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Development Agreements: A Critical Introduction

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DEVELOPMENT AGREEMENTS: A Critical Introduction

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I. INTRODUCTION

The developer lives in a world of uncertainty. Not only must he seek approval for his project and obtain numerous permits from various authorities, but he must also conform to the requirements of local zoning ordinances, a local comprehensive plan, a state comprehensive plan, and in Florida and some other states, a regional plan as well. This task would be difficult enough in a static regulatory environment; it is even more complicated when the rules of the game may change at any time. Indeed, as the length of time to complete a project increases, so does the likelihood of a rule change. This predicament can be frustrating and extremely costly, as the case of *Avco Community Developers, Inc. v. South Coast Regional Commission*[1] illustrates.

Avco was developing 5,234 acres of land in Orange County, California when the California Coastal Zone Conservation Act of 1972[2] took effect.[3] This Act imposed an additional permit requirement on seventy-four of Avco's 473 acres within the coastal zone.[4] Avco applied for an exemption from the permit requirement but was denied because it had not applied for a building permit prior to the February 1, 1973 deadline specified in the Act.[5] At that time Avco had spent over $2,000,000 on plans, infrastructure, and grading, and had incurred liabilities of nearly $750,000.[6] Avco petitioned the superior

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1. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976).

2. CAL. PUB. RES. CODE § 27000 (West 1983), added by Initiative Measure (1972) and approved by voters at the general election held November 7, 1972. Repealed by CAL. PUB. RES. CODE § 27650, January 1, 1977; however, a substantial portion was incorporated into the California Coastal Act of 1976, CAL. PUB. RES. CODE § 30000 (West 1986).

3. 17 Cal. 3d at 789, 553 P.2d at 548-49, 132 Cal. Rptr. at 389.

4. *Id.* at 789, 553 P.2d at 549, 132 Cal. Rptr. at 388.

5. *Id.* at 790, 553 P.2d at 549, 132 Cal. Rptr. at 389. Under the county building code Avco could not receive a permit until it had completed grading, which it had not done.

6. *Id.*

court for a writ of mandate to compel the California Coastal Zone Commission to grant the exemption, claiming that it had a vested right to complete the project.[7] The court held that Avco's rights had not vested because it had not been issued a building permit.[8] The court noted:

> It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit.[9]

Under California law, the permit that marks the point at which the right to complete construction vests is, with rare exceptions, a building permit.[10] Thus, under California law a restrictive vested rights doctrine operates as a source of uncertainty and risk for developers.

The California Legislature responded to the *Avco* decision by enacting the nation's first development agreement statute.[11] The Act specifically addresses the cost, waste, and uncertainty inherent in the development process, and seeks to strengthen the planning process by reducing the impact of these evils.[12] In essence, the Act encourages local governments and developers to enter into agreements wherein the governing body promises not to make any changes in the zoning ordinance or other regulations which would affect the property being developed subject to the agreement. The Act provides an element of predictability to both parties, yet it is especially valued by the developer. Moreover, as the result of detailed negotiations between the parties, the agreement formalizes each party's understanding of the project at an early date and thus simplifies the approval process. In return, the developer may be required to "pay" for these benefits by providing public facilities or in-lieu fees.[13]

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7. *Id.*

8. *Id.*

9. *Id.* at 791, 553 P.2d at 550, 132 Cal. Rptr. at 389 (citations omitted).

10. *Id.* at 793, 553 P.2d at 551, 132 Cal. Rptr. at 391 (citing Spindler Realty Corp. v. Monning, 243 Cal. App. 2d 255, 53 Cal. Rptr. 7 (1966), and Anderson v. City Council, 229 Cal. App. 2d 79, 40 Cal. Rptr. 41 (1964)). The court also rejected Avco's contention that it was entitled to a permit because, based upon its progress, issuance of a permit was no longer discretionary but was merely ministerial. 17 Cal. 3d at 795-96, 553 P.2d at 552-53, 132 Cal. Rptr. at 392-93.

11. CAL. GOV'T CODE §§ 65864-65869.5 (West 1983 & Supp. 1988). The fiscal pressures following the passage of Proposition 13 also influenced the legislature.

12. CAL. GOV'T CODE § 65864 (West 1983 & Supp. 1988).

13. This was implicit in § 65865.2 of the Act, which states that "[t]he development agreement may include conditions, terms, restrictions, and requirements for subsequent discretionary

This paper begins with a brief look at the origins of the development agreement. The California and Florida development agreement statutes are then discussed and compared. Constitutional problems with development agreements are also examined, as potential constitutional challenges are important aspects of theoretical analysis. Next, the use of vested rights or a dominant reserved powers doctrine as an alternative to development agreements is considered. Finally, the development agreement is evaluated as a practical tool, and recommendations are offered.

II. ORIGINS OF THE DEVELOPMENT AGREEMENT

The development agreement was not created solely as a response to *Avco*; it is simply a species of public contract.[14] Perhaps its closest relative is the annexation agreement. Annexation agreements need not be authorized by statute, although in Illinois they are.[15] The Illinois statute authorizes "any municipality [to] enter into an agreement with one or more of the owners of record of land in any territory which may be annexed to such municipality . . . ."[16] An agreement under the statute may provide for annexation of the subject property by the municipality; the freezing of zoning ordinances, subdivision controls,

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actions . . . ." CAL. GOV'T CODE § 65865.2 (West 1983). A 1984 amendment made the exactions provision even clearer: "The agreement may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time." CAL. GOV'T CODE § 65865.2 (West Supp. 1988). Ostensibly, this provision contemplates reimbursement from subsequent developers in the area on a pro rata basis—there is certainly no indication that reimbursement will be made by the government body—but it does recognize that the developer may initially be required to provide certain facilities. For instance, the local government may require exactions absent a development agreement, but the agreement may enable the government to demand more than it might be able to otherwise because the local government is giving up something and can demand a greater quid pro quo. Presumably, the developer is willing to pay this higher price in exchange for the increase in the level of certainty the agreement affords.

14. Professor Callies has defined a development agreement as

> a contract between a unit of local government and a private holder of property development rights the principal purposes of which are to guarantee to the developer what land development regulations will apply to the subject property during the term of the agreement and to guarantee to the local government unit what exactions, improvements and charges the landowner-developer will make and pay during the term of the agreement.

D. Callies, Development Agreements Handbook 2 (Nov. 1986) (draft).

15. *See* ILL. ANN. STAT. ch. 24, paras. 11-15.1-1 to 11-15.1-5 (Smith-Hurd Supp. 1987). This statute was enacted in 1963, although annexation agreements had been used before then. Meegan v. Village of Tinley Park, 52 Ill. 2d 354, 356-57, 288 N.E.2d 423, 425 (1972). California recently recognized annexation agreements in its development agreement act. CAL. GOV'T CODE § 65865(b) (West Supp. 1988).

16. *See* ILL. ANN. STAT. ch. 24, para. 11-15.1-1 (Smith-Hurd Supp. 1988).

and similar restrictions as they apply to the subject property; exactions; and any other matter not prohibited by law.[17]

Development agreements are also used in England and Wales, where they are known as "planning agreements."[18] Section 52 of the Town and Country Planning Act reads in part:

> A local planning authority may enter into an agreement with any person interested in land . . . for the purpose of restricting or regulating the development or use of the land . . . and any such agreement may contain such incidental and consequential provisions (including provisions of a financial character) as appear to the local planning authority to be necessary or expedient for the purposes of the agreement.[19]

Unless a time limit is written into the agreement, it will be presumed to be permanent in its effect.[20] It appears that planning agreements are used primarily as a means for planning authorities to obtain "planning gain."[21]

The English planning agreement is similar to its American counterpart. Exactions play an important role in the local government's motivation to enter into these agreements in both countries. The use of these agreements presents an opportunity to supplement overburdened municipal treasuries without raising taxes; thus the benefits are political as well as economical. Both the American and the English agreements provide some added measure of predictability, and apply to either the developer or a person with an interest in land and to that person's successors in interest. However, the English Act is not as detailed as American development agreement statutes.

III. THE CALIFORNIA DEVELOPMENT AGREEMENT STATUTE

The California development agreement statute,[22] which took effect on January 1, 1980, is typical of those in the United States.[23] The Act declares that uncertainty in the development process "can result in a waste of resources, escalate the cost of . . . development . . . and dis-

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17. ILL. ANN. STAT. ch. 24, para. 11-15.1-2 (Smith-Hurd Supp. 1988).

18. Town and Country Planning Act, 1971, ch. 78, § 52.

19. Town and Country Planning Act at § 52(1).

20. *Id. See also* Edwards, *Section 52 Agreements and Planning Gain*, LAW SOCIETY'S GAZETTE, Feb. 3, 1988, at 21, 25.

21. Edwards, *supra* note 20. "Planning gain" is the English euphemism for "exactions."

22. CAL. GOV'T CODE §§ 65864-65869.5 (West 1983 & Supp. 1988).

23. Three other states have enacted development agreement statutes to date: Hawaii (HAW. REV. STAT. §§ 46-124 to 46-132 (1985)), Nevada (NEV. REV. STAT. ANN. §§ 278.0201-.0207 (Michie 1986))(enacted 1985), and Florida (FLA. STAT. §§ 163.3220-.3243 (1987))(enacted 1986).

courage investment in and commitment to comprehensive planning . . . ."[24] The California Legislature believed these costs could be reduced if local governments could assure developers their projects would not be affected by changes in zoning policies and regulations made prior to the completion of the project.[25] The statute recognizes that the developer may be called upon to provide public facilities such as utilities, roads, and schools in exchange for these assurances.[26] "Any city, county, or city and county, may enter into a development agreement with any person having a legal or equitable interest in real property . . . ."[27] The real property in question need not be located within the jurisdiction of the local government party to the agreement, because the statute also contains an annexation agreement provision.[28]

There are few requirements for a valid development agreement. The agreement must "specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes."[29] The statute does not limit the duration of the agreement; it merely requires that the term be stated. Other conditions and restrictions may be included if they do not preclude the development of the property as otherwise provided in the agreement.[30] For example, the agreement may contain a schedule for the completion of the development or any phase thereof.[31] Also, the agreement may address "financing [by the developer] of necessary public facilities."[32]

The heart of the statute is the freeze provision. Unless the agreement provides otherwise, the development of the project is governed by the policies, rules, and regulations in effect at the time the agreement is executed.[33] In other words, the rules of the game in force at the time the agreement is made are "frozen" for the duration of the agreement, insofar as they apply to the subject property. Rules and policies of the local government party which are implemented subsequent to the signing of the agreement will apply to the development if they are not inconsistent with the agreement.[34] Of course, a local gov-

24. CAL. GOV'T CODE § 65864(a) (West 1983).
25. CAL. GOV'T CODE § 65864(b) (West 1983).
26. CAL. GOV'T CODE § 65864(c) (West Supp. 1988).
27. CAL. GOV'T CODE § 65865(a) (West 1983 & Supp. 1988).
28. CAL. GOV'T CODE § 65865(b) (West Supp. 1988).
29. CAL. GOV'T CODE § 65865.2 (West 1983).
30. *Id.*
31. *Id.*
32. CAL. GOV'T CODE § 65865.2 (West Supp. 1988). *See also supra* note 13.
33. CAL. GOV'T CODE § 65866 (West 1983).
34. *Id.*

ernment cannot freeze the laws of another jurisdiction. If state or federal law changes during the term of the agreement, the parties will be bound, and any affected "provisions of the agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations."[35]

Notice and a public hearing are required before a development agreement can be adopted.[36] In California, development agreements have been deemed to be legislative acts.[37] They must be approved by ordinance and are subject to referendum. They must also be consistent with the comprehensive plan and other applicable plans.[38] The agreement may be amended or cancelled by mutual consent,[39] and is enforceable by any party.[40] Annual reviews of development agreements require the developer to demonstrate that he has complied in good faith with the terms of the agreement. If the developer fails to show good faith compliance, the local government party may modify or terminate the agreement.[41] The agreement must also be recorded,[42] and there are additional requirements for projects in certain coastal areas.[43]

IV. THE FLORIDA LOCAL GOVERNMENT DEVELOPMENT AGREEMENT ACT

The Florida Legislature enacted the Florida Local Government Development Agreement Act[44] in 1986. The drafters used the California Act as a starting point in developing the more detailed Florida Act.[45]

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35. CAL. GOV'T CODE § 65869.5 (West 1983).

36. CAL. GOV'T CODE § 65867 (West 1983 & Supp. 1988).

37. CAL. GOV'T CODE § 65867.5 (West 1983). This does not mean that courts must treat development agreements as legislative acts. *See, e.g.*, Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973)(when local legislative body acts in quasi-judicial manner courts will not apply presumption of validity standard of review). California has refused to follow *Fasano*. Arnel Dev. Co. v. City of Costa Mesa, 28 Cal. 3d 511, 620 P.2d 565, 169 Cal. Rptr. 904 (1980)(legislative classification of zoning ordinances enjoys advantages of economy and certainty). Nevertheless, development agreements contain both legislative and administrative characteristics, and the issue as to which prevails is not settled. This uncertainty is evidenced in the Florida development agreement statute which is not clear on its face whether it is legislative or administrative in nature. FLA. STAT. §§ 163.3220-3243 (1987)*See, e.g.*, Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44, 60-63 (1981).

38. CAL. GOV'T CODE § 65867.5 (West 1983).

39. CAL. GOV'T CODE § 65868 (West 1983).

40. CAL. GOV'T CODE § 65865.4 (West 1983 & Supp. 1988).

41. CAL. GOV'T CODE § 65865.1 (West 1983).

42. CAL. GOV'T CODE § 65868.5 (West 1983).

43. CAL. GOV'T CODE § 65869 (West 1983).

44. FLA. STAT. §§ 163.3220-.3243 (1987).

45. Memorandum from Robert M. Rhodes to Fred Bosselman, Jim Murley, and Craig Richardson (Jan. 2, 1986).

The Florida Act expresses the same legislative findings as the California Act — the need to address uncertainty, waste, cost, and lack of commitment to the comprehensive planning process — but explicitly ties the Act to the Local Government Comprehensive Planning and Land Development Regulation Act[46] and the Florida State Comprehensive Planning Act of 1972.[47] By linking the Development Agreement Act with these two planning laws, the legislature has presumably made development agreements less vulnerable to judicial attack. To further clarify matters, Florida's statute also has a detailed definition section which gives examples of what constitutes development and what does not.[48]

In another departure from the California model, the Florida statute limits the term of a development agreement to five years, although the term may be extended by mutual consent of the parties.[49] This five-year limitation may discourage developers from using the agreements.[50] As development projects become larger and more sophisticated, they are more likely to require longer than five years to complete. This is particularly true of multi-phase projects. The first phase might be finished within five years, but later phases might be planned for several years thereafter. As these later phases would not be protected by the excuted agreement, the developer might hesitate to take the risk.

Like California, Florida requires that a development agreement include: a specified term; a statement of permitted uses; density, intensity and height restrictions; provisions for any reservation or dedication of land for public purposes; and a finding that the proposed development is consistent with the local comprehensive plan.[51]

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46. FLA. STAT. §§ 163.3161-.3215 (1987).

47. FLA. STAT. §§ 186.001-.031 (1987 & Supp. 1988); FLA. STAT. §§ 186.001-.911 (1987).

48. FLA. STAT. § 163.3221 (1987). Activities said to involve development include: reconstruction or alteration of the size or external appearance of a structure; change in the intensity of use of land; alteration of a shore or bank; coastal construction; drilling, mining, or excavation of land; clearing of land or demolition of a structure; and deposit of refuse or fill on land. FLA. STAT. § 163.3221(3)(a) (1987). Activities not considered to involve development include: maintenance or improvement of a road or railroad track performed within the right-of-way by a road agency or railroad company; certain work on utility rights-of-way; interior or superficial exterior alteration of a structure; use of a dwelling for purposes customarily incidental to enjoyment of a dwelling; use of land for agricultural or forestry purposes; change in use of land or a structure to another use within the same class; the creation or termination of rights in land; and change in ownership or form of ownership of land or a structure. FLA. STAT. § 163.3221(3)(b) (1987).

49. FLA. STAT. § 163.3229 (1987).

50. Telephone interview with Ralph Hook, Community Program Administrator, Florida Department of Community Affairs (Apr. 20, 1988); interview with Clifford A. Schulman in Miami, Florida (May 6, 1988).

51. FLA. STAT. § 163.3227(1) (1987).

Both states make reference to the construction of public facilities; however, Florida provisions for public facilities are mandatory, and are not restricted to "necessary" facilities.[52] Other features of the California statute adopted in Florida include: a public hearing requirement;[53] review of the agreement at least once a year to determine good faith compliance by the developer;[54] and provisions for recording,[55] enforcement,[56] and amendment or cancellation of the agreement.[57]

The Florida Act also has a freeze provision[58] and a section relating to subsequently enacted state and federal laws inconsistent with the agreement.[59] The pertinent local laws in force at the time the agreement is executed apply to the development for the duration of the agreement.[60] Thus, a development agreement might be particularly attractive if major changes in land use regulations are imminent. However, subsequently adopted local laws may be applied to the subject development *only* if the local government has held a public hearing *and* made one of five determinations.[61] Either the new laws must not conflict with those governing the agreement;[62] such laws must be necessary for "the public health, safety, or welfare, and expressly state that they shall apply to a development that is subject to a development agreement;"[63] the agreement must specifically anticipate and provide for such laws;[64] the local government must demonstrate that substantial changes have occurred since the execution of the agreement; [65] or the agreement must be found to have been "based on substantially inaccurate information supplied by the developer."[66] When the subsequently enacted law is a conflicting state or federal law, the freeze provision will not control; in such a case the "agreement shall be

52. *Id. Cf.* CAL. GOV'T CODE § 65865.2 (West 1983 & Supp. 1988). Development agreements in Florida must contain "[a] description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development." FLA. STAT. § 163.3227(1)(d) (1987).

53. FLA. STAT. § 163.3225 (1987). *Cf.* CAL. GOV'T CODE § 65867 (West 1983 & Supp. 1988).

54. FLA. STAT. § 163.3235 (1987). *Cf.* CAL. GOV'T CODE § 65865.1 (West 1983).

55. FLA. STAT. § 163.3239 (1987). *Cf.* CAL. GOV'T CODE § 65868.5 (West 1983).

56. FLA. STAT. § 163.3243 (1987). *Cf.* CAL GOV'T CODE § 65865.4 (West 1983 & Supp. 1988).

57. FLA. STAT. § 163.3237 (1987). *Cf.* CAL. GOV'T CODE § 65868 (West 1983).

58. FLA. STAT. § 163.3233 (1987).

59. FLA. STAT. § 163.3241 (1987).

60. FLA. STAT. § 163.3233(1) (1987).

61. FLA. STAT. § 163.3233(2) (1987).

62. FLA. STAT. § 163.3233(2)(a) (1987).

63. FLA. STAT. § 163.3233(2)(b) (1987).

64. FLA. STAT. § 163.3233(2)(c) (1987).

65. FLA. STAT. § 163.3233(2)(d) (1987).

66. FLA. STAT. § 163.3233(2)(e) (1987).

modified or revoked as is necessary to comply with the relevant state or federal laws."[67]

Florida's Act has several requirements not found in the California statute. These unique requirements include a legal description of the subject property and the names of its legal and equitable owners;[68] a listing of all local development permits needed;[69] a description of any conditions or restrictions the local government determines to be necessary for the public health, safety, or welfare;[70] and a statement that the failure of the agreement to cover a term or condition required by law "shall not relieve the developer of the necessity of complying with the law . . . ."[71]

V. CONSTITUTIONAL PROBLEMS WITH DEVELOPMENT AGREEMENTS

There are two conflicting federal constitutional provisions that are relevant to any consideration of development agreements: the reserved powers doctrine (which tends to negate development agreements), and the contract clause (which tends to support them). The validity of a development agreement may hinge on the resolution of this conflict.

A. The Reserved Powers Doctrine

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.[72]

Among the powers reserved to the states are those known collectively as the police powers.[73] Land use regulations bear directly on the public health, safety, and welfare; consequently, they are part of the police power.[74] Given the nature of the development agreement—a

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67. FLA. STAT. § 163.3241 (1987). *Cf.* CAL. GOV'T CODE § 65869.5 (West 1983) ("inconsistent provisions of the agreement shall be modified or suspended as may be necessary to comply . . .").

68. FLA. STAT. § 163.3227(1)(a) (1987).

69. FLA. STAT. § 163.3227(1)(f) (1987).

70. FLA. STAT. § 163.3227(1)(h) (1987).

71. FLA. STAT. § 163.3227(1)(i) (1987).

72. U.S. CONST. amend. X.

73. Charles River Bridge v. Warren Bridge Co., 36 U.S. (11 Pet.) 420, 477 (1837) ("We cannot . . . take away from [the states] any portion of that power over their own internal police and improvement, which is so necessary to their well being and prosperity.").

74. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (police power is one of the "least limitable" powers of government and can be used to regulate the location of a brick yard); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upheld comprehensive zoning as valid exercise of police power).

public contract governing the use of land—it is reasonable to hold such agreements subject to the police power. Yet, the extent to which the government can exercise the police power is unclear

One of the leading cases interpreting the reserved powers doctrine is *Stone v. Mississippi*.[75] In 1867, the Mississippi Legislature granted the respondents a twenty-five year charter for a lottery. The Mississippi Constitution of 1868 forbade the operation of a lottery.[76] In 1874, the state brought an action against the respondents, alleging that they were conducting a lottery in violation of the constitution and an 1870 statute; thus, the charter had, in effect, been repealed.[77]

The United States Supreme Court upheld the judgment for the state. The Court noted that a contract between a state and a private party is protected by the contract clause of the United States Constitution, but that there must first be a contract.[78] In this context, the existence of a contract depends on whether the legislature has the authority to bind the state. The Court then declared that "the legislature cannot bargain away the police power of a State."[79] While recognizing the impossibility of pinpointing the bounds of the police power, the Court found it undoubtedly included matters affecting the public health and morals.[80] Because the lottery affected the public morals, it was subject to the police power, and the legislature could not bargain away the power to regulate it in the future. The lottery charter was merely "a permit, good as against existing laws, but subject to future legislative and constitutional control or withdrawal."[81]

The scope of the police power has expanded over the years. In 1879 Chief Justice Waite drew a narrow characterization of the police power in *Stone*. Today, the police power is more broadly defined and encompasses such amorphous concepts as the "general welfare" and "important public purposes." For example, the United States Supreme Court in *Atlantic Coast Line R.R. v. City of Goldsboro*[82] declared:

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75. 101 U.S. 814 (1879).

76. *Id.* at 815.

77. *Id.* at 815-16.

78. *Id.* at 816-17 (citing Trustees of Dartmouth College v. Woodward, 17 U.S. (4 Wheat.) 518 (1819)).

79. *Id.* at 817. While there are many areas in which the legislature can make contracts binding upon succeeding legislatures, the police power is not one of them. Hale, *The Supreme Court and the Contract Clause: II*, 57 HARV. L. REV. 621, 660-61 (1944) (discussing Butchers' Union Co. v. Crescent City Co., 111 U.S. 746 (1884)).

80. 101 U.S. at 818.

81. *Id.* at 821.

82. 232 U.S. 548 (1914).

> [I]t is settled that neither the "contract" clause nor the "due process" clause has the effect of overriding the power of the State to establish all regulations that are reasonably necessary to secure the health, safety, good order, comfort, or general welfare of the community; that this power can neither be abdicated nor bargained away . . . and that all contract and property rights are held subject to its fair exercise.[83]

Berman v. Parker[84] is widely cited for the proposition that "[t]he concept of the public welfare is broad and inclusive."[85] The case involved legislation to rid the nation's capitol of slums and urban blight. In upholding the District of Columbia Redevelopment Act, Justice Douglas wrote:

> The definition [of the police power] is essentially the product of legislative determinations addressed to the purposes of government. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. . . .
>
> Public safety, public health, morality, peace and quiet, law and order—these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.[86]

After expressing an unwillingness to interfere with Congress' authority to define the police power, the Court declared that the boundaries of the police power included aesthetic considerations.[87]

The modern statement of the reserved powers doctrine is enunciated in *United States Trust Co. v. New Jersey*.[88] This action was brought by a bondholder, who contended that the State of New Jersey violated the contract clause by repealing a covenant not to subsidize rail service with certain funds pledged as security for the bonds.[89] The New Jersey Supreme Court found that the repeal of the covenant was a valid exercise of the police power and therefore did not violate the contract clause.[90] A closely divided Supreme Court reversed the New Jersey

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83. *Id.* at 558 (cited in Hale, *supra* note 79, at 662).
84. 348 U.S. 26 (1954).
85. *Id.* at 33.
86. *Id.* at 32.
87. *Id.* at 33.
88. 431 U.S. 1 (1977).
89. *Id.* at 17.
90. *Id.* at 21.

court's decision. A plurality of the Court agreed that energy conservation and public transportation were important state concerns, but declined the invitation to weigh the benefits of furthering these concerns against the possibility of harm to the bondholders.[91] Instead, Justice Blackmun adopted a new test: "an impairment [of contract] may be constitutional if it is reasonable and necessary to serve an important public purpose."[92] Furthermore, a presumption of constitutionality is inappropriate where a public contract is at issue "because the State's self-interest is at stake."[93]

The result of this purported rejection of a balancing test is another sort of balancing test. Rather than classify New Jersey's repeal of the covenant as an exercise of the police power, the Court looked at the measure as a financial obligation, thereby avoiding a conflict with the reserved powers doctrine.[94] By imposing the reasonable and necessary standard, coupled with the application of a higher level of scrutiny for a contract involving the state, the Court introduced a number of variable concepts that must be weighed in determining the constitutionality of an action. "Reasonableness" and "necessity" both require the weighing of qualitative considerations, and the notion of what constitutes an "important public purpose" is also debatable.[95] Moreover, as Justice Brennan indicates in his dissent, the reasonable and necessary test is confusing and out of step with modern attempts to define the reach of the contract clause.[96] Whereas a reasonableness requirement is perhaps "the most relaxed regime of judicial inquiry,"[97] the necessary criterion is normally associated with a much stricter level of scrutiny.[98] The juxtaposition of these two divergent standards demands a balancing test.[99] Because this test can use standards from either sphere of the judicial review continuum suggests that the test holds little predictive value.

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91. *Id.* at 28-29. The Court split 4-3, with Chief Justice Burger concurring to form a majority.

92. *Id.* at 25.

93. *Id.* at 25-26.

94. *Id.* at 24-25. This point is discussed in Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 39-40 (1981).

95. Admittedly, categorizing a matter as falling within or outside the realm of the police power is also a question about which reasonable minds may differ, but it is not as difficult a task as the test set forth in *U.S. Trust*. Furthermore, the police power determination requires but a single decision.

96. 431 U.S. at 53-55 (Brennan, J., dissenting).

97. *Id.* at 54 n.17 (Brennan, J., dissenting).

98. *Id.*

99. One would think that if a measure were truly necessary it would also be reasonable. However, the Court chose to use both standards. *See* 431 U.S. at 30-31.

Despite the Court's partial reliance on a reasonableness test, the plurality declares that it will not defer to the state's assessment of reasonableness, as is the usual practice with such a test.[100] In this author's opinion, the Court's rationale that "the State's self-interest is at stake" is not persuasive. When in the legislative process is a state's self-interest not at stake? Furthermore, as Justice Brennan indicates, the state is unlikely to jeopardize its interests in the credit market by habitually repudiating its obligations.[101] The credit market is largely self-regulating, and the Court's intervention is unnecessary and ill-advised.[102] Additionally, the Court should respect the wide discretion of the legislature in determining what is necessary where the reserved power is concerned.[103]

There have been no cases to date dealing with whether a city bargains away the police power when it enters into a development agreement. However, the cases concerning public contracts are helpful for analysis. *Morrison Homes Corp. v. City of Pleasanton*[104] involves a series of annexation agreements in which the city agreed to provide sewer connections to plaintiff's development.[105] The city reneged on its commitment after the regional water quality control board issued an order prohibiting additional sewer connections at the plant in question.[106] Ruling in favor of the developer, the court of appeal found the city had the authority to enter into annexation agreements.[107] The court agreed that the city could not bargain away the police power, but held this prohibition could "void only a contract which amounts to a city's 'surrender,' or 'abnegation,' of its *control* of a properly

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100. 431 U.S. at 26.

101. *Id.* at 61 (Brennan, J., dissenting).

102. It would seem that the "development market" is also self-regulating to some extent, depending on such factors as the state of the economy and the local government's growth policies, among others. A local government can choose to encourage or discourage development, and, if the latter, might not be too concerned about whether developers perceive it as a bad risk. Presumably, the developer—like all businesspeople governed by the profit motive—will simply factor this information into his investment equation. The potential for "abuse" of discretion by local government can be greatly diminished by reducing the amount of discretion in the development approval process. One way to decrease the risk of abuse is to implement an earlier-vesting rights doctrine rather than relying on development agreements. *See infra* notes 140-44 and accompanying text.

103. 431 U.S. at 58 (Brennan, J., dissenting)(citing Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 508-09 (1934)). *See also* Berman v. Parker, 348 U.S. 26 (1954).

104. 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976).

105. *Id.* at 730, 130 Cal. Rptr. at 199.

106. *Id.* at 731-32, 130 Cal. Rptr. at 200.

107. *Id.* at 733-34, 130 Cal. Rptr. at 201-02. It seems, however, that there was no *statutory* authority to enter into annexation agreements. *See* Hagman, *Development Agreements*, 3 ZONING & PLAN. L. REP. 65, 78 (1980).

municipal function."[108] This suggests that, at least in California, a local government can bargain away *some* of its police power, but not all. The court did not say how much of the police power was negotiable, but added that future legislatures could be bound if the agreement were "just, reasonable, fair and equitable" when executed.[109]

The expansion of the police power has been countered not only by adopting the more restrictive police power test of *U.S. Trust*, but also by revitalizing the contract clause.

B. The Contract Clause

> No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .[110]

In addition to providing a new interpretation of the police power, *U.S. Trust* serves as an important contract clause case. Justice Brennan's dissent demonstrates the magnitude of the Court's change of direction:

> Decisions of this Court for at least a century have construed the Contract Clause largely to be powerless in binding a State to contracts . . . . In short, those decisions established the principle that lawful exercises of a State's police powers stand paramount to private rights held under contract. Today's decision . . . rejects this previous understanding and remolds the Contract Clause into a potent instrument for overseeing important policy determinations of the state legislature.[111]

One year later, in *Allied Structural Steel Co. v. Spannaus*,[112] the Court solidified its new position. A 1974 Minnesota statute mandated pension payments to certain discharged employees ineligible under Allied's existing plan.[113] The majority held that application of the act to Allied violated the contract clause.[114] Writing for the Court, Justice Stewart recognized that "the Contract Clause does not operate to

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108. *Id.* at 734, 130 Cal. Rptr. at 202 (citations omitted) (emphasis in original).

109. *Id.* at 734-35, 130 Cal. Rptr. at 202.

110. U.S. CONST. art. I, § 10, cl. 1.

111. 431 U.S. at 33 (Brennan, J., dissenting). Note also the expansive language referring to "health, safety, and *similar collective interests*." *Id.* (emphasis added).

112. 438 U.S. 234 (1978).

113. *Id.* at 238-39; Private Pension Benefits Protection Act of 1974, MINN. STAT. §§ 181B.01-181B.17.

114. *Id.* at 250-51.

obliterate the police power of the States."[115] He accepted a broad definition of the police power as "an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people,"[116] and noted that it "is paramount to any rights under contracts between individuals."[117]

Justice Stewart then retreated from this line of thought: "If the Contract Clause is to retain any meaning at all, however, it must be understood to impose *some* limits upon the power of a State to abridge existing contractual relationships, even in the exercise of its otherwise legitimate police power."[118] What these limits are and how they are determined is unclear. Justice Stewart claims that "[t]he existence and nature of those limits were clearly indicated"[119] during the Great Depression, when the states were struggling with "unprecedented emergencies."[120] However, showing the "existence and nature" of these limits is not the same as defining them. And while times of extreme economic hardship are ideal for exercising the police power, they are not the only times when it can be invoked.

Allied Structural Steel used a sliding scale rather than a balancing test. Under this approach, the Court first determines whether the challenged statute actually imposes "a substantial impairment of a contractual relationship."[121] A minor impairment may be ignored, but a severe impairment calls for strict scrutiny of the "nature and purpose" of the statute.[122] The Court found that the Minnesota statute severely impaired Allied's contractual pension obligation without any showing of a comparably important public purpose.[123] The Court further held that "Minnesota could not constitutionally do what it tried to do to the company in this case."[124]

The sliding scale impairment test was modified in *Energy Reserves Group Inc. v. Kansas Power and Light Co.*[125] *Energy Reserves* involved contracts for the purchase of natural gas from a supplier by a public utility.[126] These contracts contained price escalator and price

115. *Id.* at 241.
116. *Id.* (*quoting* Manigault v. Springs, 199 U.S. 473, 480 (1905)).
117. *Id.* (*quoting* Manigault v. Springs, 199 U.S. 473, 480 (1905)).
118. *Id.* at 242 (emphasis in original).
119. *Id.*
120. *Id.*
121. *Id.* at 244.
122. *Id.* at 245.
123. *Id.* at 246-47.
124. *Id.* at 251.
125. 459 U.S. 400 (1983).
126. *Id.* at 403.

redetermination clauses.[127] The passage of state and federal price controls placed ceilings on the escalator clauses.[128] Energy Reserves Group sought to terminate the contracts, arguing that the contracts were unconstitutionally impaired by the state law.[129] The Kansas state courts upheld the legislation and rejected ERG's claim on the grounds that the legislature reasonably furthered the state's legitimate interest in regulating natural gas prices,[130] and the United States Supreme Court affirmed.[131]

Justice Blackmun, writing for the Court, reiterated the principle of *Allied Structural Steel*. The opinion emphasized that only a substantial impairment will be unconstitutional, and attempted to clarify the second part of the test.[132] Whereas *Allied Structural Steel* sought to examine the "nature and purpose" of the challenged legislation, the Court in *Energy Reserves* proclaimed that a significant and legitimate public purpose must exist for a state to exercise its police power.[133] If such a serious situation exists, the contractual relationship between the parties is subject to adjustment "[based] upon reasonable conditions and . . . character appropriate to the public purpose justifying [the legislation's] adoption."[134]

Energy Reserves verbally expands upon the test in *Allied Structural Steel* but does not improve upon it conceptually. While the buzzwords are different, the test is the same. The test allows courts to override the police power by enabling them to characterize certain impairments as "substantial" or "significant." As a result, the judicial branch—using a plastic two-part test—makes policy determinations of a peculiarly legislative nature.

VI. Do We Need Development Agreements?

A. Practical Concerns

Any local government in Florida may "enter into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction."[135] There is no provision for

127. *Id.* at 403-404.
128. *Id.* at 405-408.
129. *Id.* at 408-409.
130. *Id.* at 409.
131. *Id.* at 421.
132. *Id.* at 411.
133. *Id.* at 411-12.
134. *Id.* at 412, (*citing*, United States Trust Co. v. New Jersey, 431 U.S. 1, 22 (1977)).
135. Fla. Stat. § 163.3223 (1987).

the participation of any other persons who might be affected by the proposed project. Thus, neighboring citizens and governments, planning staffs, agencies, and other interests are seldom represented in the negotiations.[136] Strictly speaking, they are not entitled to participate at this stage of the process. Thus, the local government and the developer essentially reach their agreement before the agreement is heard by the public. However, by the time they are given the opportunity to be heard, there is little that can be done to influence the project—it may be too late for outsiders to mobilize and present their views, and the negotiating parties have an interest in preserving their agreement.[137] To effectively serve the public interest it is necessary to have an open and accessible planning process, especially in a time when regionalism is on the rise.

The principal rationale for development agreements is to provide a greater degree of certainty in the development approval process. Yet, development agreements are unable to provide absolute certainty as the police power can be invoked whenever necessary.[138] Thus, the question is whether the added increment of certainty afforded by development agreements justifies their use. To the extent that they reduce uncertainty, they do so only when they are honored. Assuming that most development agreements are substantially performed by both parties, they will be useful. But if a local government were to exercise its police power to renege on a development agreement there would be much uncertainty, and perhaps litigation and ill feeling as well. In such a scenario the municipality runs the risk of having a judgment of potentially catastrophic proportions returned against it. To avoid this risk the municipality may be forced to be unduly conservative in dealing with developers. As a result developers, with their superior resources, may get more favorable treatment at the public's expense.[139]

B. Possible Alternatives to Development Agreements

1. A Dominant Reserved Powers Doctrine

Why should the local government bear the risk of a development agreement gone awry? The developer is in the business of taking risks;

136. R. COWART & S. KESMODEL, FLEXIBLE BARGAINS FOR FROZEN REGULATIONS: NEGOTIATING DEVELOPMENT AGREEMENTS IN CALIFORNIA 39 (Institute of Urban & Regional Development Working Paper No. 458, 1987).

137. *Id.* at 40-41.

138. While the breadth of the police power may vary over time, it is clear that "necessity" will always justify its exercise. *See, e.g.*, Callies, *supra* note 14, at 21.

139. R. COWART & S. KESMODEL, *supra* note 136, at 50.

the public should not be. The onus can be shifted to the developer by recognizing that legislative bodies have wide latitude in exercising their police power and invalidating their own contracts, and the courts should not second guess them. This, for the most part, allows the local government, rather than the judiciary, to enforce its own bargains. Fears that the municipality may abuse its power are misplaced, for the local government is unlikely to behave irresponsibly toward parties it must deal with in the future. Moreover, neither the bounds of the police power nor the limits of judicial tolerance is infinite.

The uncertainty that inheres in a development agreement stems mostly from the interplay between the reserved powers doctrine and the contract clause. The courts are unlikely to abandon the current balancing or sliding scale test, and developers and local governments will govern their behavior according to how they think a court would decide a hypothetical case. However, one could make a good argument that these two constitutional provisions need not be read to conflict. Such an interpretation avoids the need for a balancing test. The court could just as easily give the reserved powers doctrine precedence over the contract clause as this is more in keeping with the traditional readings of the two provisions. A dominant reserved powers doctrine would render certain contracts void *ab initio* as beyond the scope of the police power. As a result, the contract clause issue would not even arise.

This approach would still not define the police power with precision, and there would still be uncertainty surrounding development agreements. But the uncertainty would be shouldered almost entirely by the developer. The developer would continue to make his investment decisions as he has always done, and would simply consider this additional risk when evaluating a proposed project. Local government officials, on the other hand, would be able to act without fear of liability, and would be better able to represent the interests of the public. Accordingly, a dominant reserved powers doctrine would greatly reduce the attractiveness of development agreements because the developer could not use them to allocate risk to the municipality.

2. *Earlier-Vesting Rights*

Another alternative to development agreements as the basis for the relationship between the local government and the developer is an earlier-vesting rights rule. Under the vested rights doctrine certain rights of a developer are deemed to vest at some point in the development process. When the vesting point is triggered remains unclear, although it has been said that rights will vest when application of the doctrine

of equitable estoppel is justified.[140] Equitable estoppel applies "when a property owner (1) in good faith (2) upon some act or omission of the government (3) has made such a substantial change in position or has incurred such extensive obligations and expenses that it would be highly inequitable and unjust to destroy the right he acquired."[141] If a developer's rights to complete development vest early enough there is little need for a development agreement.[142] Early-vesting rights would reduce the uncertainty for both the municipality and the developer, and would avoid the problem of bargaining away the police power.

However, using the early-vesting rights approach would not yield any significant differences. The local government and its successors will be bound in the future, but there will not be a constitutional problem because the local legislature will not be binding *itself*. While generally accepted without explanation by the courts, the notion that vested rights are somehow immune from attack "does not have a sound basis in logic or law."[143] This doctrine would still tie the hands of municipal officials, and may work to the detriment of the public, particularly in the case of long term development projects. Thus, the public interest might be better served if early-vesting rights vested only for a limited period of time. While limiting the time period appears feasible in theory, this approach is becoming less practical as development projects become larger and more sophisticated.

The state legislature would have to enact a statute to provide for an early-binding vested rights doctrine. Given the confused state of vested rights case law in Florida, it is almost inconceivable that the courts would suddenly create one at this point.[144] Even if they did, it is unlikely that the line would remain clearly drawn and unchanged.

3. *A Modified Vested Rights Doctrine*

Siemon and Larsen suggest an alternative approach to vested rights.[145] They recommend abandoning the traditional "fairly debata-

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140. Rhodes, Hauser & DeMeo, *Vested Rights: Establishing Predictability in a Changing Regulatory System*, 13 STETSON L. REV. 1, 2-3 (1983), *citing*, City of Hollywood v. Hollywood Beach Hotel Co., 283 So. 2d 867, 869 (Fla. 4th DCA 1973), *rev'd in part*, 329 So. 2d 10 (1976). This sounds tautological, since the doctrines of vested rights and equitable estoppel are often used interchangeably. *Id.* at 2.

141. 283 So. 2d at 869, *citing*, Sakolsky v. City of Coral Gables, 151 So. 2d 433 (Fla. 1963). *See also* Rhodes, Hauser & DeMeo, *supra* note 140; Jaslow, *Understanding the Doctrine of Equitable Estoppel in Florida*, 38 U. MIAMI L. REV. 187 (1984).

142. *See* Kessler, *The Development Agreement and its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for its Application*, 1 J. LAND USE & ENVTL. L. 451, 454-55 (1985).

143. C. SIEMON & W. LARSEN, VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS 50 (1982).

144. Jaslow, *supra* note 141, at 189.

145. C. SIEMON & W. LARSEN, *supra* note 143, at 56.

ble" criterion in favor of a due process standard.[146] Under their analysis, the destruction of a development expectation is a deprivation of property without due process of law and warrants invalidation of the regulation if a four-part test is satisfied.[147] First, the expectation must have been reasonable and final, *i.e.*, it must have been "crystallized to a point of certainty" rather than just an "unexpressed hope" or a "vague anticipation."[148] Second, the expectation must have been investment-backed.[149] Third, this investment-backed expectation must have been substantially impaired by the regulation, meaning that the developer will suffer an out-of-pocket loss if the regulation is applied to his project.[150] Fourth, the local government must demonstrate a "compelling public interest" in sustaining the regulation.[151] The Court shall employ strict scrutiny in an effort to balance public and private interests, with a restrictive interpretation of the police power available when necessary.[152]

The Siemon and Larsen approach is questionable. Does it really clarify the vested rights problem? Does it not merely increase the burden and shift it to the government? The out-of-pocket threshold is intuitively appealing—it sounds fair. But this threshold seems to provide an incentive for developers to invest large sums in a project as quickly as possible to gain an advantage vis-a-vis the government for estoppel purposes. This will improve the position of developers, but it will not eliminate the confusion surrounding vested rights.

VII. CONCLUSION

Development agreements have not been used much in Florida,[153] probably because neither local governments nor attorneys are familiar enough with them. Another reason for their limited use may be that they are not necessary or useful in Florida.[154] The reluctance to use

146. *Id.*
147. *Id.* at 62.
148. *Id.* at 65.
149. *Id.*
150. *Id.* at 65-66.
151. *Id.* at 66.
152. *Id.*
153. The attorney who handles zoning matters for Cooper City, Florida uses development agreements, primarily in connection with annexations. He knew of no other municipality in Florida that used them. Telephone interview with Richard Redner (Apr. 18, 1988). One of the drafters of the Florida development agreement statute indicated that the City of Key West has used the device, but was unsure whether it had been used elsewhere in the state. Telephone interview with Jim Murley (Apr. 21, 1988). Another attorney recently drafted a development agreement with the City of Tampa, Florida. Schulman interview, *supra* note 50.
154. The usefulness of development agreements in Florida apparently suffers as a result of the five-year limitation in the Florida Act. *See supra* note 50 and accompanying text.

development agreements may be attributable in part to questions concerning their constitutionality. While they have not been challenged in court, development agreements would probably survive a constitutional attack, given the United States Supreme Court's current position on the reserved power/contract clause conflict. While the police power may be used to thwart a development agreement, the vast majority of agreements would be substantially performed. In these instances, the parties would be able to reduce uncertainty and strengthen the planning process.

An early-vesting rights rule could reduce or eliminate the need for development agreements. However, for reasons previously stated, the vested rights doctrine is not the answer. A late-vesting rule is unsatisfactory to developers, while early-vesting rights are unduly restrictive on the municipality. Either way, the vested rights doctrine defies fine line demarcation, and a balancing test is inevitable. Regardless of whether the vested rights doctrine, development agreements, or neither is used, the balancing test should be applied so the burden is on the developer. There will always be some chance that an exercise of the police power will be required, and this risk is more appropriately borne by the investor than by the public.