80 Wis. 2d 33, 257 N.W.2d 850 (1977) (considering spot zoning), *cited in* *Chrismon*, 322 N.C. at 620 n.3, 370 S.E.2d at 585 n.3. The court was correct, however, in citing Wisconsin as a jurisdiction that has approved conditional zoning because another Wisconsin case cited later by the court in *Chrismon* did indeed approve of conditional zoning. *See* State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 30, 174 N.W.2d 533, 538 (1970), *cited in* *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 587.

106. *See* definition *supra* notes 58-67 and accompanying text and see cases discussed *infra* notes 209-15 and accompanying text.

107. *See* definition *supra* notes 68-79 and accompanying text.

108. The court reasoned that:

[T]he practice, when properly implemented, will add a valuable and desirable flexibility to the planning efforts of local authorities throughout our state. In our view, the "all or nothing" approach of traditional zoning techniques is insufficient in today's world of rapid industrial expansion and pressing urban and rural social and economic problems.

Chrismon, 322 N.C. at 622, 370 S.E.2d at 586 (citations omitted).

109. *Id.*

110. *Id.* at 622, 370 S.E.2d at 586.

111. *Id.* at 623, 370 S.E.2d at 586.

112. *Id.* at 625, 370 S.E.2d at 588.

113. The court cited several factors to consider in spot zoning challenges:

Among the factors relevant to this judicial balancing are the size of the tract in question; the compatibility of the disputed zoning action with an existing comprehensive zoning plan; the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community; and the relationship between the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Id. at 628, 370 S.E.2d at 589.

action here and the similarity of the proposed use of the tracts under the new conditional use zone to the uses in the surrounding A-1 agricultural area.¹¹⁴ Thus, the court found that the spot zoning in this case was valid spot zoning.

The *Chrismon* court also disagreed with the court of appeals on the issue of contract zoning, contending that the lower court's approach "outlawed conditional use zoning" by equating it with contract zoning.¹¹⁵ The court of appeals had held that a county zoning board must consider all uses that are permissible under the new zoning district regardless of whether the proposed rezoning is to a general use district or to a conditional use district.¹¹⁶ In their amici curiae brief, the cities of Charlotte and Greensboro argued that there should be no reason to consider all permissible uses because "[u]ses are authorized *only* upon approval of a conditional use permit. . . . Furthermore, if the land is suited to all uses allowed in the corresponding general use district, there would be little reason to provide for conditional use zones."¹¹⁷ Persuaded by this argument,¹¹⁸ the supreme court distinguished general use district rezoning from conditional use rezoning. While a zoning authority must determine that property is appropriate for all of the uses permitted as of right before rezoning to a general use district, the court held that "it is not necessary that property rezoned to a conditional use district be available for all of the uses allowed under the corresponding general use district."¹¹⁹

The court also distinguished conditional use zoning from contract zoning on two grounds: first, conditional use zoning is not a bilateral agreement between the zoning authority and the landowner, whereas contract zoning requires such a bilateral agreement; and second, in "conditional use zoning, the local zoning authority maintains its independent decision-making authority, while in the contract zoning scenario, it abandons that authority by binding itself contractually with the landowner seeking a zoning amendment."¹²⁰ The court found no evidence that the county had "entered into anything approaching a

114. *Id.* at 630-31, 370 S.E.2d at 591.

115. *Id.* at 634, 370 S.E.2d at 593 (The court called contract zoning "a practice universally considered illegal.").

116. *Chrismon v. Guilford County*, 85 N.C. App. 211, 218, 354 S.E.2d 309, 314 (1987), *rev'd*, 322 N.C. 611, 370 S.E.2d 579 (1988). The court of appeals had held that "in order to properly rezone the area to a conditional use district, the zoning authority initially must determine that the property, under the new zoning classification, is suitable for all the uses permitted in its corresponding [general use] district." *Id.*

117. Amici Curiae Brief (City of Greensboro and City of Charlotte) at 10, *Chrismon* (No. 232PA87).

118. *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 587 ("[I]f a given tract of land is suited to all uses allowed in the corresponding general use district . . . the purposes served, and the benefits provided by, conditional use districts would be negated entirely.").

119. *Id.* at 624-25, 370 S.E.2d at 587. It is curious that the court used the word "available" in this holding because property rezoned to a conditional use district, by definition, never has any uses available for it without a conditional use permit. N.C. GEN. STAT. §§ 153A-342 & 160A-382 (1987); *see supra* text accompanying note 72. From the context of the discussion in *Chrismon*, it is likely that the court intended to hold that in rezoning to a conditional use district, the property need not be *suitable* or *appropriate* for all of the uses permitted under the corresponding general use district. Just prior to this statement, the court had phrased its discussion and examples in terms of whether the property "must be *suitable* for all uses" allowed under the corresponding general use district. *See Chrismon*, 322 N.C. at 623-24, 370 S.E.2d at 587 (emphasis added).

120. *Chrismon*, 322 N.C. at 636, 370 S.E.2d at 594.

bilateral contract with the landowner"¹²¹ in this case and found that the rezoning was not contract zoning because it was accomplished through deliberation and legislative approval rather than through a contract.¹²²

Justice Webb dissented, accusing the majority of overruling *Blades* and *Allred* without specifically stating so.¹²³ He compared the processes by which rezoning was accomplished in *Blades* and *Allred* with the process by which rezoning was accomplished in *Chrismon*, and concluded that the processes were essentially the same.¹²⁴ Justice Webb then asserted that under those prior cases, this process constituted "contract zoning."¹²⁵

B. *Hall v. City of Durham*

Only ten weeks after approving conditional use zoning in *Chrismon*, the North Carolina Supreme Court decided another significant zoning case, *Hall v. City of Durham*.¹²⁶ The suit arose when the owner of a 12.9 acre tract, B,K,B, Inc., and the Lowe's Investment Corporation (Lowe's) applied to have the tract rezoned to C-4(D)—a general use district that allowed heavy commercial uses.¹²⁷ At that time, the property was divided between two districts: half was zoned neighborhood commercial (C-1) and the other half single family residential (R-20).¹²⁸ The area surrounding the property was zoned for residential and commercial uses, but Lowe's wanted the property rezoned to a heavy commercial district in order to construct and operate a "Home Center," which would include a lumber yard and several sales buildings.¹²⁹

121. *Id.* at 636-37, 370 S.E.2d at 594.

122. *Id.* at 637-39, 370 S.E.2d at 594-96.

123. *Id.* at 641-42, 370 S.E.2d at 597 (Webb, J., dissenting). Justice Mitchell also dissented. *Id.* at 640, 370 S.E.2d at 596 (Mitchell, J., dissenting). The two justices also joined each other's opinions. For discussion of the contract zoning aspects of the *Blades* and *Allred* decisions, see *supra* notes 47-48 and accompanying text and *infra* notes 166-84 and accompanying text.

124. See *infra* note 125.

125. Justice Webb explained his reasoning:

In [*Blades* and *Allred*] the landowner submitted plans for the buildings he would construct if the change was made. The City Council in each case rezoned the property as requested by the landowner. This Court in each case held this was illegal contract zoning. There was no more evidence in either case that there was a bilateral contract or any reciprocal promises than there is in this case. There was no more evidence in those cases than there is in this case that the zoning board abandoned its independent decision making authority. In my opinion *Blades* and *Allred* are indistinguishable from this case.

Chrismon, 322 N.C. at 642, 370 S.E.2d at 597 (Webb, J., dissenting). However, Justice Webb did not quote *Allred* or *Blades* or cite a particular page of either of those opinions to define contract zoning. As discussed previously, the court in *Allred* did not identify the practice invalidated in that case as contract zoning, and it is appropriate to distinguish insufficiently analyzed rezoning from contract zoning. See *supra* notes 47-52 and accompanying text for discussion of the development of an unusual doctrine of contract zoning in North Carolina; see *supra* notes 53-57 for the definition of insufficiently analyzed rezoning; and see *infra* notes 160-206 and accompanying text for the distinction between contract zoning and insufficiently analyzed rezoning.

In his separate dissent Justice Mitchell argued that at the time of its action in this case, the county did not have legislative authority to participate in this sort of zoning. *Chrismon*, 322 N.C. at 640-41, 370 S.E.2d at 596-97 (Mitchell, J., dissenting).

126. 323 N.C. 293, 372 S.E.2d 564 (1988).

127. *Id.* at 295, 372 S.E.2d at 566.

128. *Id.*

129. *Id.*

Lowe's submitted a development plan to the City of Durham with its rezoning application.¹³⁰ In addition to the proposed physical site layout showing how it would construct the buildings, Lowe's submitted some unusual additional proposals.¹³¹ Lowe's indicated that at the time of construction it would deed an adjacent nine-acre tract to the Eno River Association, a local environmental protection association.¹³² The development plan also indicated that when the property was deeded from B,K,B, Inc. to Lowe's, the deed would include a reverter clause "stating that if Lowe's ceased to use the property for a lumberyard and home center, the title would vest in the Eno River Association, or if the Eno River Association no longer existed, then in the City of Durham."¹³³ Thus, Lowe's intended to assure the City Council and the neighboring property owners that it was willing to use the property in the manner in which it had proposed and that the council and the neighbors need not worry about the other uses permitted in a C-4(D) district. The Durham City Council approved the rezoning; neighboring property owners then challenged the zoning amendment on grounds that it was illegal contract zoning.¹³⁴

The trial court granted summary judgment for plaintiffs because it found that the rezoning was contract zoning and therefore illegal and void.¹³⁵ The court of appeals affirmed,¹³⁶ asserting that "rezoning is proper only when the surrounding circumstances justify making the property available for *all* uses permissible under the particular classification."¹³⁷ In this case, the court observed that "nothing in the record indicates that the Council even *considered* the suitability of this parcel of land for any of the other uses permitted in a C-4 district, such as adult entertainment, correctional institutions, crematoria, heavy equipment sales and storage, or bulk storage of flammable liquids and gases."¹³⁸ The court of appeals explained that *Blades* and *Allred* stand "for the broad[] principles that property may not be rezoned in reliance upon *any* representations of the applicant and that rezoning must take into account all permitted uses under the new classification."¹³⁹

130. *Id.* The City of Durham has special legislative authority to require submission of development plans along with requests for rezoning. In addition, the special legislation allows the Durham City Council to consider the development plan when making the rezoning decision. *Id.* at 304-05, 372 S.E.2d at 571 (citing Act effective June 18, 1975, ch. 671, § 92, 1975 N.C. Sess. Laws 815, 863).

131. *Id.* at 295-96, 372 S.E.2d at 566.

132. *Id.* at 295, 372 S.E.2d at 566.

133. *Id.* at 295-96, 372 S.E.2d at 566.

134. *Id.* at 294, 372 S.E.2d at 565-66. Plaintiffs also challenged the rezoning on other grounds: (1) that a valid protest petition by neighbors had triggered the three-fourths majority vote needed for approval of zoning action as stipulated in the state statutes, N.C. GEN. STAT. § 160A-385 (1987), and (2) that the rezoning was not in accordance with the city's comprehensive plan for development. *Hall*, 323 N.C. at 294, 372 S.E.2d at 565-66. However, the trial court ruled for the city on the question involving the protest petition, and plaintiffs abandoned their claim involving the comprehensive plan. *Id.* at 294-95, 372 S.E.2d at 566.

135. *Hall*, 323 N.C. at 294, 372 S.E.2d at 566.

136. *Hall v. City of Durham*, 88 N.C. App. 53, 58-59, 362 S.E.2d 791, 794-95 (1987), *aff'd on other grounds*, 323 N.C. 293, 372 S.E.2d 564 (1988).

137. *Id.* at 58-59, 362 S.E.2d at 794.

138. *Id.* at 59, 362 S.E.2d at 795.

139. *Id.* at 61, 362 S.E.2d at 795.

Although affirming the court of appeals decision on other grounds, the North Carolina Supreme Court disagreed that the council's action amounted to contract zoning.¹⁴⁰ It found the council's rezoning was invalid because the council did not consider all of the uses that would be available to Lowe's when the property was rezoned to C-4(D).¹⁴¹ Following *Chrismon* so closely, *Hall* gave the court a second opportunity to redefine contract zoning, establish when a zoning board must consider all of the uses that will be available to the property owner when the property is rezoned, and distinguish conditional use districts from general use districts.

In clarifying its definition of contract zoning as set forth in *Chrismon*,¹⁴² the court stated that "impermissible . . . contract zoning depends upon a finding of a transaction in which both the landowner seeking a rezoning and the zoning authority undertake reciprocal obligations. In short, a 'meeting of the minds' must occur; mutual assurances must be exchanged."¹⁴³ As an example of contract zoning, the court described a situation in which an applicant promises to use the property only for certain purposes, and in return the zoning authority promises to rezone the property and refrain from changing the zoning classification again for a certain length of time.¹⁴⁴

The supreme court also explained that the court of appeals had relied inappropriately on *Allred*¹⁴⁵ when it rendered its *Chrismon* decision,¹⁴⁶ because *Chrismon* involved a conditional use district and *Allred* involved rezoning to a general use district. The court added that the court of appeals in *Hall* properly relied upon *Allred* because both *Hall* and *Allred* involved general use districts.¹⁴⁷ Thus, repeating the concerns expressed in *Allred*, the court warned that if the property were rezoned to a C-4(D) district, Lowe's or a future owner could use the property in any of the ways permitted in the zoning ordinance despite the current promises.¹⁴⁸ Reviewing the record before it, the court found the zoning invalid because the council had not considered all of the uses permitted in the C-4(D) district.¹⁴⁹ Thus, the court followed its *Allred* holding that the zoning authority must consider all of the uses that will be available under the district classification when considering rezoning to a general use district.¹⁵⁰ By invalidating the zoning amendment, the court followed the principles of insufficiently analyzed rezoning. It departed from the court of appeals' view by deter-

140. *Hall*, 323 N.C. at 298, 372 S.E.2d at 567-68.

141. *Id.* at 298, 372 S.E.2d at 567-68. This amounts to insufficiently analyzed rezoning. For a definition of this proposed term, see *supra* notes 53-57 and accompanying text.

142. See *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593.

143. *Hall*, 323 N.C. at 298-99, 372 S.E.2d at 568.

144. *Id.* at 299, 372 S.E.2d at 568 (quoting Shapiro, *supra* note 4, at 269).

145. For a description of the *Allred* case and the relevance of its holding, see *supra* notes 47-48 and *infra* notes 166-84 and accompanying text.

146. See *supra* notes 98-99 & 115-19 and accompanying text.

147. *Hall*, 323 N.C. at 301, 372 S.E.2d at 569. For a definition of general use districts, see *supra* notes 19-24 and accompanying text.

148. *Hall*, 323 N.C. at 303, 372 S.E.2d at 571. These same concerns were expressed in *Allred*. See *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440 (1971).

149. *Hall*, 323 N.C. at 303-04, 372 S.E.2d at 571.

150. *Id.* at 305, 372 S.E.2d at 572; see *Allred*, 277 N.C. at 545, 178 S.E.2d at 440-41.

mining that this was not contract zoning because the council and the landowner had not entered into reciprocal obligations.¹⁵¹

III. SIGNIFICANT EFFECTS OF THE *CHRISMON* AND *HALL* DECISIONS

A. *Adjustment in the Factors Determining the Permissibility of Spot Zoning*

In the area of spot zoning,¹⁵² the court in *Chrismon* restated the definition set forth in *Blades*¹⁵³ and continued to distinguish between illegal spot zoning and legal spot zoning.¹⁵⁴ The *Chrismon* court did not change prior law, but it did establish a set of factors for trial courts to consider when determining whether there is a reasonable justification for spot zoning.¹⁵⁵ The factors set forth by the supreme court in *Chrismon* are not drastically different from the factors considered by the court of appeals in that case.¹⁵⁶ The supreme court directed trial courts to consider "the benefits and detriments resulting from the zoning action for the owner of the newly zoned property, his neighbors, and the surrounding community."¹⁵⁷ The *Chrismon* court noted that if only the owner of a rezoned property receives a great benefit while a neighbor receives a detriment, the rezoning "may well be illegal, [but] spot zoning which provides a service needed in the community in addition to benefitting the landowner may be proper."¹⁵⁸ The court, therefore, placed great emphasis upon whether there is a public need for the spot zoning.¹⁵⁹

By finding that the spot zoning was supported by a reasonable justification, the court in *Chrismon* established a standard by which trial courts will compare future cases. These trial courts may be expected to place heavy emphasis upon the benefits to the community of the uses permitted in the spot zoning. Petitions like the one signed by Mr. Clapp's neighbors in the *Chrismon* case may provide

151. *Hall*, 323 N.C. at 298-99, 372 S.E.2d at 567-68.

Justices Webb and Mitchell differed with the majority, as they had done in *Chrismon*. Concurring in *Hall*, they again expressed concern that the majority was overruling *Allred* and *Blades* without expressly saying so. *Id.* at 306, 372 S.E.2d at 572 (Webb, J., concurring). They contended that "the majority has eliminated the ban on contract zoning in this state. This is regrettable because it can be a useful tool in protecting property owners from exceptions to the zoning laws which protect their property." *Id.* (Webb, J., concurring) (for a discussion of their dissenting opinions in *Chrismon*, see *supra* notes 123-25 and accompanying text).

152. For a definition of spot zoning, see *supra* notes 35-42 and accompanying text.

153. *Blades v. City of Raleigh*, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972). For a discussion of spot zoning and the *Blades* case, see *supra* notes 33-42 and accompanying text. Spot zoning involves zoning small parcels of land with restrictions different from those placed on surrounding land; it is illegal where there is not a sufficient or reasonable justification for the distinction in restrictions.

154. *Chrismon*, 322 N.C. at 626-27, 370 S.E.2d at 588-89.

155. *Id.* at 628, 370 S.E.2d at 589. See *supra* note 113 for the factors that the court listed.

156. The court of appeals considered (1) whether there is an "indication of any change in conditions which would justify the rezoning," (2) "the particular characteristics of the area being rezoned," and (3) "the classification and development of nearby land." *Chrismon v. Guilford County*, 85 N.C. App. 211, 216-17, 354 S.E.2d 309, 312-13 (1987), *rev'd*, 322 N.C. 611, 625, 370 S.E.2d 578, 588 (1988). Compare this list with the list of factors given by the supreme court, *supra* note 113.

157. *Chrismon*, 322 N.C. at 628, 370 S.E.2d at 589.

158. *Id.* at 629, 370 S.E.2d at 590.

159. See *supra* notes 113-14 and accompanying text.

substantial support for finding that there is a great community benefit derived from rezoning.

For city councils and county boards of commissioners, the *Chrismon* decision probably will not have a great impact as far as spot zoning is concerned. They must still be careful to produce a record showing reasonable justifications when rezoning small tracts of land to new classifications that are different from the surrounding properties.

B. Redefining Contract Zoning and Maintaining the Prohibition Against Insufficiently Analyzed Rezoning

After a pair of zoning decisions by the North Carolina Supreme Court in 1971¹⁶⁰ and 1972¹⁶¹ and prior to the decisions in *Chrismon* and *Hall*, North Carolina courts developed an unusually broad definition of contract zoning. This section will recount the development of that "contract zoning" doctrine while paying particular attention to the actual holdings of, and evils sought to be avoided with, the 1971 and 1972 decisions.¹⁶² This section then will describe how the supreme court redefined contract zoning in *Chrismon* and *Hall* to bring the contract zoning doctrine in North Carolina closer to the doctrine as it exists in other states¹⁶³ while retaining the prohibition against insufficiently analyzed rezoning that the court originally condemned in its 1971 and 1972 decisions.¹⁶⁴ Finally, this section will discuss the practical effects of this alteration of the contract zoning doctrine and conclude that the court's decisions in *Chrismon* and *Hall* give greater freedoms to zoning authorities but still retain protections against egregious zoning practices.¹⁶⁵

North Carolina's unusual doctrine of contract zoning began with the 1971 decision in *Allred v. City of Raleigh*.¹⁶⁶ In *Allred* a landowner requested that the Raleigh City Council rezone his property from R-4 to R-10¹⁶⁷ so that he could construct luxury high-rise apartment buildings.¹⁶⁸ The City Council granted his request and rezoned the property, but the neighbors challenged the legality of the rezoning amendment.¹⁶⁹ The North Carolina Supreme Court declared the rezoning amendment invalid because the City Council, in rendering its decision, did not consider whether the circumstances surrounding the property in question "justified the rezoning of the 9.26-acre tract so as to permit *all* uses permis-

160. *Allred v. City of Raleigh*, 277 N.C. 530, 178 S.E.2d 432 (1971).

161. *Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

162. See *infra* notes 166-90 and accompanying text.

163. See *infra* notes 191-95 and accompanying text.

164. See *infra* notes 196-203 and accompanying text.

165. See *infra* notes 204-06 and accompanying text.

166. 277 N.C. 530, 178 S.E.2d 432 (1971).

167. Both districts were general use districts, but the R-10 district permitted several uses that were not permitted as of right in an R-4 district: hospitals, rest homes, "[a] customary home occupation incidental to the occupancy of the home as a dwelling," boardinghouses, civic clubs, and other uses. *Id.* at 543, 178 S.E.2d at 439.

168. *Id.* at 536, 178 S.E.2d at 435.

169. *Id.* at 532, 178 S.E.2d at 433.

sible in an R-10 district."¹⁷⁰ Instead, the council based its decision to rezone the property solely on its approval of the proposed apartment high-rises.¹⁷¹ In holding that the council must consider all of the uses permitted as of right on the property if rezoned,¹⁷² the court expressed concern that, if it were to hold otherwise, once the property was rezoned the owner would "be legally entitled to make any use" of the property that was permissible in the R-10 district, and the developer would not be bound to construct the high-rises as he had represented before the council.¹⁷³ Although the court invalidated the zoning amendment because the council had not considered all of the permissible uses in the new zoning classification, the court did not use the term "contract zoning" in its opinion.¹⁷⁴ Ironically, this case stood as the cornerstone of the contract zoning doctrine in North Carolina for fifteen years.¹⁷⁵

One year after *Allred*, in *Blades v. City of Raleigh*¹⁷⁶ the same city council rezoned a five-acre tract to allow a developer to build twenty luxury apartments.¹⁷⁷ The supreme court not only held that the zoning amendment constituted impermissible spot zoning,¹⁷⁸ but also added an alternative ground for overturning this rezoning by stating that the zoning amendment in *Blades* "runs afoul of the rule stated in *Allred*."¹⁷⁹ Quoting extensively from *Allred*, the court in *Blades* found that the Raleigh City Council again had approved a rezoning to a new general use district after hearing the developer's plans without considering all of the uses permissible in the new district.¹⁸⁰ The court invalidated the zoning amendment because the amendment "constitute[d] unlawful 'spot zoning' and unlawful 'contract zoning.'"¹⁸¹ This was a significant conclusion, but it may have been worded improperly. Although the court was justified in finding spot zoning and in finding that the procedure by which the *Blades* amendment was adopted violated the rule set forth in *Allred* (that a zoning authority must consider and approve of all of the uses available as of right in the new district),

170. *Id.* at 544, 178 S.E.2d at 440.

171. *Id.* at 544-45, 178 S.E.2d at 440.

172. The court specifically held that:

[T]he zoning of the property may be changed from R-4 to R-10 only if and when its location and the surrounding circumstances are such that the property should be made available for all uses permitted in an R-10 district. Rezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated. Rezoning must be effected by the exercise of legislative power rather than by special arrangements with the owner of a particular tract or parcel of land.

Id. at 545, 178 S.E.2d at 440-41.

173. *Id.* at 545, 178 S.E.2d at 440.

174. *See Allred*, 277 N.C. 530, 178 S.E.2d 432 (1971).

175. *See supra* notes 47-52 and accompanying text.

176. 280 N.C. 531, 187 S.E.2d 35 (1972).

177. *Id.* at 536-40, 187 S.E.2d at 38-40.

178. *Id.* at 549, 187 S.E.2d at 45. For discussion of this case in regard to spot zoning, see *supra* notes 35-40 and accompanying text.

179. *Id.* at 549-50, 187 S.E.2d at 46.

180. *Id.* at 550, 187 S.E.2d at 46.

181. *Id.* at 551, 187 S.E.2d at 46 (emphasis added).

the term "contract zoning" had not been used at all in *Allred*¹⁸² and had not been defined in *Blades*.¹⁸³ Despite the court's failure to define contract zoning in either decision, this concluding statement in *Blades* established a lasting association of the practice prohibited in *Allred* with the term "contract zoning."¹⁸⁴

After *Allred* and *Blades*, the North Carolina Court of Appeals developed a much looser standard for finding contract zoning—a standard that left zoning authorities in a difficult position. The court of appeals has insisted "that property may not be rezoned in reliance upon *any* representations of the applicant and that rezoning must take into account all permitted uses under the new classification."¹⁸⁵ The court was justifiably concerned that zoning authorities consider all uses that would be permitted as of right under a new zoning classification.¹⁸⁶ On the other hand, the court was unnecessarily quick to label a zoning procedure as invalid contract zoning when it believed that the zoning authority had not considered sufficiently all of the uses to be permitted in the new zoning classification.¹⁸⁷ As a result, the court of appeals found contract zoning when the applicant merely mentioned to the board of commissioners or city council what his plans were for the property after it was rezoned.¹⁸⁸ This holding left boards and councils in the position of having to refuse to hear what plans a developer had designed when it considered a request to rezone property to a different general use district.¹⁸⁹ A zoning authority could have avoided this

182. See *Allred*, 277 N.C. 530, 178 S.E.2d 432 (1971).

183. See *Blades*, 280 N.C. 531, 187 S.E.2d 35 (1972).

184. When courts and attorneys later interpreted *Blades*, it was reasonable to associate contract zoning with the practice of rezoning a parcel after hearing development plans without considering all of the uses permissible in the new classification—the practice overturned in both *Allred* and *Blades*. This association was reasonable because the court found the zoning amendment invalid for two reasons: first, the amendment constituted spot zoning; and second, the amendment ran "afoul of the rule stated in *Allred*." *Id.* at 551, 187 S.E.2d at 46. When the court listed violations of spot zoning and contract zoning in its conclusion, therefore, one reasonably could conclude that "the rule stated in *Allred*" related to contract zoning.

185. *Hall v. City of Durham*, 88 N.C. App. 53, 61, 362 S.E.2d 791, 795, (1987), *aff'd on other grounds*, 323 N.C. 293, 372 S.E.2d 564 (1988).

186. This was the doctrine and message to be learned from *Allred*. See *supra* notes 47-57 and accompanying text.

187. See *supra* cases cited in notes 48-51. This interpretation traces back to a 1985 decision in which the court of appeals held that "[i]f the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan this is *contract zoning* and is illegal." *Willis v. Union County*, 77 N.C. App. 407, 409, 335 S.E.2d 76, 77 (1985) (emphasis added), *quoted in Alderman v. Chatham County*, 89 N.C. App. 610, 618, 366 S.E.2d 885, 890, *cert. denied*, 323 N.C. 171, 373 S.E.2d 103 (1988). As authority for this proposition, the court cited the *Allred* case but, significantly, did not quote from *Allred* or even cite to a particular page of the *Allred* decision. See *id.*

188. See cases cited *supra* notes 48-51.

189. S. DAVENPORT & P. GREEN, *supra* note 3, at 12-13. "Breathes there a city councilman (or planning board member), with soul so dead, who never to himself hath said, 'I wonder what he plans to do with his property,' when confronted with an application for rezoning an area?" *Id.* at 1. These writers recount a humorous story that arose when a council was aware of the restrictions placed on it by the holdings of these cases:

At one zoning commission meeting, the gentleman speaking in favor of a rezoning, when advised by the Chairman that the Commission could not "hear" the testimony he was giving (about a specific use), moved closer to the microphone and continued in a louder voice (not recognizing the distinction between legal constraints and deafness).

Id. at 13. Such was the state of contract zoning and its effects on zoning decisions in North Carolina before the recent cases. For example, the Winston-Salem zoning ordinance still provides that:

"contract zoning" problem by developing a good record showing that all of the uses had been considered and approved. Some zoning authorities, however, apparently found it easier to avoid hearing the plans instead of hearing them and developing an adequate record.¹⁹⁰

In *Chrismon* and *Hall* the North Carolina Supreme Court clarified the definition of contract zoning and decreased the likelihood that courts will invalidate zoning amendments on the grounds of contract zoning. The *Chrismon* court stated that contract zoning occurs when a zoning authority and a landowner "undertake reciprocal obligations in the context of a *bilateral* contract."¹⁹¹ The court quoted one author's example of such reciprocal obligations: the landowner agrees to "'subject his property to deed restrictions'" and the zoning authority "'binds itself to enact the amendment and not to alter the zoning change for a specified period of time.'"¹⁹² The *Hall* court repeated this definition and example,¹⁹³ and further explained that "[i]n short, a 'meeting of the minds' must occur; mutual assurances must be exchanged."¹⁹⁴ One writer asserts that with this definition, North Carolina returns to the mainstream in terms of the contract zoning doctrine.¹⁹⁵

While the court has narrowed the North Carolina definition of contract zoning, the court has not overruled *Allred* and *Blades*. Justices Webb and Mitchell disagreed with the narrowing of the contract zoning doctrine to instances involving bilateral agreements¹⁹⁶ because, they argued, the majority effectively overruled the holdings of both of those prior cases.¹⁹⁷ *Allred* and

If [an applicant for rezoning] elects to petition for general use district zoning, he may not refer either in his petition, or at any hearings related to the petition, to the use intended for the property upon rezoning. The board of aldermen may not consider the intended use in determining whether to approve or disapprove the petition, but shall consider all of the uses permitted within the requested general use district.

CODE OF WINSTON-SALEM, N.C. § 25-6 (Sept. 6, 1989).

190. See S. DAVENPORT & P. GREEN, *supra* note 3, at 12-13; see also *supra* note 189 (authors recount story of city council that could not "hear" testimony).

191. *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593 (citing Shapiro, *supra* note 4, at 267 and D. MANDELKER, *supra* note 43, at § 6.59). Mandelker writes that "[t]he term 'contract zoning' should probably be applied only to a true bilateral contract between the landowner and the municipality." D. MANDELKER, *supra* note 43, at § 6.59; see also *Hall*, 323 N.C. at 298-99, 372 S.E.2d at 568 (quoting the definition previously set forth in *Chrismon*). Some writers contend that both unilateral and bilateral agreements should be invalid. See Wegner, *supra* note 43, at 979 n.122 (asserting that "distinction between bilateral and unilateral agreements seems problematic on policy grounds . . . because even unilateral agreements can serve as an incentive to government action"). On the other hand, if the evil to be avoided through application of contract zoning is the sale or bargaining away of zoning decisions, then perhaps the only instance in which a zoning authority bargains away its discretion is when it enters a bilateral agreement and makes an enforceable promise.

192. *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593 (quoting Shapiro, *supra* note 4, at 269).

193. *Hall*, 323 N.C. at 298-99, 372 S.E.2d at 568 (quoting *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593).

194. *Id.* at 298, 372 S.E.2d at 568.

195. Green, *supra* note 70, at 5.

196. For descriptions of their dissenting opinions in *Chrismon* and concurring opinion in *Hall*, see *supra* notes 123-25 & 151 and accompanying text.

197. *Hall*, 323 N.C. at 306, 372 S.E.2d at 572 (Webb, J., concurring opinion with which Justice Mitchell joins); *Chrismon*, 322 N.C. at 641-42, 370 S.E.2d at 597 (Webb, J., dissenting opinion with which Justice Mitchell joins). Justices Webb and Mitchell do not cite any specific page or quote any specific language from *Allred* or *Blades* to support their contention that those cases have been overruled or abandoned. See *supra* note 125.

Blades, however, should not be cited as contract zoning cases, because in neither of those cases did the court describe contract zoning, nor did there exist a bilateral agreement between the zoning authorities and the rezoning applicants.¹⁹⁸ Despite the concern of Justices Webb and Mitchell that those prior cases have been overruled, *Allred* and *Blades* still stand for the proposition that a zoning authority may not rezone property to a general use district without considering all of the uses permissible under the new zoning classification, even though an applicant plans to make only limited use of the property.¹⁹⁹ Thus, *Allred* and *Blades* should properly be cited as cases that prohibit insufficiently analyzed rezoning.²⁰⁰

The procedurally insufficient zoning practice invalidated in *Allred* and *Blades* is still prohibited, as is evident in the result reached in *Hall*.²⁰¹ Justices Webb and Mitchell in their concurrence in *Hall* should have recognized that the prior holdings in *Allred* and *Blades* still had some validity because of the court's holding that the rezoning was invalid due to the Council's failure to consider all of the permissible uses under the new zoning classification.²⁰² The recent decisions only alter the definition of contract zoning in North Carolina and distinguish between the practices of contract zoning and insufficiently analyzed rezoning. A zoning authority may not enter into a binding agreement in which it promises to rezone—this is contract zoning. Although this definition of contract zoning may limit the line of cases following *Allred* and *Blades*,²⁰³ the essential holdings of *Allred* and *Blades* are still alive today: zoning authorities must consider all of the uses available to a landowner in the proposed zoning classification before approving the rezoning of the landowner's property.

Courts now must distinguish between situations in which a bilateral agreement obviously has been reached between a zoning authority and a property owner and situations in which a zoning authority has rezoned to a new district without considering all of the uses that will be permissible for the property under that new classification. The former situation should result in a finding of contract zoning, while the latter constitutes insufficiently analyzed rezoning. Zoning authorities should be able to avoid the latter problem if their city or county attorneys properly warn them that they must consider all uses that will be permitted as of right under the new zoning classification.

There is another practical result of this adjustment in the North Carolina definition of contract zoning: zoning authorities, previously concerned that they could not hear a developer's plan for the property if it were rezoned because this might result in a finding of contract zoning, now may hear those plans without fear. Zoning authorities may now consider the applicant's envisioned uses without fear of a finding of contract zoning unless they also have reached some sort

198. See *supra* notes 166-84 and accompanying text.

199. *Hall*, 323 N.C. at 301-03, 372 S.E.2d at 569-70.

200. For a definition of insufficiently analyzed rezoning, see *supra* notes 53-57 and accompanying text.

201. *Hall*, 323 N.C. at 304-05, 372 S.E.2d at 571-72 (the zoning amendment was invalidated).

202. *Id.*

203. See *supra* notes 47-51 & 185-88 and accompanying text.

of bilateral agreement with the applicant.²⁰⁴ Because zoning authorities must still avoid insufficiently analyzed rezoning, however, they must consider and find the property appropriate for all of the uses that will be permissible if it is rezoned.²⁰⁵

This redefinition of contract zoning allows the city council or the board of commissioners to consider what is planned for the area. The former approach was unwise because it prohibited a decisionmaker from examining all of the evidence available before reaching a decision. On the other hand, people tend to use a risk analysis when making a decision. For example, when a zoning authority is faced with deciding whether to rezone a parcel of property so that a proposed project may be constructed thereon, the natural tendency is to balance the proposed project and its benefits against the detriments that will arise from that use of the property. Similarly, the zoning authority will only consider the detriments that would result if the land in question is not used for the proposed development if it foresees a tangible risk that the applicant will develop the property in an undesirable manner. City attorneys, therefore, should warn city councilpersons to avoid this natural tendency for weighing the risks.

Even though the narrowing of the definition of contract zoning allows zoning authorities to hear plans proposed by developers seeking rezoning, the insufficiently analyzed rezoning doctrine still protects neighbors from hasty zoning decisions made by councils or boards who are blinded by the attractiveness of developer promises for a particular site. Attorneys who advise zoning authorities must remind them before they pass zoning amendments that there is no guarantee that the applicant always will use the property as shown in the proposed plans, so it is essential that the council or board find that the property is appropriate for all of the permitted uses. Should it appear to a court that the zoning authority has not fully considered all of the uses that will be available in the new classification, the court should overrule the rezoning as insufficiently analyzed rezoning.²⁰⁶

C. *Judicial Approval of Conditional Use Zoning*

As a result of the *Chrismon* decision, conditional use zoning now has been approved in North Carolina by both the supreme court and the legislature.²⁰⁷ Thus, property now may be rezoned to a conditional use district in which no use is permitted without obtaining a valid conditional use permit.²⁰⁸ The court asserted that it was joining a growing number of jurisdictions that approve of this

204. *Hall*, 323 N.C. at 298-99, 372 S.E.2d at 568; *Chrismon*, 322 N.C. at 635, 370 S.E.2d at 593.

205. *Hall*, 323 N.C. at 304-05, 372 S.E.2d at 571-72; *Allred v. City of Raleigh*, 277 N.C. 530, 545, 178 S.E.2d 432, 440-41 (1971).

206. *Hall*, 323 N.C. at 303-05, 372 S.E.2d at 571-72; *Allred*, 277 N.C. at 545, 178 S.E.2d at 440-41. See *supra* notes 53-57 and accompanying text for the definition of insufficiently analyzed rezoning.

207. *Chrismon*, 322 N.C. at 618-22, 370 S.E.2d at 584-86; Act of July 4, 1985, ch. 607, 1985 N.C. Sess. Laws 776 (codified at N.C. GEN. STAT. §§ 153A-342, 160A-382 (1987)).

208. See *supra* notes 68-79 and accompanying text.

type of zoning.²⁰⁹ In fact, the conditional use district concept is unique to North Carolina. While a growing number of jurisdictions have approved some form of conditional zoning,²¹⁰ no other jurisdiction has adopted the concept of rezoning to conditional use districts. Many of the states that have upheld conditional zoning have done so only where the rezoning would have been permissible without the conditions.²¹¹ In the language of one court, the conditions are imposed "to ameliorate the effects of the zoning change."²¹² However, in conditional use zoning as approved in *Chrismon*, the zoning authority may rezone property to a conditional use district when rezoning to the corresponding general use district presumably would be impermissible.²¹³ The court even held that the property need not be suitable for all of the uses that would be permitted in the corresponding general use district.²¹⁴ Because the premise underlying the decisions of most state courts approving conditional zoning—that the rezoning would have been appropriate even without the conditions—is not a prerequisite for conditional use zoning as approved in North Carolina, the supreme court cannot accurately state that it is joining a growing number of jurisdictions that approve of conditional use zoning. In fact, North Carolina has instituted a novel zoning approach.²¹⁵

Both the court of appeals and the dissenting justices in *Chrismon* essentially argued that conditional use zoning constituted contract zoning.²¹⁶ The majority, however, held that conditional use zoning generally is permissible *unless* a

209. *Chrismon*, 322 N.C. at 620-21, 370 S.E.2d at 585.

210. See *supra* notes 58-67 and accompanying text.

211. See *supra* notes 62-65 and accompanying text. In those states, the courts reasoned that a neighbor should not be allowed to challenge successfully a rezoning amendment when the rezoning would have been proper without conditions, but the zoning authority instead imposed conditions on the applicant's rezoning request in order to make the rezoning less harmful to the neighbor. See, e.g., *Cross v. Hall County*, 238 Ga. 709, 713, 235 S.E.2d 379, 382 (1977) (for the court's analysis, see *supra* note 65); *Collard v. Incorporated Village of Flower Hill*, 52 N.Y.2d 594, 600-01, 421 N.E.2d 818, 821, 439 N.Y.S.2d 326, 329 (1981) (same).

212. *Cross*, 238 Ga. at 713, 235 S.E.2d at 382.

213. If the property is suitable for rezoning to a general use district, the owner would presumably seek rezoning to the general use district instead of the conditional use district. This choice would avoid the requirement of seeking a conditional use permit. Furthermore, the *Chrismon* court would certainly not have approved a rezoning to a general use district that allowed Mr. Clapp to use his farmland for manufacturing uses permitted as of right in the M-2 district in Guilford County. Indeed, the court noted that the rezoning to a CU-M-2 district was permissible because it allowed the sale of agricultural chemicals, "which is not drastically at odds with other uses in the predecessor zone." *Chrismon*, 322 N.C. at 624, 370 S.E.2d at 587. The court recognized that some of the uses allowed under the general use M-2 district "are more clearly inconsistent with ongoing uses under the predecessor zone." *Id.* Some fairly heavy industrial uses were permitted as of right in the general use M-2 district. See *supra* note 90 (describing some of the 86 uses).

214. *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 587 (using the word "available" when the court probably intended to use the word "suitable"; see *supra* note 119 and accompanying text for discussion of why the court probably intended to use "suitable"). When holding that all uses need not be permissible, the court cited only two other cases. See *id.* (citing *Bucholz v. City of Omaha*, 174 Neb. 862, 120 N.W.2d 270 (1963) and *State ex rel. Zupancic v. Schimenz*, 46 Wis. 2d 22, 174 N.W.2d 533 (1970)). But see *Bucholz*, 174 Neb. at 874, 120 N.W.2d at 278 (the court appears to have been considering a case in which the zoning would have been permissible without the conditions).

215. The conditional use zoning approach is also unique in its use of conditional use districts.

216. See *Chrismon*, 322 N.C. at 640, 370 S.E.2d at 596 (Mitchell, J., dissenting); *id.* at 641, 370 S.E.2d at 597 (Webb, J., dissenting); *Chrismon*, 85 N.C. App. 211, 219, 354 S.E.2d 309, 314 (1987), *rev'd*, 322 N.C. 611, 370 S.E.2d 579 (1988).

given situation is invalidated on grounds that it constitutes contract zoning or is otherwise illegal.²¹⁷ By narrowly redefining contract zoning as a bilateral agreement,²¹⁸ the court allowed conditional use zoning to occur as conceived by its designers: that is, a landowner may apply to have her property rezoned to a conditional use district and present an application for a conditional use permit at the same time.²¹⁹

There are several possible explanations for the North Carolina Supreme Court's willingness to approve conditional use zoning. Perhaps the court wanted to allow zoning authorities to hear development proposals for property being considered for rezoning. Some thought this practice had been prohibited in North Carolina, causing Davenport and Green to propose the conditional use district concept.²²⁰ The court, however, eliminated the purported obstacle preventing zoning authorities from hearing development proposals during rezoning considerations when it narrowed the definition of contract zoning.²²¹

Alternatively, the court may have approved conditional use zoning in order to influence the scope of judicial review available to developers and neighbors when they appeal zoning decisions to the courts. One of the significant aspects of conditional use permits is that when a landowner shows by competent evidence that he has met the conditions listed in the ordinance, then "*prima facie* he is entitled to it."²²² If a request for a conditional use permit is denied, a landowner has this doctrine in her favor if she can show the court that she met the *prima facie* requirements. The zoning authority then has the burden of proof to show that it had substantial evidence supporting the decision to deny the permit request. Suppose, on the other hand, that the property is rezoned and a conditional use permit is granted. The neighbors of this property may seek judicial review in the courts, and they again will have greater protection in the courts because the decision was a quasi-judicial one.²²³ Thus, the approval of conditional use zoning may have been the court's way of bringing more decisions of zoning authorities under closer judicial scrutiny.

All of the excitement about the flexibility provided by conditional use zoning presumes, however, that zoning authorities will create conditional use districts²²⁴ and that landowners will apply to have their property zoned in a

217. *Chrismon*, 322 N.C. at 622-23, 370 S.E.2d at 58. In addition to illegal spot zoning and illegal contract zoning, a conditional use zoning amendment may be invalidated if it is unreasonable, arbitrary, discriminatory, or not in the public interest. *See id.*

218. *See supra* notes 191-94 and accompanying text.

219. *See Chrismon*, 322 N.C. at 614-15, 370 S.E.2d at 581-82; S. DAVENPORT & P. GREEN, *supra* note 3, at 8.

220. S. DAVENPORT & P. GREEN, *supra* note 3, at 6-8; *see supra* notes 187-90 and accompanying text.

221. *See supra* notes 191-94 and accompanying text.

222. *Humble Oil & Ref. Co. v. Board of Aldermen*, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974). *See supra* notes 28-29 and accompanying text (court's language quoted more extensively).

223. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 626-27, 265 S.E.2d 379, 383 (1980); *see supra* notes 30-34 and accompanying text.

224. Several cities and counties have had specific authority to create conditional use districts since 1973. *See supra* note 70. In 1985, the legislature specifically granted all North Carolina cities and counties authority to create conditional use districts. Act of July 4, 1985, ch. 607, 1985 N.C. Sess. Laws 776 (codified at N.C. GEN. STAT. §§ 153A-342, 160A-382 (1987)). Despite having this

conditional use district with the burden of seeking a new conditional use permit every time they want to change the use of their land.²²⁵ If either of these assumptions proves to be false, there will not be any greater number of conditional use permit decisions leading to closer judicial scrutiny.

IV. UNANSWERED QUESTIONS

A. *What (If Any) Uses Must be Considered in a Decision to Rezone to a Conditional Use District?*

There was a significant disagreement between the court of appeals and the supreme court in *Chrismon* regarding which uses must be considered before property can be rezoned to a conditional use district.²²⁶ The supreme court concluded that "it is not necessary that property rezoned to a conditional use district be [suitable] for all of the uses allowed under the corresponding general use district."²²⁷ The court, however, said nothing about what uses a zoning authority must consider and find appropriate before rezoning property to a conditional use district.²²⁸ Instead, the court implied that uses only need be considered and approved when the board considers the conditional use permit.²²⁹ This is apparently the argument that the zoning authority presented to the court of appeals.²³⁰ It is therefore arguable that the supreme court did not anticipate

authority to create conditional use districts, North Carolina zoning authorities have not rushed to create such districts. Charlotte, for example, has had authority to create conditional use districts since 1973, see Act of Apr. 11, 1974, ch. 1283, 1973 N.C. Sess. Laws, 2d sess., 461; however, the Charlotte zoning ordinance does not provide for any conditional use districts, although it does provide for conditional uses in many of its general use districts. See CODE OF CHARLOTTE, N.C. §§ 3000-3402 (Apr. 10, 1989) (providing only for general use districts); see also CODE OF DURHAM, N.C. § 24-3 (May 15, 1989) (provision establishing districts only provides for general use districts). But see GREENSBORO, N.C., CODE OF ORDINANCES §§ 30-202-203 (May 11, 1989) (listing conditional use districts); Guilford County, N.C., Zoning Ordinance § 6-17 (1988) (same); CODE OF WINSTON-SALEM, N.C. § 25-6 (Sept. 6, 1989) (providing for "special districts" that allow no uses aside from those listed in a "special use district permit"). In a move that could mark a trend of the future, the Raleigh City Council recently amended its zoning ordinance to allow conditional use districts. Compare CODE OF RALEIGH, N.C. § 10-2011 (Sept. 6, 1988) with *id.* § 10-2011 (Apr. 18, 1989) (provision listing established districts now includes conditional use districts).

225. Davenport and Green conducted a statistical analysis of rezoning requests in Greensboro after conditional use districts were implemented there. They found that over a five and one-half year period and out of 448 rezoning requests, 110 (22%) of the requests were for conditional use districts and conditional use permits. S. DAVENPORT & P. GREEN, *supra* note 3, at 17.

226. *Chrismon*, 322 N.C. at 623-25, 370 S.E.2d at 586-87 (property need not be found suitable for all uses permitted as of right in the corresponding general use district before it can be rezoned to a conditional use district, see *supra* note 119 and accompanying text); *Chrismon*, 85 N.C. App. 211, 218, 354 S.E.2d 309, 314 (1987) ("in order to properly rezone the area to a conditional use district, the zoning authority initially must determine that the property, under the new [conditional use] zoning classification, is suitable for all the uses permitted in its corresponding [general use] district"), *rev'd*, 322 N.C. 611, 370 S.E.2d 579 (1988). The court of appeals' view is unusual because if every use permissible in the corresponding general use district was appropriate for the property in question, no property owner would request having his property placed in a conditional use district when he or she could have it zoned in a general use district and have uses permitted as of right.

227. *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 587. Although the court used the word "available" instead of "suitable," it is clear from the context of the discussion that the court intended "suitable." See discussion *supra* note 119.

228. See *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 587.

229. See *id.* at 624, 638, 370 S.E.2d at 587, 595.

230. See *Chrismon*, 85 N.C. App. 216, 218, 354 S.E.2d 309, 314 (1987) ("Defendants, relying on

that any rezoning to a conditional use district could be overruled because it constituted insufficiently analyzed rezoning as that term is described above.²³¹ If this is true, then a zoning authority could give virtually automatic approval to any request for rezoning to a conditional use district and be faced only with the threat of illegal spot zoning.²³² It is only the conditional use permit decision that would then be subject to close judicial scrutiny because it is a quasi-judicial decision.²³³

Considering the rezoning decision as legislative and the permit decision as quasi-judicial is a rational way to treat conditional use zoning. The court's decision regarding what uses must be considered, however, presents a difficult problem. An applicant for a conditional use permit is prima facie entitled to the permit if she meets the conditions listed in the zoning ordinance for getting a conditional use permit for that use.²³⁴ In one case, for example, the court of appeals ruled that a landowner was entitled to a conditional use permit allowing him to use his property as an adult bookstore because he had met the conditions listed and because the zoning authority no longer had the discretion to deny the permit.²³⁵ Because the zoning authority (presumably) had considered the property to be appropriate for this conditional use when the original zoning decision was made, it was too late to deny the conditional use permit on grounds that the site was incompatible with this conditional use.²³⁶ In the *Chrismon* situation, for example, it should be noted that Mr. Clapp may now return to the Guilford County Board of Commissioners and apply for a new conditional use permit for any one of the other eighty-five conditional uses that are listed in the conditional

the 'conditional use' nature of the industrial classification, would apparently argue that a CU-M-2 zone . . . can be restricted to whatever uses are reasonable and appropriate for the surrounding area. Therefore, they argue [that] a reasonable basis exists if the approved use itself satisfies the purposes of the enabling legislation."), *rev'd*, 322 N.C. 611, 370 S.E.2d 579 (1988).

231. See *supra* notes 53-57 and accompanying text.

232. A zoning authority easily can avoid contract zoning claims by refraining from entering bilateral agreements. A zoning authority also can avoid claims that a zoning amendment is not in accordance with a comprehensive plan by making sure it keeps such a plan up to date. Thus, aside from spot zoning, there would be little else on which to challenge a rezoning to a conditional use district.

233. See *supra* notes 30-34 and accompanying text.

234. See *supra* notes 28-29 and accompanying text.

235. *Harts Book Stores, Inc. v. City of Raleigh*, 53 N.C. App. 753, 758-59, 281 S.E.2d 761, 764 (1981). The city zoning ordinance listed adult book stores as a use permissible with a special use permit. *Id.* at 756-57, 281 S.E.2d at 762-63. Plaintiff applied for the special use permit and presented evidence showing that the conditions had been met, but the board of adjustment denied the permit on grounds that the bookstore would be "incompatible" with the surrounding area. *Id.* at 758, 281 S.E.2d at 764. The court ruled that this denial was impermissible because the board could not make legislative decisions; instead, it could only refuse to grant the permit on grounds listed in the ordinance. *Id.* at 758-59, 281 S.E.2d at 764.

236. *Id.* at 758, 281 S.E.2d at 764. In making a conditional use permit decision, the zoning authority "may grant or deny a . . . permit solely on the basis of the specific authority delegated by the regulations, and subject to the limitations imposed thereby." *Woodhouse v. Board of Comm'rs*, 299 N.C. 211, 218, 261 S.E.2d 882, 887 (1980) (quoting R. ANDERSON, 3 AMERICAN LAW OF ZONING § 19.19, at 425 (2d ed. 1977)). The board must base its decision solely on the factors listed in the ordinance. *Id.* at 218-19, 261 S.E.2d at 887. When the use was listed in the ordinance as a conditional use permissible in that district upon the issuance of a conditional use permit (which is to be granted if certain conditions are met), this "is [the] equivalent [of] a legislative finding that the prescribed use is one which is in harmony with the other uses permitted in the district." *Id.* at 216, 261 S.E.2d at 886 (quoting A. RATHKOPF, 3 LAW OF ZONING AND PLANNING § 54-5 (1979)).

use district to which his property was rezoned.²³⁷ The Board will not be able to argue that his property is not appropriate for that use; the Board may only deny the conditional use permit based on the conditions listed in the ordinance and on substantial evidence.²³⁸

The real problem with this practical difficulty in *Chrismon* is that the court held that the zoning authority did not have to consider these conditional uses as compatible with the property *before* rezoning Mr. Clapp's property to a conditional use district. Because an applicant for a conditional use permit is *prima facie* entitled to the permit when she establishes that the property meets the conditions specified in the ordinance for a conditional use permit, the zoning authority should be required, when considering a request to rezone property to a conditional use district, to determine that the property is appropriate for all of the *conditional* uses listed for that district if the conditions specified in the zoning ordinance are met. Hence, when a property owner applies for and is granted rezoning to a conditional use district listing conditional uses *A, B, C, and D* and simultaneously receives a conditional use permit allowing use *A*, but then later returns to apply for conditional use *B, C, or D*, the zoning authority already should have found that the property is appropriate for those uses if the conditions enumerated in the ordinance have been met.²³⁹ Zoning authorities should give this same consideration to conditional uses listed in a general use district when they rezone property to that general use district.

In rezoning to a conditional use district, the zoning authority should be careful to note which uses are listed as conditional uses and to find that the property would be appropriate for each of those uses if the conditions listed in the ordinance are met. For this reason, courts should apply the *Allred* principles prohibiting insufficiently analyzed rezoning²⁴⁰ and require zoning authorities to consider all of the conditional uses that *may* be available for the property if it is rezoned to a conditional use district. Although the *Chrismon* court may have been anxious to approve conditional use zoning, it may have approved a potential disaster. Because of the case law on conditional use permits, if Mr. Clapp or his successor in ownership should ever want to try a manufacturing use for this property, he would only have to meet the requirements for a conditional use permit and would not have to overcome the barrier of rezoning to a different district. Therefore, in a rezoning to a conditional use district, there should be situations in which the rezoning should be overturned on a claim of insufficiently analyzed rezoning. Neighbors should not be denied a cause of action at the

237. See *supra* note 90. Mr. Clapp's property is now zoned to a CU-M-2 District, which allows such conditional uses as the manufacture of chemicals, machinery, textiles, and tobacco, among other manufacturing conditional uses.

238. See *supra* note 29.

239. For example, if a conditional use district lists apartments, convenience stores, and service stations as conditional uses upon the fulfillment of certain conditions, and if a property owner requests that her property be rezoned to that conditional use district in order to build apartments, the zoning authority should be required to consider not only the appropriateness of this property for apartments but also for the other conditional uses that are allowed for that district (and thus determine that this property would be appropriate for a convenience store or service station if the conditions are met and the owner applies for a conditional use permit).

240. See *supra* notes 53-57 and accompanying text.

outset when a zoning authority rezones property to a conditional use district without consideration of all conditional uses that potentially will be available for that property. The property owner whose property is rezoned might otherwise be entitled to a conditional use permit for a conditional use that never was considered in relation to that parcel of land.

To reconcile the problem of uses that are not considered when a zoning authority rezones property to a conditional use district, the supreme court appears to have two choices. First, the court may amend its *Chrismon* decision and determine what sort of consideration a zoning authority must give to conditional uses before rezoning to a conditional use district.²⁴¹ This approach would add the possibility of insufficiently analyzed rezoning to cases involving conditional use zoning. On the other hand, the court instead could choose to establish different rules for granting conditional use permits for property that is zoned in a conditional use district. In other words, although a conditional use permit decision is a quasi-judicial decision in a general use district, the court could choose to give zoning authorities more legislative discretion when making a conditional use permit decision in a conditional use district. Two zoning authorities have chosen this route regardless of whether they had the authority to do so.²⁴² To be consistent, the court should adopt the first option and set forth the sort of consideration a zoning authority should give to conditional uses in order to avoid an insufficiently analyzed rezoning challenge. The court should insist that zoning authorities determine that the property being considered for rezoning would be appropriate for all of the conditional uses listed for that district if the property meets the conditions listed in the ordinance for each conditional use.

B. Will Conditional Use Zoning Be Practical?

As is evident from the previous section, it is unclear from *Chrismon* whether the zoning authority must consider and approve the property for the applicable list of conditional uses before rezoning it to a conditional use district. Other practicalities will also influence whether conditional use zoning is successful. For example, for conditional use zoning to be declared a success in terms of increasing flexibility, it first must be used. Despite the fact that some jurisdic-

241. This same sort of consideration then should be required for conditional uses that are listed in addition to uses permitted as of right when a zoning authority rezones property to a general use district that has a list of conditional uses.

242. The Greensboro and Guilford County zoning ordinances have an unusual provision: "Requests for Conditional Use Permits as authorized by this Ordinance in Conditional Use Districts shall be processed and considered in the same procedure as set forth in this Ordinance for rezoning requests." Guilford County, N.C., Zoning Ordinance § 6-17(B) (1988), quoted in Record at 50, *Chrismon* (No. 232PA87); see also GREENSBORO, N.C., CODE OF ORDINANCES § 30-183(a) (May 11, 1989) (virtually identical provision). It would thus seem that Greensboro and Guilford County are attempting to circumvent the North Carolina case law holding that a conditional use permit decision is a quasi-judicial decision and subject to closer judicial scrutiny. Perhaps in future cases the court should consider whether a different standard should govern in conditional use district cases in terms of whether an applicant is ever prima facie entitled to a conditional use permit and whether the decision is still a quasi-judicial one. Until the court considers this question, Greensboro and Guilford County seem to be suspect in their attempts to apply different standards and procedures for conditional use permit decisions in conditional use district property than are applied in general use districts.

tions sought special legislative approval in order to create conditional use districts,²⁴³ very few North Carolina cities and counties appear to have created conditional use districts yet, the first step in conditional use zoning.²⁴⁴

When jurisdictions do create conditional use districts, success will depend on how well they design and draft the districts. The creators of the conditional use zoning concept suggest that zoning authorities simply "duplicate exactly the existing set of districts" so that there is a conditional use district for each corresponding general use district.²⁴⁵ Despite the "simplicity" of this procedure, conditional use zoning could be far more useful if the zoning authorities think about what conditional uses would be most compatible in a given district. A zoning authority contemplating doubling the number of zoning districts should create some intermediate general use districts with uses permitted as of right and carefully design some conditional use districts.

Although the conditional use zoning concept may turn out to be very helpful as a flexibility device in zoning, this author questions whether the whole concept places too many restrictions on a property owner's use of his land. Although Mr. Clapp may be thankful that he now has a conditional use permit allowing him to sell agricultural chemicals on his property,²⁴⁶ he may not be happy ten years from now when he wants to expand his business to another use or sell his property to someone with different plans. Because his property is in a conditional use district, a prospective buyer may wish to discount the sales price for Mr. Clapp's property to account for the inconvenience and uncertainty in obtaining a different conditional use permit or obtaining rezoning to a different district. Furthermore, a property owner whose land is in a conditional use district has no freedom to change the use of his land without returning to the zoning authority for approval. Wise landowners may not want to be this restricted in the use of their property. In a general use district, a property owner usually can change her use to, at least, a similar use without gaining the approval of the zoning authority.

If the court chooses to allow rezoning to conditional use districts without consideration of all of the conditional uses and to allow more legislative discretion to the zoning authority when making conditional use permit decisions in conditional use districts, the North Carolina legislature should amend the statutes which stipulate that conditional use permit decisions cannot be subjected to supermajority voting requirements by a valid protest petition.²⁴⁷ In a condi-

243. See *supra* note 70.

244. See *supra* note 224.

245. S. DAVENPORT & P. GREEN, *supra* note 3, at 7. This is precisely what the City of Greensboro and Guilford County have done in setting up their conditional use districts. See GREENSBORO, N.C., CODE OF ORDINANCES §§ 30-202-203 (May 11, 1989); Guilford County, N.C., Zoning Ordinance § 6-17 (1988).

246. See *supra* notes 88-93 and accompanying text.

247. See N.C. GEN. STAT. §§ 153A-340 & 160A-381 (1987). The statutes provide that "no vote greater than a majority vote shall be required for the city council to issue such [conditional use] permits." *Id.* § 160A-381. A supermajority (three-fourths) vote is required to approve a zoning amendment that changes the zoning classification of property only if more than 20 percent of the neighbors sign a protest petition against the rezoning. See *id.* § 160A-385(a).

tional use district, if all of the conditional uses are not considered and approved during the decision to rezone to a conditional use district, then the really significant decision is the conditional use permit decision. When a zoning authority considers a conditional use permit decision, neighbors should be able to present a protest petition with the required number of votes and trigger the requirement of a supermajority vote necessary for approval of a conditional use permit.

C. *Should Conditional Zoning Be Approved in North Carolina?*

Because the supreme court has alleged that it is joining other jurisdictions and because it has cited many cases involving conditional zoning—as opposed to conditional use zoning—the question remains whether, given an appropriate case, the North Carolina Supreme Court would approve conditional zoning in a general use district situation. That question almost arose, and perhaps could have been decided, in *Hall*.²⁴⁸

In its brief to the court, the Durham City Council contended that this rezoning was “merely an instance of orthodox conditional zoning.”²⁴⁹ The court argued that “[a]lthough defendants make a spirited attempt to use *Chrismon* to support their contention that the situation here is a type of conditional use zoning, their reliance on that decision is misplaced.”²⁵⁰ The court accurately found that the Durham City Council may not rely on *Chrismon* because the *Chrismon* case involved rezoning to a *conditional use* district, and the council in this case had rezoned to a *general use* district.²⁵¹ However, the court’s reference to the council’s “spirited attempt” and “misplaced” reliance is ironic in light of the fact that the court itself in *Chrismon* made a spirited attempt to support its approval of conditional use zoning with citations and references to other jurisdictions.²⁵² As distinguished above, the jurisdictions cited by the court in *Chrismon* that constituted the “growing trend of jurisdictions” approving conditional use zoning²⁵³ may in fact only be cited as approving conditional zoning.²⁵⁴ The practices approved in other states in the cases cited by the court in *Chrismon* more closely resemble the practice that the court struck down in *Hall*, so the court’s rebuke of the city council is more than a little ironic.

The *Chrismon* court cited with approval one case that bears a remarkable resemblance to the *Hall* case. In *Bucholz v. City of Omaha*²⁵⁵ a corporation obtained an option to purchase a 103-acre tract of land in a largely residential area for the purpose of building a large shopping center.²⁵⁶ The landowner and the corporation applied to the city council to have the property rezoned from a

248. See *Hall v. City of Durham*, 323 N.C. 293, 372 S.E.2d 564 (1988).

249. *Id.* at 299, 372 S.E.2d at 568.

250. *Id.* at 301, 372 S.E.2d at 568.

251. *Id.* at 301, 372 S.E.2d at 569.

252. *Chrismon*, 322 N.C. at 620-22, 370 S.E.2d at 584-86.

253. *Id.*

254. See *supra* notes 104-07 and accompanying text.

255. 174 Neb. 862, 120 N.W.2d 270 (1963), cited with approval in *Chrismon*, 322 N.C. at 620 n.3 & 625, 370 S.E.2d at 585 n.3 & 587.

256. *Id.* at 864, 120 N.W.2d at 273.

low-density residential district to a district that would permit the shopping center.²⁵⁷ The applicants presented their plans for a shopping center to the council.²⁵⁸ The fact pattern thus far is virtually identical to the situation in *Hall*.²⁵⁹ The cases are similar in terms of the restrictions²⁶⁰ that would be placed on the land. In *Bucholz* the protective covenant agreement was between the landowner and the option-holder wishing to build a shopping center;²⁶¹ whereas, in *Hall* the proposed restrictive covenant was to be placed in the deed transferring title from the landowner to Lowe's. The Nebraska Supreme Court upheld the conditional zoning after citing cases that had both disapproved and approved conditional zoning.²⁶² Having cited the *Bucholz* case only two months earlier in approving conditional use zoning,²⁶³ and having left unanswered the question whether conditional zoning would be approved in North Carolina for rezoning to general use districts in the form approved elsewhere, *Hall* would have been an appropriate case in which to have considered the question and distinguished conditional zoning from conditional use zoning. The council's decision did involve rezoning to a general use district, so the court correctly distinguished this case from conditional use zoning and the *Chrismon* decision.²⁶⁴ However, the Durham City Council followed the same practice as zoning authorities in Nebraska, New York, and Georgia where conditional zoning has been approved.²⁶⁵

The procedures followed by the City of Durham can be distinguished from those in other states on one ground that seems insignificant in light of the restrictions to be placed on the property. The courts that have approved conditional zoning have done so on the premise that the land would have been appropriately rezoned to its new classification without any conditions and that the conditions were imposed only to ameliorate the change to the new district.²⁶⁶ Even the *Bucholz* court included language to the effect that the neighbors should not be

257. *Id.*

258. *Id.* at 871, 120 N.W.2d at 276.

259. See *supra* notes 126-34 and accompanying text.

260. In *Hall* Lowe's suggested all of the restrictions voluntarily. *Hall*, 323 N.C. at 295-96, 372 S.E.2d at 566. A council member stated at the meeting that

[t]he key here is something that I have never heard of before—these people [the landowner and Lowe's] are adding a "covenant" to the deed that says that if Lowe's does anything else other than what they are saying they are going to do with this land tonight, that land must go to the Eno River Association.

Id. at 303, 372 S.E.2d at 571. In *Bucholz* the city council proposed the restrictions and drafted the restrictive covenants. *Bucholz*, 174 Neb. at 871, 120 N.W.2d at 276.

261. *Bucholz*, 174 Neb. at 872, 120 N.W.2d at 277.

262. *Id.* at 874-75, 120 N.W.2d at 278. The court also addressed whether the city had entered a contract to rezone (which would be impermissible as contract zoning); see *supra* notes 43-46 and accompanying text. The court concluded that there had been no "bargain or agreement between the applicants and the city." *Bucholz*, 174 Neb. at 873, 120 N.W.2d at 277.

263. See *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 587.

264. See *Hall*, 323 N.C. at 301, 372 S.E.2d at 569. For discussion of the distinctions between conditional zoning in general use districts and conditional use zoning in conditional use districts, see *supra* notes 58-79 and accompanying text.

265. See *supra* notes 60-66 and accompanying text.

266. See *supra* notes 62-66 and accompanying text.

able to complain that conditions were imposed on their behalf.²⁶⁷

In *Hall* the court ultimately based its decision to invalidate the rezoning on the fact that the council had not sufficiently considered all of the uses available to Lowe's under the new classification.²⁶⁸ Thus, the court suggested that some of the uses permissible under the new classification might not be appropriate for the property, and the council should whole heartedly consider all of those uses because of the possibility that the land would someday be used for one of those uses despite the plans of the applicant now before the council.

Although insufficiently analyzed rezoning has been an impermissible practice in North Carolina for many years,²⁶⁹ it may not have been a valid concern in *Hall* because of the reverter restriction that Lowe's proposed to place in its deed. A council should not have to consider uses that would be permissible in a general use district in which property is proposed to be rezoned when those uses are expressly prohibited in a restrictive covenant in the deed for that property. Such a requirement appears useless. When property is restricted by enforceable covenants in a deed, the uses prohibited by the deed should not have to be considered and determined to be appropriate for that property in order for it to be rezoned to a general use district that otherwise would allow those uses but for the restrictive covenant.

In spite of this argument for approving conditional zoning in a case like *Hall*, the court's decision in *Hall* can be defended as a practical matter on the grounds that the restrictions had not yet been attached to the property, but would only be placed in the deed from B,K,B, Inc. to Lowe's, which appears to have been conditioned upon the successful rezoning of the property.²⁷⁰ Thus, there was the possibility that after the property was rezoned the property might not be transferred from B,K,B, Inc. to Lowe's after all or that the deed might not include the reverter clause. In those situations, the owner would have available all of the uses allowed in a C-4(D) district and there would be no reverter clause to protect the city and the neighboring landowners.²⁷¹

The parties in the *Bucholz* case overcame this prohibition against rezoning in anticipation of restrictive covenants that might never become effective by executing their agreement before the rezoning was approved by the council.²⁷² Their "agreement expressly [provides] that it [was] not conditioned upon a rezoning of the [property]."²⁷³ It is unlikely, however, that many prospective buyers would agree to place restrictions in the deed before they have some guarantee that the property will be rezoned to allow the use for which they have planned the property. In considering solutions to this problem, developers should be

267. *Bucholz*, 174 Neb. at 874, 120 N.W.2d at 278.

268. *Hall*, 323 N.C. at 303-04, 372 S.E.2d at 570-71.

269. See *supra* notes 53-57 and accompanying text.

270. B,K,B, Inc. was described as the owner of the land, and the proposed plans included description of a reverter clause "to be placed in the deed from B,K,B, Inc. to Lowe's." *Hall*, 322 N.C. at 296, 372 S.E.2d at 566.

271. *Id.* at 303, 372 S.E.2d at 571.

272. *Bucholz*, 174 Neb. at 872, 120 N.W.2d at 276.

273. *Id.*

wary of the prohibition against contract zoning²⁷⁴—they may not enter into a bilateral agreement with the zoning authority.

V. CONCLUSION

These new developments in zoning law in North Carolina give cities and counties greater zoning flexibility by allowing conditional use zoning and by allowing planners to consider the development proposals of those who request rezoning. The North Carolina Supreme Court wisely distinguished between contract zoning and insufficiently analyzed rezoning and has narrowed the scope of illegal contract zoning. Furthermore, the court sanctioned conditional use zoning—albeit while under the mistaken belief that it was joining other jurisdictions—providing a potential solution to zoning inflexibility. The court has, however, left the success of this new type of zoning to individual cities and counties, who must respond with conditional use districts that are well considered and well written in their zoning ordinances.

To better define this innovative approach, the court, at its earliest opportunity, should require a zoning authority to consider all of the conditional uses permitted in a proposed conditional use district upon the finding of conditions sufficient to justify the granting of a conditional use permit. In the area of zoning formerly thought to constitute contract zoning in this state, the court should adopt a term for situations in which a zoning authority rezones to a general use district without considering all of the uses that will be available in the new district—this Comment suggests one possible term: “insufficiently analyzed rezoning.” Finally, in the area of conditional zoning, as distinguished from conditional use zoning, the court should approve the form of conditional zoning that it relied on so heavily in approving conditional use zoning. However, the court should continue to insist that any restrictions to be placed in a deed to restrict the use of land be written in some form of enforceable writing before the property is rezoned unless the property is appropriate for all uses in the new classification without the limitations of any proposed restrictions.

LOUIS W. DOHERTY

274. See *supra* notes 43-46 & 191-95 and accompanying text.