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Structural Obstacles to Settlement of Land Use Disputes

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Recommended Citation

Stewart E. Sterk, *Structural Obstacles to Settlement of Land Use Disputes*, 91 *Boston University Law Review* 227 (2011).

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STRUCTURAL OBSTACLES TO SETTLEMENT OF LAND USE DISPUTES

STEWART E. STERK*

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* Mack Professor of Law, Benjamin N. Cardozo School of Law. This article benefited from helpful comments at the Property Works in Progress Conference and at a Colloquium at the University of Florida Levin College of Law. Emily Bayer-Pacht and Brian Steinwascher provided invaluable research assistance.

INTRODUCTION

Land use litigation pervades the dockets of state and federal courts. State supreme courts, for instance, routinely confront critical issues of constitutional principle, including the scope of governmental power to take private property.¹ But state supreme courts also hear mundane disputes between landowners and municipalities about excessive pet-keeping,² inadequate setbacks,³ and docks that interfere with the views of neighbors.⁴ In a culture as litigious as ours, it should not be surprising that landowners or their neighbors sue municipalities when they are aggrieved by land use decisions. What is remarkable is that so many controversies – major and minor – are litigated to final judgment, and often reach appellate courts. In a universe where the overwhelming majority of cases filed end with settlement rather than judgment, land use cases tend not to settle.

Settling a land use case is difficult for a variety of reasons. First, unlike civil actions in which plaintiff seeks a sum of money from defendant, land use cases do not typically present an unlimited array of obvious compromise solutions. If a landowner wants a variance to permit construction of two homes on a lot zoned for one, there is little middle ground for settlement of litigation resulting from the municipality's decision on the permit. Second, because municipal officials are politically accountable to their constituents, they may choose to avoid the political heat they would generate by settling with an unpopular developer – preferring to hide behind judicial resolution of controversial issues. Legal doctrine bears little responsibility for either of these settlement obstacles; legal rules have little effect on the number of compromise solutions or the political instinct to avoid controversial decisions.

Legal doctrine, however, does bear a close relation to other obstacles to settlement of land use cases. Broad standing rules often permit neighbors, community groups, and other governmental entities to challenge any

¹ See, e.g., *Goldstein v. N.Y. State Urban Dev. Corp.*, 921 N.E.2d 164, 170-72 (N.Y. 2009).

² See *Luper v. City of Wasilla*, 215 P.3d 342, 344 (Alaska 2009).

³ *Moon v. Zoning Bd. of Appeals of Madison*, 966 A.2d 722, 725-27 (Conn. 2009).

⁴ *Hitch v. Vasarhelyi*, 680 S.E.2d 411, 412 (Ga. 2009).

settlement.⁵ Zoning law also provides a variety of grounds, both procedural and substantive, on which to attack any settlement.⁶

Suppose a municipality rezones property over the objection of an affected landowner, or denies the landowner a special permit or a variance. If the landowner then brings an action against the municipality challenging the municipality's decision, what power does the municipality's counsel have to settle the litigation? The municipality will typically have to offer one of two concessions to settle: money paid to the plaintiff landowner or some relaxation of the use restrictions imposed on the plaintiff landowner's land. The structure of zoning law does not limit the municipality's power to make payments to the landowner, but it does inhibit the municipality's power to make a settlement offer that changes the restrictions imposed on plaintiff's land.

First, in many jurisdictions, any settlement will require the formal approval of one or more municipal bodies.⁷ Whether the settlement requires the local legislative body to amend the zoning ordinance, a zoning board of appeals to issue a special permit or variance, or a local planning board to issue site plan approval, these formal approvals will typically involve public hearings and ultimately a public vote. In many jurisdictions, the approval will also require the approving body to make findings to support its determination.

Second, even if the settlement receives formal approval, neighbors may have standing to challenge that approval.⁸ The challenge might rest on procedural grounds if the approving body has departed from statutory procedures in order to expedite the settlement. But even if the approving body has dotted all of its i's and crossed all of its t's, neighbors might be able to challenge the approval on substantive grounds, contending that the approval constituted "spot zoning" or was arbitrary or capricious in violation of state law, or on a variety of other grounds.⁹

The prospect of further municipal approvals and neighbor litigation reduces the attractiveness of settlement to developers. From the developer's perspective, time is money, and a principal reason to settle pending litigation is to speed up the development process. To the extent that these structural hurdles entail delay, they make litigation to judgment relatively more attractive

⁵ See, e.g., 120 W. Fayette St., LLLP v. Mayor of Baltimore, 964 A.2d 662, 672-73 (Md. 2009) (concluding that a landowner in close proximity to development has standing to challenge land use decision and that the municipality has the burden of proving that a landowner in close proximity is not aggrieved for standing purposes); *Save the Pine Bush, Inc. v. Common Council of Albany*, 918 N.E.2d 917, 918, 921 (N.Y. 2009) (ruling that even persons who do not own land in close proximity and the organizations to which they belong have standing to challenge land use decision that would affect a natural resource if the landowner or organization "can prove that he or she uses and enjoys a natural resource more than most other members of the public").

⁶ See *infra* Part I.

⁷ See *infra* Part I.B.2.

⁸ See *infra* Part I.A.

⁹ See *infra* Part I.B.3.

than settlement. Compared to settlements, judgments will typically provide more insulation from neighbor challenges.

From the perspective of the parties in the midst of litigation, this appears to be a lose-lose situation. Both the municipality and the developer would prefer to settle the litigation on terms that reduce the impact of the proposed development rather than incurring the costs, risks, and delays inherent in continuing to litigate.¹⁰ Even the neighbors (who are also municipal taxpayers) will often benefit from a settlement rather than continued litigation that could result in a complete victory for the developer. From this perspective, streamlining the settlement process to overcome structural obstacles would appear to be an attractive reform.

There is, however, another side to the story. The doctrines that interfere with settlement may also serve significant land use objectives. First, they might discipline municipal officials, reducing the risk of regulatory capture by developers¹¹ or neighbors.¹² Second, some of these doctrines – particularly

¹⁰ Moreover, settlement may avoid social costs – of providing judges and courtrooms – as well as private costs to the litigant. See Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 259 (1999); Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 602-04 (1997).

On the other hand, when cases are litigated to judgment, the resulting precedent may reduce legal uncertainty, and therefore the volume of future controversies, a benefit parties are not likely to factor into their settlement calculus. Similarly, litigation to judgment may assist in the development of social norms. See Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085 (1984) (comment) (emphasizing the role of courts in giving effect to public values). Shavell, however, suggests that these benefits of litigation are overstated because, in a world where so few cases go to trial, the marginal social value of an additional trial for law clarification or norm development is likely to be small. See Shavell, *supra*, at 595-96, 606.

¹¹ Neighbor standing, public hearing requirements, and doctrines that give neighbors a cause of action against the municipality make it more difficult for municipal officials to capitulate to the demands of politically influential developers.

¹² In the absence of structural obstacles to settlement, one might fear that municipalities would enact regulations designed to not take account of externalities a proposed development might produce, but instead to extract public benefits unrelated to those externalities – a practice the Supreme Court tried to limit in *Nollan v. California Coastal Commission*, 483 U.S. 825, 838-42 (1987) (holding that an easement condition placed on a beachfront property owner's permit – designed to provide lateral access across the beach – exceeded the coastal commission's power because the condition was unrelated to the justification for requiring the permit). Consider *Trancas Property Owners Ass'n v. City of Malibu*, 41 Cal. Rptr. 3d 200 (Ct. App. 2006), in which the court set aside a settlement agreement at the behest of objecting neighbors. *Id.* at 202. After about twenty years of unsuccessful efforts to obtain approval of a subdivision, the developer sued to enjoin the city from disapproving subdivision maps filed by the developer. *Id.* at 202-03. While the litigation was pending, the city and the developer "agreed to settle" the litigation on terms

public hearing and environmental review requirements – may operate to generate information that improves the quality of land use decisions. Third, the same doctrines that increase the information available to decision makers may also operate to promote participation in the land use process, generating greater public acceptance of controversial decisions.

These defenses of doctrines that make settlement difficult do not, however, rely on the importance of judicial resolution of land use controversies. Judicial review (or the *prospect* of judicial review) may increase the likelihood that municipal officials will better identify and account for the interests of parties affected by controversial land use decisions. But as long as final judicial resolution of land use disputes is not an end in itself, it should be possible to streamline doctrine to permit easier, quicker, and cheaper settlement without sacrificing the quality or legitimacy of land use decisions.

Part I of this Article explores the obstacles to settlement presented by current legal doctrine. Part II demonstrates that those obstacles serve few critical functions within the traditional “plan” model of land use regulation or within a public choice model of land use regulation. By contrast, they do play a significant role within a more modern model that treats municipal officials as mediators of land use conflicts. Part III examines alternatives to the current approach, and suggests that a regime that bars potential objectors from challenging a settlement unless they participated in the litigation that generated the settlement would retain the primary advantages of current restrictions on settlement – without the current costs.

I. THE DOCTRINAL PROBLEM

A concrete example illustrates the doctrinal issues surrounding settlement of zoning litigation. Consider a variant on the facts of *Westchester Day School v. Village of Mamaroneck*,¹³ decided by the Second Circuit in 2007. A private

that required the developer to dedicate to the city 26.5 acres in exchange for approval of a map permitting 32 units on the developer’s remaining 8.5 acres. *Id.* at 204. If the city had imposed the dedication of 26.5 acres as a condition of obtaining development approvals, the city’s exaction would have required both a “nexus” to the reasons for withholding development approval and “rough proportionality” to the harms the development might impose on the community. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) (“[A] term such as ‘rough proportionality’ best encapsulates what we hold to be the requirement No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”); *Nollan*, 483 U.S. at 837 (“[T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation.”). But if the *Trancas* court had held the settlement binding, the city would have escaped the need to satisfy the standards articulated in *Nollan* and *Dolan*.

¹³ 504 F.3d 338 (2d Cir. 2007).

Orthodox Jewish day school sought to expand its operation.¹⁴ Under the village zoning ordinance, the expansion required a special permit from the village's zoning board of appeals, an administrative body empowered to consider applications for variances and special permits.¹⁵ Westchester Day School applied for the permit,¹⁶ and provided the requisite notice to neighboring landowners.¹⁷ Many neighbors expressed their opposition to the proposed expansion.¹⁸ The zoning board of appeals denied the permit, citing traffic and other concerns.¹⁹

Westchester Day School then brought an action in federal district court, contending that the permit denial violated both the Religious Land Use and Institutionalized Persons Act (RLUIPA)²⁰ and state law.²¹ The action sought the permit, damages, and attorneys' fees.²²

Suppose the village attorney, faced with this action, consulted with the village board of trustees, the village's elected governing body, and suggested that settlement would be in the village's interest.²³ Suppose further that she proposed offering to permit the day school to complete a somewhat modified expansion in return for dropping all claims against the village. Suppose also that both the village board of trustees and the day school found the terms of the proposed settlement more attractive than continuing the litigation. Would the parties settle?

¹⁴ *Id.* at 344-45.

¹⁵ *Id.* at 344.

¹⁶ *Id.* at 345.

¹⁷ See *Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 510 (S.D.N.Y. 2006).

¹⁸ *Id.* at 510-11.

¹⁹ *Westchester Day Sch.*, 504 F.3d at 346.

²⁰ 42 U.S.C. §§ 2000cc to 2000cc-5 (2006) (protecting freedom of religion in prisons and under zoning laws).

²¹ The procedural history of the case was, in fact, somewhat more complicated. The Day School initially brought suit challenging the zoning board of appeals issuance of a "positive declaration" under the state's environmental statute, which would have required preparation of an environmental impact statement. *Westchester Day Sch.*, 417 F. Supp. 2d at 512. That challenge was premised both on RLUIPA and on state law. *Id.* at 483. When the village subsequently denied the permit application, the Day School amended its complaint to focus on RLUIPA and the All Writs Act, 28 U.S.C. § 1651 (2006) (authorizing federal courts to "issue all writs necessary or appropriate in aid of their respective jurisdictions"). *Westchester Day Sch.*, 504 F.3d at 346.

²² See *Westchester Day Sch.*, 417 F. Supp. 2d at 572-73 (ordering board to issue the permit, but reserving judgment on "plaintiff's prayer for damages and attorneys' fees pending appellate review").

²³ In fact, the village ultimately settled with the Day School *after* the Second Circuit's decision, agreeing to pay the school \$4.75 million to avoid a potential damage award that could have been significantly higher. Juli S. Charkes, *Mamaroneck and School Settle Dispute*, N.Y. TIMES, Jan. 27, 2008, at WE2.

Prevailing models of the settlement process assume that settlement costs are typically lower than litigation costs, and that parties generally settle disputes unless their estimates of the likely litigation outcomes are widely disparate.²⁴ Of course, as the cost of settlement rises relative to the cost of litigation, the parties to a dispute become more likely to litigate, even if their estimates of litigation success are similar.²⁵ At the limit, if settlement costs exceed litigation costs, risk neutral parties generally should litigate rather than settle even if they have identical estimates of the litigation outcome.²⁶

From the perspective of the day school, two potential settlement costs might make litigation look attractive, even if the parties shared similar assessments of the litigation outcome. First, procedural requirements for finalizing the settlement might entail delay. Second, any risk that the settlement would not be enforceable increases the effective cost of settlement and makes settlement less attractive. These costs, in turn, increase the concessions the day school would want from the village before foregoing litigation, making settlement less attractive to the village and its attorney.

These problems are far from hypothetical.²⁷ *Lake County Trust Co. v. Advisory Plan Commission*,²⁸ decided in 2009 by the Indiana Supreme Court, furnishes a recent real-world illustration. After the plan commission disapproved a developer's subdivision application, the developer sought judicial review.²⁹ The trial court, pursuant to Indiana's alternative dispute resolution rules, ordered mediation of the dispute.³⁰ The plan commission granted its lawyers full authority to settle the dispute,³¹ and the mediation resulted in a written settlement that the commission agreed to approve at its

²⁴ The classic treatment of settlement is George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984). Priest and Klein assumed explicitly that litigation costs are greater than settlement costs. *Id.* at 13. On their assumptions, the likelihood that a dispute will be litigated increases when the difference in the parties' probability estimates of the outcome of litigation increases. *Id.* at 16. As another article puts it:

[S]ettlement efforts will fail, and adjudication will result, only when (1) the plaintiff and defendant have different estimates of the expected value of litigation, (2) the plaintiff's estimate is higher than the defendant's, and (3) the two estimates differ by more than the combined transaction costs (and risk-aversion effects) of the parties.

Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 8 (2002) (summarizing the traditional approach to settlement).

²⁵ See Priest & Klein, *supra* note 24, at 20.

²⁶ See *id.*

²⁷ For a case upsetting settlement of a RLUIPA challenge – much like the one in *Westchester Day School* – see *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052 (9th Cir. 2007), discussed *infra* text accompanying notes 74-79.

²⁸ 904 N.E.2d 1274 (Ind. 2009).

²⁹ *Id.* at 1275.

³⁰ *Id.*

³¹ *Id.* at 1279.

next meeting.³² Despite the agreement, the plan commission voted to defer consideration of the subdivision, and ultimately rejected the plan.³³ After deferral and before rejection, the developer filed a motion to enforce the settlement agreement.³⁴ Ultimately, the Indiana Supreme Court held that the commission lacked the power to delegate settlement authority to its lawyer because Indiana law required final approval of any subdivision plat "by a majority of the commission members at meetings subject to the Open Door Law."³⁵

Lake County Trust reduces the incentive for developers to mediate or settle in Indiana, and similar decisions generate the same disincentives in other states.³⁶ *Lake County Trust* involved the relatively unusual – but not unique – situation in which the municipality reneged on its own agreement. The problem is exacerbated in many jurisdictions because a variety of parties might have standing to challenge the settlement on any of several different grounds. This Section first examines standing to challenge a settlement, and turns then to the grounds on which a settlement might be upset.

A. Standing

Multiple parties may have standing to challenge a settlement. First, the municipality itself may have standing to upset a settlement agreement. A municipality may challenge a settlement when there has been a change in municipal administration after the settlement, but a municipal challenge can also arise when political pressure causes local officials to change their mind about the wisdom of the settlement. For example, in *Martin v. City of Greenville*,³⁷ the city and the landowner reached a compromise agreement settling the landowner's action to declare the city's zoning ordinance unconstitutional as applied to the landowner's parcel.³⁸ Subsequently, the landowner sought to enforce the settlement agreement, but the city successfully argued that the agreement was invalid because the city lacked legal authority to make the agreement.³⁹

³² *Id.* at 1275.

³³ *Id.* at 1276.

³⁴ *Id.* at 1275-76.

³⁵ *Id.* at 1279. The Indiana Supreme Court vacated a lower court's award of sanctions against the plan commission. *Id.* at 1275, 1280. The trial court, however, had ordered the plan commission to approve the subdivision, and the commission did not appeal from that aspect of the trial court's order. *Id.* at 1279 n.2. Nevertheless, the Indiana Supreme Court's opinion, which permits a subsequent commission to renege on a negotiated or mediated settlement without sanction, generates a disincentive to settlement in future cases.

³⁶ See *infra* notes 37-90 and accompanying text.

³⁷ 369 N.E.2d 543 (Ill. App. Ct. 1977).

³⁸ *Id.* at 544.

³⁹ *Id.* at 546.

Second, in some states local governmental authority is sufficiently fragmented that even if the municipality's elected governing body agrees to settle a land use dispute, another governmental body will have standing to challenge the settlement. New York furnishes a prime example. In *Commco, Inc. v. Amelkin*,⁴⁰ the Court of Appeals held that a town's zoning board of appeals – a body appointed by the elected town board – had standing to challenge a stipulation of settlement authorized by the town board and entered into by the town board's special counsel and the landowner.⁴¹ The court emphasized that the zoning board of appeals, whose variance denial had triggered the litigation and subsequent settlement, "is a separate entity whose members serve with statutory powers and for statutorily specified periods of time."⁴² The court also rejected the town board's argument that giving the zoning board of appeals control over litigation and settlement could force the town board "to finance frivolous appeals . . . to the possible fiscal ruination of the town."⁴³

Third, neighbors often have standing to challenge settlements between the municipality and a developer. In most jurisdictions, if a municipality grants a variance⁴⁴ or rezones land,⁴⁵ immediate neighbors have standing to challenge the variance or the zoning amendment. Perhaps because of this established

⁴⁰ 465 N.E.2d 314 (N.Y. 1984).

⁴¹ *Id.* at 316-17. The dispute initially arose when the zoning board of appeals denied the landowner's application for a use variance that would have permitted conversion of "an abandoned school building into a home for senior citizens." *Id.* at 315. When the landowner challenged the zoning board's decision, the trial court annulled the variance denial, and the town appealed. *Id.* While the case was on appeal, the town appointed special counsel and authorized settlement discussions, which ultimately resulted in the settlement. *Id.* at 315-16. The zoning board of appeals, whose determination the landowner had challenged, was not a party to the stipulation of settlement. *Id.* at 316.

⁴² *Id.* at 317. The relevant statute – today and at the time of the court's decision – also provides that the town board can only remove members of the zoning board of appeals after a public hearing and for cause. N.Y. TOWN LAW § 267(9) (McKinney Supp. 2010); *see also Commco, Inc.*, 465 N.E.2d at 317.

⁴³ *Id.* at 316. Three judges dissented from the court's conclusions. *Id.* at 319-22 (Meyer, J., dissenting) (arguing that the town board should not be deemed subordinate to the zoning board on a procedural technicality). Other courts have suggested a similar result. Thus, in *Warner Co. v. Sutton*, 644 A.2d 656 (N.J. Super. Ct. App. Div. 1994), a challenge to a settlement brought by neighboring landowners, the court emphasized that the zoning board was not a party to the suit, even though deviation from density standards are typically granted by the zoning board. *Id.* at 664-65.

⁴⁴ *See, e.g., John John, LLC v. Planning Bd. of Brookhaven*, 790 N.Y.S.2d 500, 501-02 (App. Div. 2005) (holding that an adjacent landowner who raised concerns "within the zone of interest to be protected" had standing to challenge the board's approval of a development and variance).

⁴⁵ *See, e.g., Smith v. City of Papillion*, 705 N.W.2d 584, 591 (Neb. 2005) (concluding that an adjacent landowner has standing to object to rezoning if the landowner shows some "special injury").

doctrine, cases in which neighbors challenge settlement agreements rarely even discuss the standing issue. Thus, in *Trancas Property Owners Ass'n v. City of Malibu*,⁴⁶ a California court, at the behest of a neighboring property owners association, set aside a settlement agreement that would have permitted the developer to build thirty-two homes while dedicating an adjacent tract to the city.⁴⁷ Neither the developer, nor the trial court that upheld the agreement, nor the appellate court that invalidated it, suggested that the association lacked standing.⁴⁸ Even in cases where courts ultimately sustain a settlement against a neighbor challenge, neighbor standing is often assumed.⁴⁹

B. *Grounds for Upsetting a Settlement*

Standing to challenge a settlement agreement would not, by itself, be a significant obstacle to settlement if no grounds were available for upsetting the settlement. Litigants have, however, successfully advanced a number of grounds for upsetting settlements.

1. Contract Zoning

When a municipality extracts concessions from a landowner in return for a municipal promise to rezone land, a number of courts have invalidated the resulting zoning amendment as impermissible "contract zoning."⁵⁰ Those courts have articulated a number of reasons for the prohibition on contract zoning. Some have invoked the "reserved powers" doctrine and argued that a municipality may not contract away its power to legislate in the public interest.⁵¹ On this theory, a contract to rezone improperly constrains legislative discretion. Other courts have focused instead on the theory that contract zoning impermissibly applies special rules to benefit some developers, but not others.⁵²

⁴⁶ 41 Cal. Rptr. 3d 200 (Ct. App. 2006).

⁴⁷ *Id.* at 202, 204.

⁴⁸ *Id.* at 200; *see also* *League of Residential Neighborhood Advocates v. City of Los Angeles*, 498 F.3d 1052, 1053 (9th Cir. 2007); *Chung v. Sarasota County*, 686 So. 2d 1358, 1358-59 (Fla. Dist. Ct. App. 1996); *Warner*, 644 A.2d at 658-59, 665-66.

⁴⁹ *See, e.g.,* *Murphy v. City of W. Memphis*, 101 S.W.3d 221, 222-25 (Ark. 2003); *Brownsboro Rd. Area Def., Inc. v. McClure*, No. 2002-CA-002559-MR, 2004 WL 1909337, at *1 (Ky. Ct. App. Aug. 27, 2004) (validating settlement agreement over the objections of a neighborhood organization, a business, a church, and four individual residents who were allowed to intervene in the original action "without conditions or limitations").

⁵⁰ *See, e.g.,* *Hale v. Osborn Coal Enters., Inc.*, 729 So. 2d 853, 855 (Ala. Civ. App. 1997); *Dacy v. Vill. of Ruidoso*, 845 P.2d 793, 794, 798 (N.M. 1992).

⁵¹ *See, e.g.,* *Haas v. City of Mobile*, 265 So. 2d 564, 566-67 (Ala. 1972) (dismissing appellant's contract zoning argument because the zoning requirements did not "control or embarrass the legislative prerogatives of the city").

⁵² *See, e.g.,* *Morgran Co. v. Orange County*, 818 So. 2d 640, 642-43 (Fla. Dist. Ct. App. 2002) ("[I]f each parcel of property were zoned on the basis of variables that could enter

Almost all academics criticize contract zoning doctrine.⁵³ Scholars (and practitioners) recognize that individually tailored “deals” are often the most effective mechanism for harmonizing competing private interests.⁵⁴ And scholars have also noted that courts have selectively enforced the prohibition on contract zoning by developing fine (and often unsupportable) distinctions between prohibited contract zoning and permitted conditional zoning.⁵⁵

Although the prohibition on contract zoning generally appears to be losing its doctrinal steam,⁵⁶ it remains a ground on which both neighbors and the municipality itself can rely in seeking to invalidate agreements designed to settle litigation between developers and the municipality. Thus, in *Chung v. Sarasota County*,⁵⁷ an adjacent owner challenged a settlement agreement reached by a landowner and the county in an action disputing the county’s refusal to rezone the landowner’s parcel.⁵⁸ The settlement required the county to rezone the property, subject to stipulations and conditions.⁵⁹ The court agreed with the adjacent owner that the settlement was invalid, concluding that

into private contracts then the whole scheme and objective of community planning and zoning would collapse.” (quoting *Hartnett v. Austin*, 93 So. 2d 86, 89 (Fla. 1956) (en banc)); *Dacy*, 845 P.2d at 797 (“Enforcement of such a promise [to zone] allows a municipality to circumvent established statutory requirements to the possible detriment of affected landowners and the community as a whole.”).

⁵³ See, e.g., Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 407, 488, 496 (2004) (highlighting “murky and overlapping” judicial treatment of contract and conditional zoning, and suggesting that development agreements – a form of land use bargaining – should not be treated as invalid contract zoning); Stewart E. Sterk, *Publicly Held Servitudes in the New Restatement*, 27 CONN. L. REV. 157, 172-74 (1994) (discussing the “incoherent underpinnings” of contract zoning doctrine); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 979-80 (1987) (criticizing tendency to apply labels, such as contract zoning, that “suggest a relevant theoretical framework but serve primarily to describe ultimate outcomes”); Jennifer G. Brown, Note, *Concomitant Agreement Zoning: An Economic Analysis*, 1985 U. ILL. L. REV. 89, 96-97 (characterizing distinctions between contract and conditional zoning as “distinctions without differences”).

⁵⁴ See, e.g., Green, *supra* note 53, at 489-96; Charles L. Siemon, *Conditional Zoning in Illinois: Beast or Beauty?*, 15 N. ILL. U. L. REV. 585, 609-10 (1995); Wegner, *supra* note 53, at 984; Brown, *supra* note 53, at 110.

⁵⁵ See, e.g., Green, *supra* note 53, at 407; Brown, *supra* note 53, at 96-97.

⁵⁶ See David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 CASE W. RES. L. REV. 663, 675-76 (2001) (“It is unlikely that courts will fall back on the reserved powers clause to invalidate development agreements . . .”).

⁵⁷ 686 So. 2d 1358 (Fla. Dist. Ct. App. 1996).

⁵⁸ *Id.* at 1359.

⁵⁹ *Id.*

the county had “contracted away the exercise of its police power, which constituted an ultra vires act.”⁶⁰

In *Attman/Glazer P.B. Co. v. Mayor of Annapolis*,⁶¹ the court held that a municipality itself can invoke the prohibition on contract zoning to escape from a settlement agreement.⁶² The landowner brought an action challenging a parking requirement imposed by the municipality as a condition for permitting the landowner to make active use of basement space.⁶³ The municipality and the landowner settled the lawsuit, apparently on terms that reduced the landowner’s obligation to provide parking.⁶⁴ The agreement also required submission of a new application for a conditional use permit, allegedly as a matter of form, but when the landowner filed the application, the city’s planning and zoning commission concluded that the proposed conditional use of the premises was illegal.⁶⁵ In light of the commission’s recommendation, the city council held a new hearing and denied the application.⁶⁶ The landowner sought enforcement of the agreement,⁶⁷ but the court held that the city council had no authority to make the agreement, citing the “prohibition against contracting away the exercise of the zoning power.”⁶⁸

2. Failure to Comply with Statutory Procedures

State statutes typically surround the zoning process with procedural safeguards. Before a municipal body may effect any sort of zoning change – from a comprehensive rezoning to a minor variance – neighboring landowners must generally receive notice of the proposed change.⁶⁹ That notice is typically followed by public hearings on the proposed change before the

⁶⁰ *Id.* at 1360; *see also* *Trancas Prop. Owners Ass’n v. City of Malibu*, 41 Cal. Rptr. 3d 200, 206 (Ct. App. 2006) (invalidating settlement agreement because “it includes commitments to take or refrain from regulatory actions regarding the zoning of Trancas’s development project, which may not lawfully be undertaken by contract”); *cf.* *BPG Real Estate Investors-Straw Party II, L.P. v. Bd. of Supervisors*, 990 A.2d 140, 143 (Pa. Commw. Ct. 2010) (invalidating part of a settlement agreement because the court lacked power to approve an agreement that permitted development of land that was not the subject of the underlying litigation).

⁶¹ 552 A.2d 1277 (Md. 1989).

⁶² *Id.* at 1284.

⁶³ *Id.* at 1280.

⁶⁴ There was a dispute about the precise terms of the agreement. *Id.* On the court’s view that the municipality had no power to reduce parking requirements by contract, the precise terms of the agreement were not critical. *Id.* at 1282.

⁶⁵ *Id.* at 1280-81.

⁶⁶ *Id.* at 1281.

⁶⁷ *Id.* at 1281-82.

⁶⁸ *Id.* at 1284.

⁶⁹ *See, e.g.*, CAL. GOV’T CODE § 65091 (West 2010) (requiring notice to owners of real property “within 300 feet of the real property that is the subject of the hearing”).

designated municipal body votes on the change.⁷⁰ Some statutes provide an opportunity for opponents to seek a public referendum on the change,⁷¹ while other statutes require approval of the proposed change by multiple levels of government.⁷² Moreover, in an increasing number of states, significant zoning changes require environmental review, which often entails time-consuming preparation of an environmental impact statement, followed by public hearings and fact-finding by the "lead agency" charged with evaluating environmental impact.⁷³

These statutory mandates have provided fertile ground for challenge to settlements that would result in a change in the permitted use of the land. The Ninth Circuit's decision in *League of Residential Neighborhood Advocates v. City of Los Angeles*⁷⁴ furnishes a recent example. After the City of Los Angeles denied a conditional use permit for operation of a synagogue in an area zoned for residential uses, the congregation brought an action in federal court alleging RLUIPA violations.⁷⁵ The city and the congregation settled the action on terms that authorized use of the property for worship, subject to various restrictions.⁷⁶ When neighbors brought an action contending that local zoning ordinances denied the city authority to enter into the settlement agreement, the Ninth Circuit agreed, emphasizing that the procedure for reviewing conditional use permit applications requires public notice, a public hearing, a series of factual findings, and potential administrative appeals.⁷⁷ The court held that the city could not allow a use for which the zoning ordinance requires a conditional use permit unless the city complied with the procedural formalities required by the ordinance.⁷⁸ Because the city did not comply with those formalities, the settlement agreement was invalid and unenforceable.⁷⁹

⁷⁰ See, e.g., *id.* § 65856 (West 2009); *id.* § 65905.

⁷¹ See, e.g., MASS. GEN. LAWS ch. 43, § 42 (2008), *applied in* *LaBranche v. A.J. Lane & Co.*, 537 N.E.2d 119, 119-20 (Mass. 1989).

⁷² See, e.g., N.Y. GEN. MUN. LAW § 239-m (McKinney 1999).

⁷³ See, e.g., CAL. PUB. RES. CODE §§ 21000-21006 (West 2007) (describing environmental review process); N.Y. ENVTL. CONSERV. LAW § 8-0109 (McKinney Supp. 2010) (detailing process for preparation of environmental impact statement). See generally Stewart E. Sterk, *Environmental Review in the Land Use Process: New York's Experience with SEQRA*, 13 CARDOZO L. REV. 2041 (1992) (discussing the impact of environmental review processes for land use review implemented in many states and, in particular, the environmental review process in New York).

⁷⁴ 498 F.3d 1052 (9th Cir. 2007).

⁷⁵ *Id.* at 1054.

⁷⁶ *Id.*

⁷⁷ *Id.* at 1054, 1056.

⁷⁸ *Id.* at 1056.

⁷⁹ *Id.*; see also *Chung v. Sarasota County*, 686 So. 2d 1358, 1360-61 (Fla. Dist. Ct. App. 1996); *Warner Co. v. Sutton*, 644 A.2d 656, 664-65 (N.J. Super. Ct. App. Div. 1994).

A settlement agreement is more likely to survive challenge by neighbors if the agreement requires the developer to apply to the relevant municipal boards, who will then satisfy all statutory requirements.⁸⁰ But, of course, such a settlement agreement is of less value to the developer because of the uncertainty and delay it entails. Moreover, some courts have suggested that even a contingent settlement agreement would be invalid because of the pressure municipal officials would feel to act in accordance with the settlement agreement.⁸¹

3. Substantive Challenges to the Settlement Agreement

Because municipalities are not themselves sovereign entities, their power to regulate land use, like most of their other powers, is rooted in state statutes and constitutions. As a result, landowners or neighbors can challenge zoning decisions made by the municipality's governing body as inconsistent with state enabling legislation, even if the municipality has followed all statutory procedures. In those states that have enacted a version of the Standard State Zoning Enabling Act (SZEA),⁸² landowners can challenge a regulation on the ground that it fails to satisfy the statutory mandate that regulations be "[f]or the purpose of promoting health, safety, morals, or the general welfare of the community"⁸³ or on the ground that the regulation is inconsistent with the statutory directive that "regulations shall be made in accordance with a comprehensive plan."⁸⁴ Neighbors more often focus on the comprehensive plan requirement.⁸⁵ A claim that the challenged regulation constitutes impermissible "spot zoning"⁸⁶ is a variant of the comprehensive plan claim.

⁸⁰ See, e.g., *Brownsboro Rd. Area Def., Inc. v. McClure*, No. 2002-CA-002559-MR, 2004 WL 1909337, at *4 (Ky. Ct. App. Aug. 27, 2004).

⁸¹ See *Chung*, 686 So. 2d at 1360.

⁸² The SZEA was first published by the United States Department of Commerce in 1924 as a model for use by state legislatures seeking to confer on municipalities the power to zone. STANDARD STATE ZONING ENABLING ACT explanatory notes 1, 14 (Advisory Comm. on Zoning, U.S. Dep't of Commerce rev. ed. 1926), reprinted in MODEL LAND DEV. CODE 210 app. A, at 210, 212 (Tentative Draft No. 1, 1968).

⁸³ STANDARD STATE ZONING ENABLING ACT § 1 (Advisory Comm. on Zoning, U.S. Dep't of Commerce rev. ed. 1926), reprinted in MODEL LAND DEV. CODE 210 app. A, at 212 (Tentative Draft No. 1, 1968) (footnotes omitted). Courts also may invalidate regulations that do not promote the health, safety, morals or general welfare on substantive due process grounds. See, e.g., *Nectow v. City of Cambridge*, 277 U.S. 183, 188-89 (1928); *Twigg v. County of Will*, 627 N.E.2d 742, 745-46 (Ill. App. Ct. 1994).

⁸⁴ STANDARD STATE ZONING ENABLING ACT § 3 (Advisory Comm. on Zoning, U.S. Dep't of Commerce rev. ed. 1926), reprinted in MODEL LAND DEV. CODE 210 app. A, at 214-15 (Tentative Draft No. 1, 1968); see, e.g., *Griswold v. City of Homer*, 186 P.3d 558, 560 (Alaska 2008).

⁸⁵ Neighbors typically challenge municipal decisions that relax regulations on a landowner's parcel. Because the parcel remains subject to some regulation, and the neighbors prefer the remaining restrictions to none, it typically will not be in the neighbor's

Because most courts take a deferential approach to local zoning decisions, comprehensive plan challenges and spot zoning challenges are generally unsuccessful.⁸⁷ Resolution of the challenges, however, is often time-consuming. Moreover, in states that take a less deferential approach to piecemeal zoning changes, these challenges stand a reasonable chance of success.⁸⁸

*BPG Real Estate Investors-Straw Party II, L.P. v. Board of Supervisors*⁸⁹ illustrates the problem. A neighbor challenged a settlement agreement as impermissible spot zoning.⁹⁰ Although an appellate court ultimately rejected the neighbor's challenge on the merits,⁹¹ the very fact that an appellate court considered the issue demonstrates that spot zoning doctrine offers potential for upsetting a settlement agreement. Similarly, if a zoning amendment, conditional use permit, or variance would be subject to invalidation on any other substantive ground, it would appear that a settlement agreement conferring comparable rights on a landowner should be subject to attack on the

interest to contend that the restrictions do not promote health, safety, morals, or general welfare.

⁸⁶ See, e.g., *Little v. Winborn*, 518 N.W.2d 384, 387-88 (Iowa 1994).

⁸⁷ The tradition of deference to local zoning decisions started with *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), where Justice Sutherland wrote: "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control." *Id.* at 388. For a more recent justification of judicial deference, see *Coniston Corp. v. Village of Hoffman Estates*, 844 F.2d 461, 468-69 (7th Cir. 1988) (emphasizing electoral check on power of local zoning officials). For criticism of the deferential approach, see, for example, Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 1-3 (1992).

⁸⁸ Illinois has often been cited as a state with a less deferential approach to local zoning decisions. See Fred P. Bosselman, *The Commodification of "Nature's Metropolis": The Historical Context of Illinois' Unique Zoning Standards*, 12 N. ILL. U. L. REV. 527, 528-30, 580-82 (1992) (explaining the principles on which Illinois courts repeatedly base land use decisions, which do not always favor local governments). There are signs, however, that the Illinois Supreme Court is becoming more deferential toward local zoning determinations. See, e.g., *Napleton v. Vill. of Hinsdale*, 891 N.E.2d 839, 850-51 (Ill. 2008) (concluding that language in prior cases requiring that zoning have a "substantial relation" to advancement of public health, safety, morals or general welfare should not be read to require more than rational basis scrutiny).

⁸⁹ 990 A.2d 140 (Pa. Commw. Ct. 2010).

⁹⁰ *Id.* at 149-50. In *BPG*, after the landowner challenged conditions the board of supervisors had imposed on the grant of a conditional use application, the court permitted a neighbor to intervene. *Id.* at 143. The landowner and the board then negotiated a settlement over the objection of the neighbor, and the trial court approved the settlement over a number of objections advanced by the neighbors, including spot zoning and contract zoning objections. *Id.* at 144. The Pennsylvania Commonwealth Court did upset the settlement agreement in part, holding that the settlement impermissibly granted development approvals for land not included within the scope of the landowner's initial application. *Id.* at 149.

⁹¹ *Id.* at 151.

same ground. So long as a neighbor would have standing to challenge an ordinary zoning action on a substantive ground, a change in the procedure by which the municipality reached its decision would appear to have little bearing on the merits of the substantive attack.

C. Preclusion Principles

Courts do not invariably uphold the right of neighbors to challenge settlements. Some courts have upheld settlements by holding that a neighbor's failure to intervene in the action between the developer and the municipality precludes the neighbor from challenging the settlement of that action. Thus, in *Cuson v. Tallmadge Charter Township*,⁹² the developer initially sought to develop its parcel for multi-family residential use, and when the township denied the developer's request to rezone for that purpose, the developer brought an action accusing the township of exclusionary zoning.⁹³ That litigation resulted in a consent judgment.⁹⁴ When residential neighbors sought to vacate the consent judgment on the ground that it violated statutory procedures, the court held that the neighbors' sole remedies were "political in nature . . . or through the timely intervention in prior proceedings."⁹⁵ Because the neighbors had not intervened in the initial proceeding that produced the consent judgment, they were precluded from advancing a collateral attack on that judgment.⁹⁶

The *Cuson* approach presents some difficult (although not insurmountable) conflicts with existing preclusion doctrine. Intervention is not generally mandatory.⁹⁷ A party's failure to intervene in litigation that might affect its

⁹² No. 234157, 2003 WL 21108470 (Mich. Ct. App. May 15, 2003).

⁹³ *Id.* at *1.

⁹⁴ The consent judgment provided that the developer would sell part of its parcel to another developer, who would build a power plant on the parcel. *Id.* By the terms of the agreement, the township would treat that parcel as if it were zoned for industrial use (thus permitting the power plant), even though it was not in fact zoned for such use. *Id.*

⁹⁵ *Id.* at *4.

⁹⁶ *Id.* at *5; see also *Stranahan House, Inc. v. City of Fort Lauderdale*, 967 So. 2d 1121, 1126 (Fla. Dist. Ct. App. 2007) (holding that a neighboring property owner could not challenge a consent final judgment because it did not intervene in the circuit court proceedings); *Summit Twp. Taxpayers Ass'n v. Summit Twp. Bd. of Supervisors*, 411 A.2d 1263, 1265 (Pa. Commw. Ct. 1980) (holding that objectors could not appeal a "final and binding order" when they did not intervene in the prior appeal of the zoning decision).

⁹⁷ In *Chase National Bank v. City of Norwalk*, 291 U.S. 431 (1934), Justice Brandeis wrote:

The law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger. . . . Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights.

Id. at 441 (footnote omitted). More recently, the Court cited the Brandeis excerpt with approval in *Martin v. Wilks*, 490 U.S. 755, 763 (1989).

interests does not generally preclude the party from asserting its legal rights in a subsequent proceeding.⁹⁸

This rule reflects the origins and development of intervention doctrine.⁹⁹ As originally conceived in the Federal Rules of Civil Procedure, a non-party had a right to intervene only when the non-party's interests were inadequately represented in the litigation *and* the non-party "[was or may have been] bound by a judgment in the action."¹⁰⁰ The Supreme Court, however, construed the original Rule 24 narrowly, noting that a person whose interests were not adequately represented by existing parties to a litigation could never be bound by the litigation, making it logically impossible for a proposed intervenor to establish *both* that it was not adequately represented and that it would be bound by an adverse judgment.¹⁰¹ Although subsequent amendments to Rule 24 liberalized intervention doctrine,¹⁰² they did not change the Supreme Court's insistence that a non-party not adequately represented in a proceeding cannot

⁹⁸ *Chase Nat'l Bank*, 291 U.S. at 441.

⁹⁹ Intervention had its origins in equity and admiralty practice, and did not become generally available in civil actions until promulgation of the Federal Rules of Civil Procedure. See Peter A. Appel, *Intervention in Public Law Litigation: The Environmental Paradigm*, 78 WASH. U. L.Q. 215, 239-53 (2000).

¹⁰⁰ FED. R. CIV. P. 24(a)(2) (1940) (amended 1946).

¹⁰¹ *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 691 (1961). *Sam Fox Publishing* involved an attempt by small music publishers to intervene as of right in a proceeding by the federal government to modify an antitrust consent decree in a dispute with the American Society of Composers, Authors and Publishers (ASCAP). *Id.* at 687. The Supreme Court held that because the publishers would not be bound by the consent judgment, they had no right to intervene: "We regard it as fully settled that a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation, and hence may not, as of right, intervene in it." *Id.* at 689.

The Court, in an opinion by Justice Harlan, went on to address the logical problem: [A]ppellants, however, face this dilemma: the judgment in a class action will bind only those members of the class whose interests have been adequately represented by existing parties to the litigation; yet intervention as of right presupposes that an intervenor's interests are or may *not* be so represented. Thus appellants' argument as to a divergence of interests between themselves and ASCAP proves too much, for to the extent that it is valid appellants should not be considered as members of the same class as the present defendants, and therefore are not "bound." On the other hand, if appellants are bound by ASCAP's representation of the class, it can only be because that representation has been adequate, precluding any right to intervene. It would indeed be strange procedure to declare, on one hand, that ASCAP adequately represents the interests of the appellants and hence that this is properly a class suit, and then, on the other hand, to require intervention in order to insure of this representation in fact.

Id. at 691-92 (citation omitted).

¹⁰² See Appel, *supra* note 99, at 254-58.

be bound by the results of that proceeding – even if the party would have been entitled to intervene in the proceeding.¹⁰³

Rule 24 does not bind state courts like the court in *Cuson*. But, in *Richards v. Jefferson County*, the Supreme Court cited the Due Process Clause, not the Federal Rules of Civil Procedure, as the basis for holding that a non-party to a proceeding cannot be bound by the result of that proceeding.¹⁰⁴ The Due Process Clause, of course, does bind state courts.

Nevertheless, the Federal Constitution almost certainly does not prevent the state courts from barring neighbors from challenging a settlement if they choose not to intervene in ongoing litigation. The Supreme Court has said that in cases involving a public action that has only an indirect impact on an individual's interests, "we may assume that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all."¹⁰⁵ That latitude would appear to include a mandatory intervention rule of the sort adopted by the court in *Cuson*.¹⁰⁶

Perhaps the bigger issue with the *Cuson* approach is not conceptual, but practical. In reducing the obstacles to settlement, the *Cuson* court simultaneously undermined the doctrinal framework that required municipalities to comply with statutory procedures before making zoning changes. Parts II and III of this Article evaluate that tradeoff and potential alternatives.

D. *Impact on Settlement*

This discussion of doctrinal structure raises an obvious and important question: how much impact has doctrinal structure had on settlement rates in land use litigation? Unfortunately, the question admits of no easy answer. It is easy to identify large numbers of low-value land use cases that make their way to appellate courts. But state courts do not maintain reliable data from which one could compare settlement rates in land use cases with settlement rates in other litigation. First, most state systems do not maintain data on settlement

¹⁰³ *Richards v. Jefferson County*, 517 U.S. 793, 800 n.5 (1996) (citing *Chase Nat'l Bank*, 291 U.S. at 441, with apparent approval); *Martin v. Wilks*, 490 U.S. 755, 763 (1989) ("[A] party seeking a judgment binding on another cannot obligate that person to intervene; he must be joined.").

¹⁰⁴ *Richards*, 517 U.S. at 805 ("Because petitioners received neither notice of, nor sufficient representation in, the *Bedingfield* litigation, that adjudication, as a matter of federal due process, may not bind them and thus cannot bar them from challenging an allegedly unconstitutional deprivation of their property.").

¹⁰⁵ *Id.* at 803.

¹⁰⁶ See *Cuson v. Tallmadge Charter Twp.*, No. 234157, 2003 WL 21108470, at *4 (Mich. Ct. App. May 15, 2003).

rates.¹⁰⁷ Second, the data they do collect does not code zoning or land use cases as a separate category.¹⁰⁸

Moreover, even if empirical work established that settlement rates are lower in zoning and land use cases than in other categories of cases, doctrinal structure might not explain the difference. For instance, agency costs might be particularly high in zoning and land use cases.¹⁰⁹ Because land use disputes are often hot-button political issues, local officials may prefer to blame courts for unfavorable outcomes, even if their lawyers advise them ahead of time that the prospect of municipal success is small. This agency cost problem may lead officials to litigate cases to judgment even when settlement may ultimately be in the interest of local residents.

Even in the absence of empirical data, however, both intuition and economic analysis suggest that if a doctrinal model increases the cost of settlement to the settling parties, the parties will be less likely to settle than if settlement involved lower costs.

II. INTEGRATING SETTLEMENT INTO PREVAILING MODELS OF LAND USE LAW

Do doctrinal obstacles to settlement of land use litigation advance significant policy objectives? The social benefits associated with litigation of disputes (and conversely, with settlement of disputes) do not correlate perfectly with the private benefits.¹¹⁰ Even private litigation has the potential to generate external benefits – development of precedent,¹¹¹ reinforcement of norms,¹¹² and, in some cases, optimal deterrence.¹¹³ The correlation of private

¹⁰⁷ See Theodore Eisenberg, *Use It or Pretenders Will Abuse It: The Importance of Archival Legal Information*, 75 UMKC L. REV. 1, 12 (2006).

¹⁰⁸ The State Court Guide to Statistical Reporting, developed by the National Center for State Courts' Court Statistics Project, divides civil cases into a number of subcategories for reporting purposes. Zoning and land use cases would appear to fall into the more general subcategory of "Administrative Agency." COURT STATISTICS PROJECT, STATE COURT GUIDE TO STATISTICAL REPORTING 11 (2009), available at http://www.ncsconline.org/d_research/csp/CSPStatisticsGuidev1.3.pdf.

¹⁰⁹ See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 404-10 (1977) (discussing options facing municipal officials concerned about re-election possibilities); Stewart E. Sterk, Nollan, *Henry George, and Exactions*, 88 COLUM. L. REV. 1731, 1736-42 (1988) (discussing the difficulty municipal officials face in aggregating preferences).

¹¹⁰ Shavell, *supra* note 10, at 577.

¹¹¹ John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1134 (2009); Lederman, *supra* note 10, at 258-59; Shavell, *supra* note 10, at 595-96 (discussing "amplification of law," which occurs "through its interpretation and the setting of precedents").

¹¹² Fiss, *supra* note 10, at 1085.

¹¹³ Shavell, *supra* note 10, at 578. Of course, as Shavell notes, there may also be cases in which private litigation generates more litigation than would be socially optimal. *Id.*

and social benefits becomes even more complex with public law litigation.¹¹⁴ When government officials are on one side of a litigation, one might ideally expect those public officials to account for all of the social costs and benefits of litigating rather than settling. But, of course, most separation of powers principles operate on the assumption that no single official, and no single branch of government, will adequately account for social costs and benefits.

Almost nowhere is that more true than in the process of land use regulation. Although local governments play the primary role both in enacting land use regulations and in enforcing them, state law constrains the regulatory power of local officials. State statutes typically impose on localities a format for local regulation, often mandating a particular planning process,¹¹⁵ requiring public hearings,¹¹⁶ and limiting the availability of administrative relief.¹¹⁷

Land use scholars have developed a number of models to rationalize this pattern of checks and balances on local decision makers. None of these models has focused explicitly on the power of municipal officials to settle land use litigation. But each model provides a context for evaluating the wisdom of doctrinal restraints on settlement of litigation. This Section examines the role settlement might play in each of three models of land use regulation.

A. *The "Plan" Model*

Although it has fallen from academic favor during the last quarter century,¹¹⁸ the "plan" model of land use control was prevalent from zoning's

¹¹⁴ Owen Fiss observed that within any organization, the formal procedures for identifying who can make decisions on behalf of the organization are imperfect in assessing the interests of the persons bound by those decisions. Fiss, *supra* note 10, at 1078. But Fiss emphasized that when governmental entities are involved, the procedures for generating authoritative consent to a settlement are "far cruder." *Id.* at 1079. Moreover, in the case of groups who bring much public law litigation, the procedures are often non-existent. *Id.* at 1079-81.

¹¹⁵ See, e.g., N.Y. TOWN LAW § 272-a (McKinney 2004).

¹¹⁶ See, e.g., *id.* § 272-a(6).

¹¹⁷ See, e.g., *id.* § 267-b (imposing the framework the board of appeals must use in evaluating applications for use variances and area variances); *Cohen v. Bd. of Appeals of Saddle Rock*, 795 N.E.2d 619, 621, 624 (N.Y. 2003) (holding that state standards preempt inconsistent local regulations, and overturning the grant of administrative relief as inconsistent with statutory requirements).

¹¹⁸ Carol Rose's 1983 assault on what she called "plan jurisprudence" marked a significant departure from prior academic work, which had criticized the practice of piecemeal zoning changes. Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 841-46 (1983). For earlier work focusing on the evil of piecemeal changes, see, for example, Jesse Dukeminier, Jr. & Clyde L. Stapleton, *The Zoning Board of Adjustment: A Case Study in Misrule*, 50 KY. L.J. 273, 330-35, 349-50 (1962). For the classic article seeking to breathe life into the requirement in the SZEA that zoning be in accordance with a comprehensive plan, see Charles M. Haar, "In Accordance with a Comprehensive Plan", 68 HARV. L. REV. 1154

inception through much of the Twentieth Century. As a result, the model shaped and continues to shape much land use doctrine.

The model's central premise is that planning is a rational process that improves on land use patterns generated by piecemeal decisions, whether those decisions be made by market participants or by government decision makers.¹¹⁹ A subsidiary premise is that municipal decision makers can be trusted to enact ordinances that reflect the insights of the planning process.¹²⁰

Within the plan model, rational planning requires objective analysis of data – particularly about population and economic trends – which enables professionals to lay out a municipality in ways that enable it to keep pace with future development needs.¹²¹ Building on that analysis, a commission insulated from politics would draft a zoning ordinance for ultimate enactment by the local legislative body.¹²²

The rational planning model requires doctrinal precautions against subsequent changes that might exalt politics or self-interest over the scientific analysis embodied in the original ordinance. Doctrine has developed such precautions. First, although enabling statutes and zoning ordinances provide for administrative variances, they narrowly circumscribe the power to grant those variances.¹²³

Second, although the local legislative body typically has broader power to enact zoning amendments, that power, too, is subject to doctrinal limits. Enabling acts typically impose public hearing requirements, in part to ensure that local officials who seek to change an ordinance must face political heat for

(1955).

¹¹⁹ See Haar, *supra* note 118, at 1155; Rose, *supra* note 118, at 848-49. The drafters of the SZEA included the requirement that zoning be "in accordance with a comprehensive plan" out of fear that municipalities would otherwise engage in "haphazard or piecemeal zoning." STANDARD STATE ZONING ENABLING ACT § 3 & n.22 (Advisory Comm. on Zoning, U.S. Dep't of Commerce rev. ed. 1926), reprinted in MODEL LAND DEV. CODE 210 app. A, at 214-15 (Tentative Draft No. 1, 1968).

¹²⁰ But see Rose, *supra* note 118, at 854-56 (challenging the underlying trust granted to decision makers in the context of local government). Trust on this score did not always run deep. Often, the task of proposing the initial ordinance was left to a commission, whose work was designed to be free from the influence of politics, on the theory that the final product would be better if the local legislature had to adopt the work as a whole rather than tinkering with small pieces of the ordinance. See, e.g., N.Y. TOWN LAW § 266 (requiring appointment of commission to recommend district boundaries prior to enactment of first zoning ordinance).

¹²¹ See Ira Michael Heyman, *Innovative Land Regulation and Comprehensive Planning*, 13 SANTA CLARA LAW. 183, 228-29 (1972).

¹²² See Anthony James Catanese, *Learning by Comparison: Lessons from Experiences*, in PERSONALITY, POLITICS, AND PLANNING: HOW CITY PLANNERS WORK 179, 183-87 (Anthony James Catanese & W. Paul Farmer eds., 1978) (discussing the politicization of the planning process and the changing role of independent commissions).

¹²³ See, e.g., N.Y. TOWN LAW § 267-b.

doing so.¹²⁴ In addition, state courts have developed prohibitions on "spot zoning," sometimes in reliance on statutory requirements that zoning be "in accord with the comprehensive plan."¹²⁵ Some jurisdictions have taken the plan model one step further, treating zoning amendments as "quasi-judicial" actions subject to searching judicial review,¹²⁶ or prohibiting all amendments unless the amending body can demonstrate a change in conditions or a mistake in the original ordinance.¹²⁷

The rational planning model, then, reflects a fear that developers (and to a lesser extent neighbors) will capture the zoning process, forfeiting the insights of the rational planning process. The assumption, then, is that local elected officials cannot be trusted to act in the interest of the broader body politic. Courts, by contrast, serve an important policing function, because most of the doctrinal restrictions on zoning changes are judicially enforceable.

B. *The Public Choice Model*

The rational planning model has fallen out of academic favor in recent decades, in part because even planners have lost faith in their ability to devise long-term end-state plans,¹²⁸ and in part out of recognition that planning and politics cannot realistically be separated.¹²⁹ But the plan model's fall from scholarly grace has not resulted in repeal of the restrictions on municipal zoning activity. Perhaps the restrictions persist because the insights of legal and planning scholarship do not immediately filter down to state zoning and planning legislation. Another explanation reflects the influence of public choice theory on land use regulation.¹³⁰

Public choice theory is primarily concerned with the agency costs that lead government officials to make decisions in their own interests, which may diverge from those of their constituents.¹³¹ In particular, public choice

¹²⁴ See, e.g., *id.* § 264(4).

¹²⁵ See, e.g., *Gaida v. Planning & Zoning Comm'n of Shelton*, 947 A.2d 361, 368-70, 369 n.8 (Conn. App. Ct. 2008).

¹²⁶ See, e.g., *Chrobuck v. Snohomish County*, 480 P.2d 489, 495-96 (Wash. 1971) (en banc).

¹²⁷ See, e.g., *Clayman v. Prince George's County*, 292 A.2d 689, 695 (Md. 1972).

¹²⁸ See, e.g., MELVILLE C. BRANCH, *CONTINUOUS CITY PLANNING* 47-49 (1981).

¹²⁹ See *Catanese*, *supra* note 122, at 183-87.

¹³⁰ For a public choice analysis of the need for judicial constraints on local government activity, see Clayton P. Gillette, *In Partial Praise of Dillon's Rule, or, Can Public Choice Theory Justify Local Government Law?*, 67 CHI.-KENT L. REV. 959 (1991).

¹³¹ James Buchanan, one of the pioneers of public choice theory, commented that in a "representative democracy, we must introduce the possible divergence between the interests of the representative or agent who is elected or appointed to act for the group and the interests of the group members themselves." James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, in *THE THEORY OF PUBLIC CHOICE - II*, at 11, 18 (James M. Buchanan & Robert D. Tollison eds., rev. ed. 1984). Buchanan went on to observe that, among public choice scholars:

theorists fear that government officials respond to “rent-seeking” behavior, resulting in inefficient regulation, combined with inefficient expenditure of resources obtaining that regulation.¹³² At the local level, mobility of residents imposes constraints on the potential for rent-seeking. More than fifty years ago, Charles Tiebout demonstrated that, assuming enough competing municipalities and perfect mobility of residents, competition among municipalities could ensure efficient provision of municipal services.¹³³ Tiebout’s assumptions, however, are heroic with respect to many municipalities.¹³⁴ As a result, even if competition exerts some constraint on inefficient regulation, rent-seeking remains prevalent within the land use process.¹³⁵

Rent-seeking is not limited to any particular interest group. Developers have much at stake in the land use process, and they are often willing to fund politically-valuable amenities or projects in return for regulatory concessions. Moreover, because many of the benefits developers seek are personal to them, they do not face significant organizational problems in lobbying for those

Electoral competition has come more and more to be viewed as competition among prospective monopolists, all of whom are bidding for an exclusive franchise, with profit maximizing assumed to characterize the behavior of the successful bidder. Governments are viewed as exploiters of the citizenry, rather than the means through which the citizenry secures for itself goods and services that can best be provided jointly or collectively.

Id. at 19.

¹³² Buchanan defined rent-seeking as “behavior in institutional settings where individual efforts to maximize value generate social waste rather than social surplus.” James M. Buchanan, *Rent Seeking and Profit Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 3, 4 (James M. Buchanan et al. eds., 1980).

¹³³ Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 *J. POL. ECON.* 416, 419-20 (1956).

¹³⁴ See Wallace E. Oates, *On Local Finance and the Tiebout Model*, 71 *AM. ECON. REV.* 93, 93 (1981) (“The pure [Tiebout] model . . . involves a set of assumptions so patently unrealistic as to verge on the outrageous.”). For instance, scholars have questioned whether residents may move without cost from one jurisdiction to another to take advantage of a more attractive package of costs and governmental services, one of the foundations of the Tiebout model. See, e.g., David Lowery & William E. Lyons, *The Impact of Jurisdictional Boundaries: An Individual-Level Test of the Tiebout Model*, 51 *J. POL.* 73, 92-93 (1989) (concluding that few citizens contemplate moving in response to governmental services). Others have questioned whether municipalities act as profit-maximizers. See, e.g., Truman F. Bewley, *A Critique of Tiebout’s Theory of Local Public Expenditures*, 49 *ECONOMETRICA* 713, 719 (1981).

¹³⁵ See Gillette, *supra* note 130, at 971-75 (arguing that neither exit nor voice will adequately discipline local officials); Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 *VAND. L. REV.* 831, 867 (1992) (concluding that competition alone will not prevent municipalities from imposing exactions that exceed external costs generated by new development).

benefits.¹³⁶ Homeowners, however, are also participants in the rent-seeking process. Although their large numbers make it harder for them to organize, their numbers give them voting power that often enables them to dominate local politics.¹³⁷

The goal of rent-seeking behavior, whether by developers or neighbors, is procuring a municipal decision that authorizes (or prohibits) a particular development, or a development of a specified type. If the decision is subject to searching judicial review, the decision will be less valuable to the parties who lobby for it. Judicial review, then, reduces the return on an investment in rent-seeking, and consequently reduces the incentive to engage in rent-seeking.

C. *The Mediation Model*

A mediation model of land use regulation, developed most extensively by Carol Rose, shares with both the plan model and the public choice model a recognition that in the absence of legal constraints, local officials are subject to factional influence of special economic interests.¹³⁸ Unlike proponents of the plan or public choice models, however, Rose embraced the role of politics in the land use process, suggesting that local officials effectively act as mediators in local land use disputes.¹³⁹

The mediation model rejects the rational planning ideal as unrealistic, in large measure because government bodies will not focus on abstract planning issues. Instead, specific development proposals that generate concrete disputes energize local officials.¹⁴⁰ In the mediation model, piecemeal changes – anathema to rational planners – are at the heart of land use regulation. Planning is a rolling process that simply requires decision makers to take careful account of a number of values in making individualized decisions.¹⁴¹

Within the mediation model, participants in land use disputes derive protection from “voice” and “exit,” not from placing local officials in

¹³⁶ See David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1272-73 (1997). Developer influence may have a greater impact in larger municipalities, where the issues faced by the local government are more diffuse and where majority interests are more likely to be sacrificed in a logrolling process. See Robert C. Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 406-08 (1977).

¹³⁷ Robert Ellickson has suggested that homeowner interests dominate many suburban communities. See Ellickson, *supra* note 136, at 405-07. That proposition also serves as the foundation for William A. Fischel's “homevoter hypothesis,” which assumes that homeowners “are the most numerous and politically influential group within most localities.” WILLIAM A. FISCHEL, *THE HOMEVOTER HYPOTHESIS* 4-6 (2001); see also Dana, *supra* note 136, at 1273.

¹³⁸ Rose, *supra* note 118, at 863.

¹³⁹ *Id.* at 887-93.

¹⁴⁰ *Id.* at 874-75.

¹⁴¹ *Id.* at 875-76.

legislative or judicial handcuffs.¹⁴² Mediation guarantees each party input into the decision making process, and allows each party to raise concerns beyond those that might be reflected in any formal plan document. Moreover, mediation encourages compromise; sometimes the interests of the parties can be accommodated in a way that a comprehensive plan or zoning ordinance cannot anticipate.¹⁴³ Mediation does raise the possibility of redistribution among the parties in the process, but no one forces parties to participate in the land use process; exit is an option for those unwilling to take regulatory risks.

Much land use doctrine developed over the past three decades is consistent with the mediation model. Judicial condemnation of contract zoning has moderated, and courts have developed doctrines that enforce bargains between developers and municipalities.¹⁴⁴ Floating zones¹⁴⁵ and planned unit developments¹⁴⁶ provide municipalities with the flexibility to negotiate deals with developers over individual projects, taking into account the strength and breadth of community sentiment about project alternatives. Judicial deference

¹⁴² Albert Hirschman developed the terms "voice" and "exit" to describe two forces that serve to discipline institutional actors, including businesses, political parties, and volunteer organizations. ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY 120-23 (1970). "Voice" refers to the effort of a customer, member, or constituent to change existing practices, while "exit" refers to the customer, member, or constituent's decision to depart from the enterprise. *Id.* at 4.

¹⁴³ Mark Fenster has made this point in the course of criticizing the Supreme Court's exactions doctrine:

Negotiation by property owners and local governments over the exchange of entitlements is more likely to reach a mutually agreeable solution when parties can consider a wide universe of terms as part of a bargain than when the negotiation is limited in scope by formal rules imposed and enforced by external judicial agents.

Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CALIF. L. REV. 609, 675 (2004).

¹⁴⁴ Indeed, many states have, by statute, authorized development agreements that permit municipalities to contract to freeze regulations in order to induce development. See Green, *supra* note 53, at 394-95, 400; Wegner, *supra* note 53, at 997-1000.

¹⁴⁵ When a municipality's zoning ordinance creates a floating zone, it specifies all of the uses and standards applicable within the zone, but does not locate the zone on the zoning map. Instead, a developer who wants to build in accordance with the zone's standards applies to have the floating zone applied to his property. The New York Court of Appeals approved the technique in *Rodgers v. Village of Tarrytown*, 96 N.E.2d 731, 735-36 (N.Y. 1951), and other courts have followed suit. See, e.g., *Bellemeade Co. v. Priddle*, 503 S.W.2d 734, 738-39 (Ky. 1973); *Bigenho v. Montgomery Cnty. Council*, 237 A.2d 53, 56-58 (Md. 1968).

¹⁴⁶ When a municipality zones land into a planned unit development district, it essentially invites the developer to propose a project that the municipality will consider as a whole, rather than requiring the developer to adhere to pre-set standards. For an early case upholding a PUD ordinance, see *Cheney v. Village 2 at New Hope, Inc.*, 241 A.2d 81, 84-85, 87 (Pa. 1968).

to local board decisions – both on variance applications and on zoning amendments – is also consistent with the mediation model.

The model reflected by these established doctrines, and rationalized by Rose and others, casts municipal officials in the role of mediators. Even more recently, a number of state legislatures have explicitly incorporated an opportunity for more formal mediation into the land use process *after* municipal officials have made their initial determination on a landowner's application. Florida was a pioneer in providing for mediation of land use disputes,¹⁴⁷ but a number of other states have followed suit.¹⁴⁸ In Florida, once a local government makes a decision on a development order, an unhappy developer can seek a mediated solution rather than proceeding directly to litigation.¹⁴⁹ Although the Florida statute has been on the books for fifteen years, developers have not made widespread use of mediation,¹⁵⁰ in part because of two unresolved questions about the statutory scheme: who, besides the developer and the municipality, will be a party to the mediation,¹⁵¹ and what rights will non-parties have to challenge any mediated solution?¹⁵²

¹⁴⁷ The Florida Land Use and Environmental Dispute Resolution Act was enacted in 1995. FLA. STAT. § 70.51 (2010). For a general review of the act's operation, see Mark S. Bentley, *Understanding the Florida Land Use and Environmental Dispute Resolution Act*, 37 STETSON L. REV. 381 (2008).

¹⁴⁸ See, e.g., CONN. GEN. STAT. § 8-8a (2010); ME. REV. STAT. tit. 5, § 3341 (2009).

¹⁴⁹ See FLA. STAT. § 70.51(3).

¹⁵⁰ Cf. Bentley, *supra* note 147, at 390 (“[A]s of October 4, 2007, only eight out of [Florida’s] sixty-seven counties and three out of four hundred and twelve cities have adopted procedures to implement the Act.”).

¹⁵¹ The statute allows abutting owners and persons who submitted testimony in support of the municipality's order to request participation in the proceeding. FLA. STAT. § 70.51(12). The statute then states that “[t]hose persons may be permitted to participate in the hearing but shall not be granted party or intervenor status.” *Id.*

¹⁵² The statute provides that:

The first responsibility of the special magistrate is to facilitate a resolution of the conflict between the owner and governmental entities to the end that some modification of the owner's proposed use of the property or adjustment in the development order or enforcement action or regulatory efforts by one or more of the governmental parties may be reached. Accordingly, the special magistrate shall act as a facilitator or mediator between the parties in an effort to effect a mutually acceptable solution. The parties shall be represented at the mediation by persons with authority to bind their respective parties to a solution, or by persons with authority to recommend a solution directly to the persons with authority to bind their respective parties to a solution.

Id. § 70.51(17)(a). The statute does not indicate what rights any non-party has in those cases where the parties reach a mutually acceptable solution. Where the parties do not reach such a solution, the statute permits the special magistrate to make recommendations, which the magistrate then submits to the governmental entity for consideration. *Id.* § 70.51(21). If the developer is unhappy with the governmental entity's action, the developer may then bring an action. *Id.* § 70.51(24). The statute does not discuss the right of a non-party to challenge the governmental entity's action.

Within the mediation model, voice and exit – not robust judicial oversight – shape and discipline municipal decisions. Land use decisions acquire legitimacy if all affected parties had the opportunity to participate in the process. Participation is the mechanism for transforming land use regulation from a zero-sum game to one where the interests of multiple parties can be accommodated. Judicial review retains a role within the mediation model, but the focus of judicial review is on ensuring that all parties have had an opportunity to participate in the decision making process, not on evaluating the merits of the municipality's decision.

D. *The Role of Settlement Restrictions Within the Models*

Although litigation plays a role within each of the models of land use regulation, the roles vary considerably among the models. Within the plan and public choice models, litigation operates primarily to protect against regulatory capture. By contrast, voice and exit – not litigation – provide the principal safeguard against capture within the mediation model. If municipal officials are to act as effective mediators, however, participation by all interested parties is critical – both because participation itself may be a value,¹⁵³ and because participation generates information that permits officials to make more informed decisions.¹⁵⁴ Within the mediation model, litigation operates to ensure adequate participation in the decision making process.¹⁵⁵

¹⁵³ In the words of Roderick Hills, local government theorists have sometimes argued that “participation in local politics is not only a good way to control government, but also a useful way to transform citizens, imbuing them with civic spirit, a taste for public affairs, and political skills.” Roderick M. Hills, Jr., *Romancing the Town: Why We (Still) Need a Democratic Defense of City Power*, 113 HARV. L. REV. 2009, 2009 (2000) (reviewing GERALD E. FRUG, *CITY MAKING: BUILDING COMMUNITIES WITHOUT BUILDING WALLS* (1999)). Gerald Frug in particular has championed the city as an entity that fosters political participation, which he views as freedom enhancing. Jerry Frug, *Decentering Decentralization*, 60 U. CHI. L. REV. 253, 257 (1993) (discussing “the freedom gained from the ability to participate in the basic societal decisions that affect one’s life”); Gerald E. Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067-73 (1980); see also Richard Briffault, *Our Localism: Part II – Localism and Legal Theory*, 90 COLUM. L. REV. 346, 396 (1990); Fenster, *supra* note 143, at 671-72.

For other discussions of the advantages of participation, see Carol M. Rose, *New Models for Local Land Use Decisions*, 79 NW. U. L. REV. 1155, 1168 (1985) (stating that the goal within the mediation process is to assure, through participation, the “parties’ future ability to get along”); Rose, *supra* note 118, at 898 (stressing that “venting” alone may “help[] the disputants to accept a decision”).

¹⁵⁴ See Rose, *supra* note 118, at 898 (remarking that “voice” keeps decision makers “informed of costs and benefits”).

¹⁵⁵ *Id.* at 900 (“[C]ourt[s] should focus on voice in mediation and ask whether the local body went through the steps of identifying disputants, exploring issues, and explaining results.”).

Amelioration of doctrinal restrictions on settlement would reduce the number of land use disputes that proceed to final judgment. This Section demonstrates, however, that those doctrinal restrictions, in their current form, are not necessary to preserve the role of litigation as a tool for disciplining municipal behavior.

1. Settlement Restrictions as a Constraint on Developer Capture

Public choice theory suggests that developers may exert disproportionate influence in the land use process because their interests are highly concentrated,¹⁵⁶ eliminating the organization problems that face neighbors who might oppose development. Statutory and judicially-imposed constraints on the decisions municipal officials make, which neighbors enforce through litigation, reduce the value of any concessions a developer receives from municipal officials, and therefore reduce the amount the developer will be willing to pay to influence those officials. The threat of litigation has a similar salutary effect within the plan model: developers will be willing to spend less to obtain deviations from the plan if neighbors can litigate to undo those deviations.

Within these models, the litigation that disciplines municipal officials is litigation that neighbors bring. But once the neighbors commence litigation challenging municipal action, there is little reason for legal doctrine to constrain the power of the interested parties (neighbors, municipality, and developer) to settle the dispute. Any potential settlement will reflect the parties' expectation of success in the litigation,¹⁵⁷ and the prospect of settlement should create the same incentives for the developer as the prospect of litigation. So long as the doctrinal rules that would be applied in litigation are adequately protective of neighbor interests, there is every reason to believe that settlement – which reflects the expected result of litigation – should generate the same deterrent effect as litigation to judgment.

Similarly, within the plan model, if the threat of litigation operates to preserve the sanctity of the plan, it does so only to the extent neighbors are willing to challenge municipal decisions favoring developers.¹⁵⁸ Because the willingness of neighbors to settle will generally reflect their prospects in litigation, settlement is not likely to weaken neighbor litigation as a mechanism for safeguarding the plan.

¹⁵⁶ See Dana, *supra* note 136, at 1272; Daniel A. Farber, *Public Choice and Just Compensation*, 9 CONST. COMMENT. 279, 289 (1992); Nicole Stelle Garnett, *Planning as Public Use?*, 34 ECOLOGY L.Q. 443, 466 (2007).

¹⁵⁷ See Priest & Klein, *supra* note 24, at 4-17.

¹⁵⁸ The neighbors may not care about preserving the plan, but only about the private benefits they derive from preventing a proposed development. As a result, the situations in which they choose to litigate may not coincide with the cases in which proponents of plan jurisprudence might believe litigation would be socially optimal. See Shavell, *supra* note 10, at 575-79.

This analysis suggests that, from a regulatory capture perspective, there is little advantage to superimposing public hearing requirements or additional environmental review on settlements approved by the litigating parties – the neighbors, the municipality, and the developer. Imposing such requirements would make litigation relatively more attractive than settlement, but would not provide any additional safeguards against regulatory capture.

Of course, many of the costs of restrictions on settlement will be generated not in litigation commenced by neighbors, but in litigation brought by developers. Restricting settlement of those cases, however, will have little effect on regulatory capture. By hypothesis, the developer has already *lost* before the municipal officials, suggesting that the municipal officials were not terribly susceptible to capture in the first instance. One might imagine cases in which municipal officials hope to have it both ways – by making public decisions popular with neighbors with the expectation that the developer will then sue, leading the municipality to capitulate. In that way, municipal officials might seek “cover” from the ultimate capitulation.¹⁵⁹ But in those cases, municipal officials are unlikely to settle any litigation brought by the developer, even if there are no doctrinal restrictions on settlement. The “cover” will be much more effective if a court orders the municipality to rescind the restrictions than if the municipality accomplishes the same result through settlement.

Perhaps concerns about regulatory capture are most significant during regime transitions.¹⁶⁰ Municipal officials might enact a zoning restriction or deny a permit or variance during one administration. During the course of litigation by the developer, that regime might be replaced by a new administration more sympathetic to development. In that circumstance, one might reasonably be concerned that the new administration would be too quick to settle on terms unfavorable to neighbors. In that situation, however, the new administration could evade any restrictions on settlement of litigation by using its new power to rescind the offending restrictions. Even in this circumstance, then, concerns about regulatory capture provide no justification for doctrinal restrictions on settlement.

2. Settlement Restrictions as a Protection Against Uninformed Decisions

Unless municipal officials have adequate information about the impact zoning changes or development approvals would have on neighboring landowners, those officials are unlikely to function effectively as mediators between developers and neighbors. Many of the doctrinal requirements that

¹⁵⁹ See Jeffrey H. Goldfien, *Thou Shalt Love Thy Neighbor: RLUIPA and the Mediation of Religious Land Use Disputes*, 2006 J. DISP. RESOL. 435, 460.

¹⁶⁰ For discussion of the problems associated with settlement during presidential transitions, see Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1033-43 (2001).

surround zoning decisions – from public hearing requirements¹⁶¹ to environmental review procedures¹⁶² – are designed in part to ensure that decision makers are fully informed.

From an information perspective, permitting municipal officials to settle litigation with developers presents a potential problem: a settlement on terms different from those originally considered at a public hearing may not be vetted as fully as was the original proposal municipal officials rejected. On that basis, one might contend that doctrinal restrictions on settlement – including the requirement of additional public hearings and environmental review – remain important safeguards in the municipal decision making process.

Two factors undermine this argument. First, the initial public hearing on a controversial zoning issue is likely to educate municipal officials not just about neighborhood objections to the developer's particular proposal, but also about more general neighbor perspectives on appropriate development of the area. In a state that requires environmental review of the initial proposal, that review most likely included review of the environmental impact of alternative development proposals.¹⁶³ All of that information remains available to municipal officials considering subsequent settlement offers, reducing the likelihood that settlement decisions will be based on too little information.

Second, compare the information available to municipal officials evaluating settlement proposals with the information base on which a decision will be made if there is no settlement. In that instance, if a court overturns the municipality's decision, it has two alternatives. Most frequently, the court will remand to the local board for reconsideration of the developer's application.¹⁶⁴ At that point, there will be additional opportunity for interested parties to generate information about any proposed development. In other circumstances, courts approve the developer's project, without soliciting any public comment or conducting further environmental review.¹⁶⁵ When that

¹⁶¹ See Rose, *supra* note 118, at 897; Daniel P. Selmi, *Reconsidering the Use of Direct Democracy in Making Land Use Decisions*, 19 UCLA J. ENVTL. L. & POL'Y 293, 296 (2001/2002).

¹⁶² See, e.g., *Citizens Alliance to Protect Our Wetlands v. City of Auburn*, 894 P.2d 1300, 1304 (Wash. 1995) (en banc) (indicating that the impact statement requirement is designed to make sure decision makers have "sufficient information to make a reasoned decision"); Sterk, *supra* note 73, at 2052-53; see also Keith H. Hirokawa, *The Prima Facie Burden and the Vanishing SEPA Threshold: Washington's Emerging Preference for Efficiency over Accuracy*, 37 GONZ. L. REV. 403, 403, 428-29 (2002) (examining the exchange of environmental information under a Washington state statute); Rose, *supra* note 153, at 1169 (explaining that environmental impact review shares some characteristics with mediation, such as collecting information).

¹⁶³ See, e.g., N.Y. ENVTL. CONSERV. LAW § 8-0109(2)(d), (2)(j) (McKinney Supp. 2010).

¹⁶⁴ See, e.g., *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008).

¹⁶⁵ See, e.g., *Wendy's Old Fashioned Hamburgers of N.Y., Inc. v. Bd. of Appeal*, 909 N.E.2d 1161, 1172-73 (Mass. 2009) (ordering grant of special permit and variance because remand "would delay an inevitable result").

happens, the final decision on the developer's project will be based on no more information than would be available at the time of any settlement of the developer's claim. As a result, it is not clear to what extent restricting settlement will ensure a fuller information base for zoning decisions.

3. Settlement Restrictions as a Mechanism for Assuring Participation

"Voice" plays multiple roles within the mediation model of land use regulation. Not only does voice act to insure informed decision making, it also lends legitimacy to the ultimate decision made by municipal officials.¹⁶⁶ When constituents have an opportunity to participate in local political decisions, the chances increase that they will accept even determinations adverse to their interests.¹⁶⁷

On the participation score, easy settlement of litigation between a developer and the municipality presents a problem. Neighbors, who have prevailed before the local board of trustees or zoning board of appeals, now discover that their victory may have been pyrrhic – because the developer has, through negotiation conducted without broad neighborhood participation, obtained relief denied to it through the ordinary, open, political channels.

Of course, when a dispute between a developer and the municipality is resolved through litigation, there will generally be no opportunity for neighbor participation. But at least if the litigation continues through to judgment, municipal officials will have advanced, in a public forum, the position the municipality endorsed through the political processes. Moreover, the judicial system itself is imbued with a sense of legitimacy in resolving disputes, reducing any sense of unfairness to non-participating neighbors.¹⁶⁸ Closed-door settlements, by contrast, have neither of these features. As a result, easy settlement, without neighbor participation, or even an opportunity for neighbors to be heard, creates legitimacy problems within the mediation model.

4. Settlement Restrictions as a Constraint on Neighbor Capture

Another possible justification for restrictions on settlement focuses on protecting against inefficiencies generated by neighbor capture of the regulatory process. Suppose municipal officials know that all actions that disgruntled developers bring will be litigated to final judgment. Those officials now have an incentive to act reasonably in imposing restrictions on a developer, because unreasonable restrictions generate a high risk of loss in

¹⁶⁶ See Melvyn R. Durchslag, *Forgotten Federalism: The Takings Clause and Local Land Use Decisions*, 59 MD. L. REV. 464, 486 (2000) (observing that participatory opportunities in resolving land use disputes afford those opposing the decision "the ability to help frame the . . . debate"); Rose, *supra* note 153, at 1168.

¹⁶⁷ See Fenster, *supra* note 143, at 670.

¹⁶⁸ One of the reasons judges and courts enjoy a sense of legitimacy stems from the requirement that they explain their decisions. Cf. Rose, *supra* note 118, at 899-900.

litigation, which leaves the municipality in a weaker position than if it had acted reasonably.

By contrast, one might surmise that if those same officials knew that settlement of a litigation were a possibility, they might push the envelope a bit further, enacting unreasonable regulations with the understanding that if the developer were to bring suit, the municipality could then offer to settle on terms more reasonable to the developer. That is, the possibility of subsequent settlement might lead municipal officials to act less reasonably *ex ante*.¹⁶⁹

Although some municipal officials might behave that way, the strategy will typically be a losing one if developers act rationally. The strategy depends on the assumption that the municipality will be able to retreat from unreasonable restrictions once a developer starts litigation. But that assumption depends on the developer's willingness to negotiate. The more unreasonable the municipality's original determination, the more likely the developer will prevail in the litigation, and the less willing the developer will be to settle on terms that are attractive to the municipality.¹⁷⁰ As a result, the prospect of

¹⁶⁹ Justice Scalia raised a similar fear in his opinion in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), where he wrote that he might expect that a regime in which a permit condition did not have to serve the same governmental purpose as a permissible development ban "would produce stringent land-use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land-use goals purportedly sought to be served." *Id.* at 837 & n.5.

¹⁷⁰ The process can be modeled as a two-player game in which the municipality moves first by deciding whether to act reasonably or unreasonably in evaluating a developer's application. The developer then decides whether to litigate or to settle. Assume that if the municipality enacts an unreasonable regulation, and the regulation remains in force, the developer does not develop, leaving the municipality with no costs or benefits. Assume also that if the neighbor-dominated municipality imposes "reasonable" restrictions on the developer, the resulting aggregate harm to the neighbors will be \$400,000. If, however, the developer can develop free of restrictions, the harm to the neighbors will be \$1,000,000. In this stylized example, assume the harm the development generates for the neighbors is precisely equal to the benefit to the developer.

If the municipality enacts the reasonable regulation, the developer faces an uphill battle in any litigation. Assume, for instance, that the developer has only a 10% chance of prevailing. The value of any litigation to the developer is \$60,000 (the developer has a 10% probability of reaping an additional \$600,000 in benefit). In that circumstance, the cost and delays attendant to litigation will generally make it worth the developer's while to accept the municipality's regulation. Because the municipality knows that, there is little reason for the municipality to offer any more in settlement. The result is a regulation that generates \$400,000 in benefit to the developer, and an equal cost to the neighbors.

Suppose instead that the municipality enacts an unreasonable regulation, and assume now that the developer has a 60% chance of prevailing in litigation (allowing for the extraordinary deference courts typically afford to municipal land use decisions). The expected value of the litigation to the developer is \$600,000 (60% of \$1,000,000). In the absence of doctrinal restrictions on settlement, the municipality could make a settlement offer to avoid potential loss in the litigation (and the attendant litigation costs). But the

settlement should not induce the municipality to act unreasonably, and concerns about neighbor capture do not justify doctrinal constraints on settlement.

5. Summary

Within both the plan and the public choice models of land use regulation, litigation plays a significant role in guarding against regulatory capture. Permitting unconstrained settlement does not significantly undermine that role. If the primary concern is capture by developers, the municipality will, by hypothesis, have capitulated to developers, leading to litigation by neighbors. But even if there are no doctrinal constraints on settlement, neighbors will be unlikely to settle on terms less favorable than their expected result in litigation, providing adequate protection against collusion between the municipality and developers.

Similarly, if the primary concern involves capture by neighbors, the developer is unlikely to settle on terms less favorable than those the developer believes it can obtain in litigation, so that doctrinal restraints on settlement are unnecessary to deter municipal officials from capitulating to those neighbors.

The case for doctrinal constraints on settlement is somewhat stronger within the mediation model, where the threat of litigation operates to ensure informed and participatory decision making. In particular, permitting settlements to bind persons who had no opportunity to participate in the settlement process threatens the legitimacy of the regulatory process. The next Section considers alternative mechanisms for addressing that concern while mitigating the inefficiencies associated with current doctrine.

III. POTENTIAL SETTLEMENT STRUCTURES

As Part I demonstrated, the principal doctrinal obstacle to settlement of land use litigation is the potential for attack on the settlement by affected parties – principally neighbors, but in some instances other governmental entities. Unless a doctrinal framework can preclude such attacks, settlement will remain unattractive to developers who challenge municipal land use decisions. This Part considers four alternative frameworks – one that eliminates doctrinal restrictions altogether, a second that seeks to ensure that municipal decision makers will better represent their constituents, a third that relies on judicial approval to represent non-parties to the litigation, and a fourth that relies on neighbors themselves to represent their interests.

developer would have no reason to accept such an offer unless the municipality's offer approached the value of the litigation. So long as that is true, the municipality does not obtain any better payoff by enacting an unreasonable regulation than by enacting a reasonable regulation. Hence, the rational choice for the municipality is to enact the reasonable regulation. The ready availability of settlement does not induce the municipality to enact unreasonable restrictions.

A. *Dispensing with All Doctrinal Restrictions*

Perhaps the simplest way to encourage settlement of land use disputes would be to permit municipal officials to approve settlement of litigation with a developer without requiring time-consuming subsequent approval by the relevant land use boards, with their attendant public hearings. Doctrine could accomplish virtually the same result by denying neighbors standing to challenge any settlement. The two solutions are virtually equivalent because standing would do the neighbors little good if doctrine removed any doctrinal basis on which the neighbors could frame a complaint.

Giving municipal officials a free hand to settle land use litigation would resemble the judicial approach to settlement of another class of public law litigation: administrative agency enforcement proceedings. Just as municipal officials are charged with interpreting and enforcing local land use regulations, administrative agencies are charged with enforcement of a wide variety of statutes and regulations. When an agency brings an enforcement proceeding against a regulated entity in alleged violation of a statute or regulation, the parties might want to settle, but settlement would be of little value to the regulated entity if third parties were free to challenge the settlement.

The D.C. Circuit, relying on the Supreme Court's opinion in *Heckler v. Chaney*,¹⁷¹ has held that agency decisions to settle enforcement proceedings are unreviewable.¹⁷² The court has applied the presumption to settlements that are forward-looking as well as backward-looking.¹⁷³ Thus, in addition to

¹⁷¹ 470 U.S. 821 (1985). In *Chaney*, the Supreme Court held that an agency's decision not to bring an enforcement proceeding is presumptively unreviewable, relying on section 701(a)(2) of the Administrative Procedure Act, *id.* at 832, which creates an exception to the Act's judicial review provisions in cases where "agency action is committed to agency discretion by law," 5 U.S.C. § 701(a)(2) (2006). In concluding that enforcement decisions are committed to agency discretion, the Court reasoned, analogizing to principles of prosecutorial discretion, that agencies are in the best position to assess whether enforcement resources are best spent on pursuing a particular alleged violation, and on whether the enforcement proceeding is likely to succeed. *Chaney*, 470 U.S. at 831-32.

Chaney itself involved a challenge by death row inmates to the FDA's failure to bring an enforcement action against states that planned to use drugs for lethal injections even though the FDA had not approved the drugs for that purpose. *Id.* at 823. Perhaps tongue-in-cheek, the challengers contended that the FDA was required to approve the drugs "as 'safe and effective' for human execution" and that the FDA should affix warnings to the drugs stating that "they were unapproved and unsafe for human execution." *Id.* at 824.

¹⁷² *Ass'n of Irrigated Residents v. EPA*, 494 F.3d 1027, 1030-31 (D.C. Cir. 2007); *Balt. Gas & Elec. Co. v. Fed. Energy Regulatory Comm'n*, 252 F.3d 456, 461 (D.C. Cir. 2001); *N.Y. State Dep't of Law v. FCC*, 984 F.2d 1209, 1213 (D.C. Cir. 1993); *Schering Corp. v. Heckler*, 779 F.2d 683, 686 (D.C. Cir. 1985). The Third Circuit also applied the presumption of nonreviewability in *Mahoney v. U.S. Consumer Products Safety Commission*, 146 F. App'x 587, 589 (3d Cir. 2005).

¹⁷³ Lisa Bressman has criticized application of the presumption to cases in which the agency abstains from enforcing statutes and rules against future conduct. She contends that

settlements in which the agency required a regulated entity to make payments for past violations,¹⁷⁴ the presumption applies to settlements by which the agency agreed to abstain from taking action for a specified period of time,¹⁷⁵ and settlements which required the regulated party to take action in the future.¹⁷⁶ The presumption applies without regard to the stage of the dispute during which the parties reach settlement.¹⁷⁷

In the typical agency enforcement provision, then, the presumption of nonreviewability effectively confers on agencies broad power to settle with regulated entities.¹⁷⁸ As a result, the potential for third-party claims should not significantly interfere with the incentives of the agency and regulated entities to settle their disputes.¹⁷⁹

“[s]ince the societal interest in preventing future harms to statutory beneficiaries is ‘more focused and in many circumstances more pressing’ than the societal interest in punishing the past conduct of particular individuals, it often will justify increased judicial review and reduced administrative control.” Lisa Schultz Bressman, *Judicial Review of Agency Inaction: An Arbitrariness Approach*, 79 N.Y.U. L. REV. 1657, 1695 (2004) (quoting *Chaney*, 470 U.S. at 847-48 (Marshall, J., concurring in judgment)).

¹⁷⁴ See *N.Y. State Dep’t of Law*, 984 F.2d at 1212 (describing consent decree under which regulated telephone companies accused of overcharges agreed to make “voluntary” contributions to the U.S. Treasury in lieu of forfeitures).

¹⁷⁵ See *Schering*, 779 F.2d at 685.

¹⁷⁶ See *Ass’n of Irrigated Residents*, 494 F.3d at 1029 (describing agreements in which agency settled with animal feed operations on terms that required operations to help fund study and to permit facilities to be monitored in the study); *Balt. Gas & Elec. Co.*, 252 F.3d at 457 (stating that agency agreed to settle on terms that required natural gas vendors to determine whether there was demand for increased capacity, and, if so, to make that capacity available to customers).

¹⁷⁷ Thus, the court has applied the presumption when the settlement followed agency initiation of enforcement proceedings, see *N.Y. State Dep’t of Law*, 984 F.2d at 1212, when the settlement preceded any proceedings, see *Ass’n of Irrigated Residents*, 494 F.3d at 1035, and when the settlement followed a declaratory judgment action by a regulated entity, see *Schering*, 779 F.2d at 684-85.

¹⁷⁸ By applying the presumption, courts have often avoided the standing issue. For instance, in *Ass’n of Irrigated Residents*, 484 F.3d 1027, the agency disputed challengers’ standing to contest a settlement, but the D.C. Circuit held that the presumption of nonreviewability deprived the court of subject matter jurisdiction. *Id.* at 1030-31. The court thus disposed of the standing claim in a footnote: “Although petitioners’ standing was also challenged, this court is not bound to consider jurisdictional questions in any particular order.” *Id.* at 1030 n.1.

¹⁷⁹ Because the presumption is rebuttable, limited potential for third-party actions remains. *Heckler v. Chaney* makes it clear that Congress may limit an agency’s enforcement decision. 470 U.S. 821, 832-33 (1985). For an application of the exception, see *FEC v. Akins*, 524 U.S. 11, 25 (1998) (holding that where the agency’s decision not to enforce a disclosure requirement against a particular organization rested, even in part, on a misconstruction of statutory language, voters could challenge the agency’s interpretation of the language, and hence the agency’s decision not to enforce). But the D.C. Circuit, in

Unfortunately, the analogy between settlement of land use litigation and settlement of federal agency litigation is imperfect. First, federal agency officials typically have more information at their disposal than do municipal officials. Federal agencies are staffed by well-trained, full-time officials. Local zoning officials, by contrast, are often lay volunteers dependent on the parties they regulate for critical information.¹⁸⁰ As a result, permitting unrestrained settlement raises concerns not present in the federal agency context.

Second, federal agencies do not depend on political participation for their legitimacy. Instead, agencies are accountable to the political branches of the federal government.¹⁸¹ Within the Madisonian framework, the wide range of issues and the need for each interest group to build coalitions prevents domination of the political branches by any single faction.¹⁸² Municipal zoning officials, by contrast, do not enjoy comparable insulation from faction; wide and visible participation by constituents may function as a substitute mechanism for building legitimacy. Allowing officials to settle litigation without input from the parties who prevailed before the relevant zoning agency threatens to undermine that legitimacy.

settlement cases, has been careful to assure that no statute operated to rebut the presumption of nonreviewability. See, e.g., *Ass'n of Irrigated Residents*, 494 F.3d. at 1032; *Balt. Gas & Elec. Co.*, 252 F.3d at 460 ("Nowhere does the act place an affirmative obligation on FERC to initiate an enforcement action, nor does it impose limitations on FERC's discretion to settle such an action.").

¹⁸⁰ A number of states have enacted mandatory training programs for local zoning officials out of recognition that most decisions are made by inexperienced volunteers unfamiliar with the issues they are required to address. See Anthony J. Samson, *A Proposal to Implement Mandatory Training Requirements for Home Rule Zoning Officials*, 2008 MICH. ST. L. REV. 879, 881-82, 897-98.

¹⁸¹ See, e.g., Jerry L. Mashaw, *Recovering American Administrative Law: Federalist Foundations, 1787-1801*, 115 YALE L.J. 1256, 1260-61 (2006); Lisa Schultz Bressman, *Procedures as Politics in Administrative Law*, 107 COLUM. L. REV. 1749, 1809-14 (2007) (concluding that the Supreme Court's cases can be understood as establishing a set of mutual political checks, by Congress and the President, on agency action); Mark Seidenfeld, *Why Agencies Act: A Reassessment of the Ossification Critique of Judicial Review*, 70 OHIO ST. L.J. 251, 298 (2009).

¹⁸² In *Federalist Paper No. 10*, Madison, after discussing the evils of democratic government within a small territory, wrote:

Extend the sphere, and you take in a greater variety of parties and interests; you make it less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other.

THE FEDERALIST NO. 10, at 60 (James Madison) (The Lawbook Exch., Ltd. & Martino Publ'g spec. ed. 2001) (1788).

B. *The Representation-Reinforcing Approach: Public Hearings as a Safeguard*

One way to address the information and participation deficit generated by an approach that permits unrestrained settlement would be to require that municipal officials conduct public hearings on proposed settlements, and vote to approve those settlements only at the close of the public hearing. Once the municipal body concludes the hearing and approves the settlement, litigation challenging the settlement would be foreclosed. Indeed, three New Jersey lawyers, two of them judges, proposed such an approach about fifteen years ago.¹⁸³

Like the unrestrained settlement approach, requiring public hearings as a safeguard finds an analog in federal administrative law. When a regulated party challenges an agency rule that was the product of notice-and-comment rulemaking, a settlement that resulted in a change in the rule would require a second round in the notice-and-comment process.¹⁸⁴ Moreover, liberal standing rules for challenges to administrative rules limit the finality of settlement.¹⁸⁵

Within the agency context, at least two factors mitigate any disincentive to settlement created by the requirement that rules developed within a settlement be subjected to notice-and-comment procedures. First, because the agency's professional staff will typically have greater capacity to assess the consequences of settlement than will local officials, the likelihood is smaller that facts will emerge in the notice-and-comment process that would lead the agency to upset the settlement. Second, and more important, the agency that

¹⁸³ Richard S. Cohen, Douglas K. Wolfson & Kathleen Meehan DalCortivo, *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit is this Anyway?*, 23 SETON HALL L. REV. 844, 868-71 (1993).

¹⁸⁴ The Supreme Court has held that an agency may not repeal a rule promulgated through the notice and comment process without going through the same notice and comment process. *Motor Vehicle Mfrs. Ass'n of the U.S. v. State Farm Mut. Auto Ins. Co.*, 463 U.S. 29, 41-42 (1983); see also Jeffrey M. Gaba, *Informal Rulemaking by Settlement Agreement*, 73 GEO L.J. 1241, 1245-46 (1985); Rossi, *supra* note 160, at 1051 (explaining that judicial and executive review "helps to ensure that the public interest is not skirted through a rulemaking settlement and its implementation"). Professor Rossi argues, however, that in some cases an agency may circumvent notice and comment requirements by adopting interpretive rules or policy statements not subject to APA review. *Id.* at 1055.

¹⁸⁵ Article III's case or controversy requirement places limits on the power of a public citizen to challenge administrative rules unless the litigant can show concrete and particularized injury. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). But the D.C. Circuit has held that the Chamber of Commerce has standing to challenge the SEC's regulation of mutual funds because it invested in, and wanted to continue to invest in, funds not governed in accordance with the SEC's rule. *Chamber of Commerce of the United States v. SEC*, 443 F.3d 890, 896-97, 899 (D.C. Cir. 2006). For discussion of standing rules more generally, see Richard J. Pierce, Jr., *The Role of the Judiciary in Implementing an Agency Theory of Government*, 64 N.Y.U. L. REV. 1239, 1275-85 (1989).

agrees to the settlement is the same agency that will conduct the rulemaking process and promulgate the new rule.¹⁸⁶ By contrast, in the land use process, the division of authority among local boards means that the public hearing, and the decision following the hearing, will often be made by a group of lay officials who played no role in the settlement negotiation. From the developer's standpoint, the disparity in parties increases the risk – and decreases the value – of settlement.

Within the land use context, a number of problems suggest that a public hearing requirement offers no panacea. First, what presumptions would surround the public hearing? If the hearing were designed to be largely a rubber stamp of a settlement already reached, the hearing would serve little purpose. But if the hearing were designed to give serious consideration to substantive objections to a settlement, the prospect of public hearings would generate a strong disincentive to settlement. A developer considering whether to settle rather than litigate would discount the value of settlement to reflect two unattractive alternatives: (1) the municipality might disapprove the settlement entirely after conducting the hearing; and (2) the municipality might condition approval of the settlement on additional concessions by the developer – resulting in the need for additional negotiations and, perhaps, public hearings.

Second, a public hearing requirement inevitably opens the settlement process to attack on the grounds that the hearing was inadequate. That is, aggrieved neighbors might allege that the municipality provided inadequate notice of the hearing, or rely on other procedural inadequacies. If courts or legislatures were to impose a hearing requirement on municipal decision makers, it would be difficult to justify precluding aggrieved citizens from attacking settlements for failure to comply with the mandated procedures.

The problem, then, is that if settlements could be insulated from subsequent attack only if the municipality conducted a serious public hearing addressed to the merits of the settlement, developers would not be significantly more likely to settle than they are under current law, which typically conditions settlements on the municipality's compliance with statutory or common law procedures for amending ordinances or granting variances or permits – procedures which generally require public hearings.

Conversely, if the municipality were required only to conduct a pro forma public hearing on the settlement, but were contractually (or perhaps even morally) bound to abide by the settlement agreement, the public hearing

¹⁸⁶ Another factor mitigating any disincentive to settlement is the challenger's belief that it might have more influence in crafting a new rule as part of the settlement process than it might have in the more open notice-and-comment process that would arise after judicial invalidation of the original rule. See Cary Coglianese, *Litigating Within Relationships: Disputes and Disturbance in the Regulatory Process*, 30 LAW & SOC'Y REV. 735, 757 (1996); Rossi, *supra* note 160, at 1029-30.

requirement will not reduce the agency costs that generated the hearing requirement in the first place. The result, therefore, is that a public hearing requirement offers little promise for resolving the settlement dilemma.

C. *Judicial Approval: The "Consent Decree" Approach*

A third approach to settlement would rely on judicial approval of the settlement as a mechanism for precluding subsequent attacks on the settlement. This approach would effectively transform a settlement of land use litigation into a "consent decree" common in other areas of public law litigation. Once litigation begins, if parties choose to settle, they could seek judicial approval of the settlement. The court would then review the terms of the settlement – perhaps after conducting a "fairness" hearing – and judicial approval would preclude non-parties from challenging the settlement.¹⁸⁷

Consent decrees have become common in federal court challenges to local zoning laws, particularly when the challenge alleges housing discrimination in violation of federal law.¹⁸⁸ In recent years, some states have permitted developers and municipalities to use the consent decree approach in ways that would permit the litigating parties to bypass state law procedural requirements.¹⁸⁹

The consent decree approach removes some of the uncertainty of the representation-reinforcing approach, and therefore makes settlement more attractive. One would expect that, especially over time, judicial reaction to settlement agreements would become predictable – or at least considerably more predictable than the reaction of elected officials after contentious public hearings – making it possible for settling parties to account for judicial reactions at the time they structure their settlements.¹⁹⁰ Moreover, subsequent attacks on judicially-approved settlements are far less likely to be successful than subsequent attacks on settlements reached without judicial imprimatur.¹⁹¹

¹⁸⁷ See Larry Kramer, *Consent Decrees and the Rights of Third Parties*, 87 MICH. L. REV. 321, 322 (1988) (discussing two critical features of consent decrees, the fairness hearing and the "collateral attack bar").

¹⁸⁸ See, e.g., *United States v. Yonkers Bd. of Educ.*, 29 F.3d 40, 42 (2d Cir. 1994); *Greater New Orleans Fair Hous. Action Ctr. v. St. Bernard Parish*, 641 F. Supp. 2d 563, 565 (E.D. La. 2009).

¹⁸⁹ See, e.g., *City of Torrington v. Zoning Comm'n of Harwinton*, 806 A.2d 1020, 1024 (Conn. 2002). But see David L. Callies, *The Use of Consent Decrees in Settling Land Use and Environmental Disputes*, 21 STETSON L. REV. 871, 885 (1992) (concluding that, as of 1992, "[s]tate courts appear less likely to permit consent decrees that adversely affect local zoning and environmental laws").

¹⁹⁰ See Sanford I. Weisburst, *Judicial Review of Settlements and Consent Decrees: An Economic Analysis*, 28 J. LEGAL STUD. 55, 62-63 (1999).

¹⁹¹ See Kramer, *supra* note 187, at 322.

While making settlement easier, judicial review also addresses some of the agency costs that play central roles in the plan and public choice models.¹⁹² If we typically trust courts to police municipal officials who would too readily depart from a rational plan (the plan model) or who would collude too readily with dominant factions (the public choice model), the consent decree approach holds out promise not present with the representation-reinforcing approach.

Nevertheless, the consent decree approach is not without its problems. First, a court has limited information on which to evaluate the proposed consent decree.¹⁹³ The municipality and the developer both support the decree, and are unlikely to make a case for setting it aside.¹⁹⁴ Inviting neighbors (or the public at large) to participate in a "fairness" hearing might augment the information available to the court, but collective action problems might limit neighbor participation.¹⁹⁵

Second, even if a court has multiple perspectives on the consent decree, the court faces another problem: how should it deal with that information? The only formal parties to the proceeding are the developer and the municipality. A court has no basis for superimposing its own views on the parties or for mediating a dispute between parties and non-parties;¹⁹⁶ at most, it can decide to condition its approval of the consent decree on changes in the agreed-upon terms. That, however, sends the parties back to the bargaining table, and if courts take that approach too often, the results will be to make settlement more costly.

Finally, if a court were to issue consent decrees based only on the request of the developer and the municipality, the court would be treating neighbors and members of the public only as information sources, not as right-bearing individuals. That is, to be of significant value, the consent decree would cut off the legal rights of neighbors without their permission, and without any adjudication of the merits of their legal position.¹⁹⁷ By contrast, if the municipality had approved a developer's proposal before the start of any litigation, the neighbors would have had standing to challenge the approval. The effect of the consent decree, then, would be to preclude neighbors from

¹⁹² See Weisburst, *supra* note 190, at 58-59 (discussing judicial review of settlements as a response to inadequate representation).

¹⁹³ Judith Resnick, *Judging Consent*, 1987 U. CHI. LEGAL F. 43, 101; Weisburst, *supra* note 190, at 64.

¹⁹⁴ Fiss, *supra* note 10, at 1082.

¹⁹⁵ Weisburst, *supra* note 190, at 65-66.

¹⁹⁶ Cf. Kramer, *supra* note 187, at 353-55 (observing that third parties cannot force adjudication of a claim if two parties wish to settle; at best, a third party can bring a separate action to enforce its own rights).

¹⁹⁷ As Larry Kramer notes, consent decrees also have the potential to lower the cost of enforcement of a settlement agreement. See *id.* at 326. That advantage is often of little importance in the land use context because once the project has been approved and completed, no further issues are likely to generate any need for enforcement of the settlement agreement.

raising legal issues that they previously had standing to raise, even though they were not parties to the proceeding that cut off their rights. That result is in tension with foundational principles of claim preclusion.¹⁹⁸ It is also entirely inconsistent with the mediation model of land use regulation; neighbors who negotiated – successfully – for a particular result before municipal officials now find themselves excluded from any participation in a settlement that materially changes the result of their negotiation.

D. *The Participation Approach*

Perhaps the most promising approach to facilitating settlement would give neighbors and other aggrieved parties the opportunity to participate in the proceeding between the developer and the municipality, and to preclude subsequent attack on any settlement by parties who choose not to participate. This approach builds, of necessity, on the consent decree approach, because without some form of judicial imprimatur, there would be no basis for binding non-participants to any settlement.¹⁹⁹ The bar to subsequent attacks would create certainty for the parties not generally available under current doctrine, and therefore make settlement more attractive than current law. At the same time, because participating neighbors would become parties to the litigation, they would have to consent to any settlement. For this reason, a participation-based approach would be most consistent with the mediation models of land use regulation.

A developer could join neighbors and other potential objectors as defendants in a suit against a municipality, but such joinder presents conceptual difficulties because the developer is not seeking relief from those parties; instead, the developer typically wants the municipality to rescind or modify its

¹⁹⁸ *Id.* at 331-38.

¹⁹⁹ *Id.* at 331.

action.²⁰⁰ Doctrinally, the more promising avenue is to permit neighbors to intervene in the action between the developer and the municipality.²⁰¹

Giving neighbors a right to intervene would be of little value if the neighbors did not have notice of the litigation. To be effective as a device for promoting participation-based settlement, the developer would have to provide notice. Due process typically requires adequate notice to a party of a judicial proceeding when that proceeding would bar that party's legal claims.²⁰² Notice would therefore have to be provided to all potential parties who would otherwise have standing to challenge the municipality's decision to settle. But standing in land use cases is often fuzzy, making it difficult for a municipality or developer to be sure that they have provided personal notice to every person who might have standing.²⁰³ Ultimately, however, it would seem adequate to

²⁰⁰ The rules surrounding joinder of parties vary among the states. Rule 20 of the Federal Rules of Civil Procedure, used as a model in some states, permits joinder of persons as defendants "if there is asserted against them . . . any right to relief." FED. R. CIV. P. 20(a).

Rule 19, which deals with mandatory joinder, requires joinder when a person claiming an interest is so situated that adjudicating a claim in the person's absence would "as a practical matter impair or impede the person's ability to protect that interest or []leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest." FED. R. CIV. P. 19(a). The language of that provision might be broad enough to cover neighbors in a zoning or other land use dispute, but such a broad reading would require joinder in every dispute, generating significant costs even when neighbors would have little interest in participating. See Kramer, *supra* note 187, at 337-38 ("There will almost certainly be third parties who do not care enough about the adverse effects of a consent decree to initiate litigation but who will litigate once they have been made parties to an ongoing lawsuit. There is no reason to encourage such litigation.").

²⁰¹ For comparison purposes, Rule 24(a) of the Federal Rules of Civil Procedure permits intervention to any person who "claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." FED. R. CIV. P. 24(a). Dean Kramer has noted that parties subject to the collateral attack bar associated with consent decrees have had little difficulty satisfying Rule 24's requirements. Kramer, *supra* note 187, at 339-41.

²⁰² As the Supreme Court said in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950): "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 314; see also *Jones v. Flowers*, 547 U.S. 220, 234 (2006) (requiring adequate notice of tax sale of landowner's property); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 798 (1983) ("Since a mortgagee clearly has a legally protected property interest, he is entitled to notice reasonably calculated to apprise him of a pending tax sale.").

²⁰³ For instance, community and environmental groups sometimes have standing to challenge zoning or environmental regulations. See, e.g., *Save the Pine Bush, Inc. v.*

provide personal notice to all parties entitled, by statute, to notice of the zoning actions necessary to implement the settlement, and to provide notice by publication to the rest of the municipality.²⁰⁴

A developer who had no intention of settling would not be required to provide notice to neighbors or to trigger intervention rights. As a result, neighbors would not have to incur the costs associated with intervention except in those cases where the developer has signaled a willingness to settle, and where the neighbors fear that the municipality will not adequately reflect their interests in settlement negotiations.

Of course, this intervention approach entails collective action problems.²⁰⁵ No individual neighbor may find it worth her while to intervene in legal proceedings, and free rider problems may prevent organized intervention by neighbors. Ultimately, however, this problem seems less serious because precisely the same collective action problems exist when neighbors try to challenge a settlement in a collateral proceeding – the only right they would lose by failing to intervene. If neighbors would be unable to overcome those collective action problems to intervene when settlement is proposed, they would probably be equally unable to overcome them by challenging the settlement in a collateral proceeding.

Another objection to the intervention approach focuses on timing: when should neighbors be required to intervene in order to preserve a right to object to any settlement? Requiring intervention as soon as the developer challenges municipal action requires an expenditure by neighbors at a time when they have reason to believe municipal officials adequately represent their interests.²⁰⁶ On the other hand, permitting the neighbors to intervene after they learn of the settlement reduces somewhat the incentive of the developer and the municipality to settle, because the investment in settlement will be for

Common Council of Albany, 918 N.E.2d 917, 918 (N.Y. 2009). It would be practically impossible for a developer to provide notice to every potential environmental or community group with standing to challenge a development proposal.

²⁰⁴ See, e.g., N.J. STAT. ANN. § 40:55D-62.1 (West 2008). In other jurisdictions, by contrast, publication is the only notice required for land use changes. See, e.g., CAL. GOV'T CODE § 65090 (West 2010). In those jurisdictions where law requires neighbors to be alert to publication, the same notices should suffice for intervention purposes.

²⁰⁵ See Weisburst, *supra* note 190, at 65-66.

²⁰⁶ See *St. Charles Tower, Inc. v. County of Franklin*, No. 4:09CV987-DJS, 2010 U.S. Dist LEXIS 16948, at *15-16 (E.D. Mo. Feb. 25, 2010) (upholding right to intervene at the time settlement is reached, stating that intervenors had no right to intervene “while the County and BZA continued to adequately represent their interests”).

Connecticut has a process for judicial approval of settlements (essentially the consent decree approach), but the Connecticut courts have held that neighbors have a right to intervene during the approval process. See *Diamond 67, LLC v. Planning & Zoning Comm'n of Vernon*, 978 A.2d 122, 129-30 (Conn. App. Ct. 2009); see also *Kramer, supra* note 187, at 342 (suggesting that time limitation on intervention should not run until a third party “knew or should have known that his interests were threatened”).

naught if neighbors object at the eleventh hour.²⁰⁷ On balance, a rule requiring the neighbors to protect their interest by relatively “quiet” intervention – participation as a nominal party – would not seem unduly burdensome.²⁰⁸ Either alternative, however, avoids the delays the developer endures under prevailing doctrine in many jurisdictions – delays attendant to collateral litigation brought by neighbors after final resolution of the dispute between the municipality and the developer.

The intervention approach does not eliminate disincentives to settlement. If the neighbors intervene, and are sufficiently obstinate, they can effectively force the municipality and the developer to litigate to final judgment, perhaps even to appellate courts. Faced with that prospect, the developer and the municipality would have reasons to forego an investment of resources in settlement negotiations. But in many cases, neighbors will not intervene, clearing a path for developers and the municipality to negotiate a settlement. Even when neighbors do intervene, the chances for settlement are not necessarily smaller than a doctrinal framework that does not provide for intervention, but leaves any settlement open to neighbor challenge. In the current no-intervention framework, reaching an agreement with the municipality may be easier than in a regime that permits intervention, but the settlement will be of less value to the developer because of the prospect that neighbors will delay the project by bringing collateral litigation challenging the settlement. An intervention regime would eliminate the costs and delays associated with collateral litigation.

Making mediation available to the parties might further increase the likelihood of settlement. Multi-party mediation of public policy issues has become more common in recent years.²⁰⁹ Once neighbors have decided to intervene in a proceeding brought by the developer, they have little to lose by seeking mediation of the dispute; any mediated settlement will require their

²⁰⁷ See *T.H. Props., L.P. v. Upper Salford Twp. Bd. of Supervisors*, 970 A.2d 495, 500 (Pa. Commw. Ct. 2009) (holding that intervention had come too late because intervenor “or other interested residents could have petitioned to intervene when the land use appeal was filed or when the Board authorized settlement negotiations”).

²⁰⁸ Professor Kramer has suggested that measuring the timeliness of a motion to intervene from a starting point before the consent decree is entered would violate due process. Kramer, *supra* note 187, at 344. That argument, however, is problematic in the land use context. Certainly, state law would be free to deny standing to neighbors to challenge municipal decisions to approve development projects, concluding that municipal officials adequately represent neighbor interests. In light of that possibility, it is hard to see how the state could violate due process by embracing a more limited rule giving those neighbors standing, but requiring them to assert any rights as soon as litigation between the developer and the municipality commences.

²⁰⁹ See Carrie Menkel-Meadow, *The Lawyer as Consensus Builder: Ethics for a New Practice*, 70 TENN. L. REV. 63, 73 (2002); Carrie Menkel-Meadow, *When Litigation Is Not the Only Way: Consensus Building and Mediation as Public Interest Lawyering*, 10 WASH. U. J.L. & POL’Y 37, 52-53 (2002).

consent,²¹⁰ and they may be able to negotiate a settlement that leaves them better off than the likely result of litigation. The prospect of a mediated and binding settlement, avoiding the prospect of collateral litigation, will, in turn, make negotiation and mediation more attractive to the developer.²¹¹

Implementing an intervention-based system would, in most jurisdictions, require legislative action. The scope of any legislation, however, would vary depending on current law within the jurisdiction. At a minimum, however, legislation would have to provide explicitly that failure to intervene would preclude parties from collaterally attacking settlement of a litigation in which the party could have intervened – a change from existing preclusion law in most jurisdictions. Explicit language overriding public hearing or environmental review requirements might also be necessary or desirable. This approach appears to provide the best alternative for promoting settlement without risking other significant land use values.

CONCLUSION

In most jurisdictions, current doctrine limits the power of a municipality to settle land use disputes without attaching conditions that reduce the value of settlement to developers. As a result, more land use litigation proceeds to judgment than would be the case in a regime that permitted free settlement.

Although the prevailing regime would appear inefficient in a world without agency costs, the structure of land use law generally recognizes that agency costs are a matter of significant concern. Some models of land use law fear that municipal officials will be captured by dominant interest groups, and value litigation as a check on capture. Within these models, giving municipal officials unconstrained power to settle litigation will not significantly undermine the value of litigation as a check on official behavior. Within the mediation model of land use regulation, a model that treats municipal officials as mediators in disputes between developers and neighbors, unconstrained settlement presents information and legitimacy problems, because settlement threatens to leave one relevant interest group – and the information it might bring to the table – out of the settlement process.

Even though some constraints on settlement of land use disputes may be necessary in light of information and legitimacy concerns, there is little reason

²¹⁰ See Goldfien, *supra* note 159, at 449 (commenting that one of the advantages of mediation is that parties can discuss issues in the absence of “the imminent threat of an adverse decision hanging over the proceedings”).

²¹¹ Another alternative, a close cousin to mediation, is a “consensus building” approach. Rather than insisting that all parties agree on each aspect of a proposal, the consensus building approach first has the parties agree to abide by a near-unanimity rule. With such an approach, all parties have an incentive to compromise to obtain the requisite consensus, without fear that a single holdout will block consensus. See Lawrence Susskind, *Deliberative Democracy and Dispute Resolution*, 24 OHIO ST. J. ON DISP. RESOL. 395, 401-02 (2009).

to assume that the set of constraints imposed by current doctrine are optimal. In particular, information and legitimacy concerns would best be addressed by requiring parties who might object to a settlement to intervene in the litigation between developer and municipality rather than retaining the right to challenge any settlement in collateral litigation.