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# WINDFALLS, WIPEOUTS, GIVINGS, AND TAKINGS IN DRAMATIC REDEVELOPMENT PROJECTS: BARGAINING FOR BETTER ZONING ON DENSITY, VIEWS, AND PUBLIC ACCESS

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**Abstract:** Large-scale redevelopment projects such as Boston’s “Big Dig” bestow numerous public benefits—often without charge—to nearby property owners. In the case of the Big Dig, these benefits include twenty-seven acres of newly created parkland, where once an elevated freeway stood. Beyond the immediate and obvious beneficiaries are nearby landowners seeking “better zoning” that might include a relaxation of maximum height or floor area ratios to enjoy the new view. This Article explores the often hidden impact of the nearby landowners’ means of accomplishing their desired result: bargaining with municipalities for private, derivative benefits. The Article compares legislative and judicial responses to land use bargaining in California and Massachusetts, states with dramatically different approaches to land use planning. The Article concludes that bargaining in the absence of a guiding land use plan—the Massachusetts “model”—results in a chaotic land use policy and unpredictable development.

## INTRODUCTION

When completed in 2007, Boston’s Central Artery/Tunnel Project (commonly referred to as the “Big Dig”) will have replaced the city’s elevated downtown expressway, the Central Artery, with a two-mile, twin-decked tunnel and opened over twenty-seven acres of pre-

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viously inaccessible land to public use. The result will be to re-unite a city once divided—like so many other American cities—by an above-ground highway system laid out in the 1950s.<sup>1</sup> While the obvious beneficiaries of one of the nation's largest ever public works projects will be the public, tangible and quantifiable benefits also will accrue to readily identifiable individuals and business entities.<sup>2</sup>

Consider, for example, the cylindrical office towers One and Two International Place, built on the edge of Boston's financial district in the late 1980s. Until the spring of 2004, these structures stood within forty feet of the elevated highway. The offices of several of Boston's most prominent firms—at least those situated on floors six through forty-six—overlooked traffic so dense and continuous that the Central Artery was labeled as “one of the most congested highways in the United States.”<sup>3</sup> Occupants below floor six had views of rusting steel beams and support pylons for the elevated highway.

Today, however, all of these office floors overlook what will shortly become a public park, greenway, botanical garden, and open space festooned with public art.<sup>4</sup> The noise and visual assault of the elevated highway is, literally, out of mind and sight, having been “depressed” fifty to seventy feet beneath its former location.<sup>5</sup> This seemingly magical transformation from blight to beauty has granted an enormous public benefit to the owners and tenants of One and Two International Place, as well as those of hundreds of similarly situated properties.

This type of “giving” has been the focus of several excellent articles over the past thirty years, spurred by Professor Donald Hagman's work, *Windfalls for Wipeouts: Land Value Capture and Compensation*.<sup>6</sup> More recent articles have sought to analogize “givings” with regula-

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<sup>1</sup> See Mass. Tpk. Auth., *Project Background*, at <http://www.masspike.com/bigdig/background/index.html> (last visited Feb. 12, 2005); Mass. Tpk. Auth., *Tunnels and Bridges*, at <http://www.masspike.com/bigdig/background/tunnels.html> (last visited Feb. 12, 2005).

<sup>2</sup> See Mass. Tpk. Auth., *Project Background*, *supra* note 1.

<sup>3</sup> See *id.*

<sup>4</sup> See Mass. Tpk. Auth., *Boulevard Creation and Streetscapes*, at <http://www.masspike.com/bigdig/parks/boulevard.html> (last visited Feb. 12, 2005); Mass. Tpk. Auth., *Rose Kennedy Greenway*, at <http://www.masspike.com/bigdig/parks/greenway.html> (last visited Feb. 12, 2005).

<sup>5</sup> See Mass. Tpk. Auth., *What Are We Digging?*, at <http://www.masspike.com/bigdig/background/digging.html> (last visited Feb. 12, 2005).

<sup>6</sup> WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION (Donald G. Hagman & Dean J. Misczynski eds., 1978).

tory takings.<sup>7</sup> The argument made by givings advocates is that if a court can order compensation due when it concludes that a regulatory taking has occurred, the same fact pattern—only in reverse—should support an order requiring the beneficiary of a “giving” to pay the government for the benefits bestowed upon it. Simply put, givings theory argues that instead of government compensating the landowner for that which was taken, the landowner should pay the government for that which was given.

While requiring individual beneficiaries of projects such as the Big Dig to pay for the benefits directly bestowed has some appeal because the reciprocity of advantage is complete,<sup>8</sup> we recommend against adoption of this theory. Our principal concern, and that expressed by others before us, is that givings awards likely would lead to increased approvals of regulatory takings claims; such an outcome could easily upset the delicate balance currently preserved by the absence of anything beyond basic ad hoc factual inquiries for each and every takings claim.<sup>9</sup>

And while we decline to advocate for the adoption of formalized givings jurisprudence for projects such as the Big Dig, we believe a derivative issue is of concern: the temptation to bargain away local land use controls in proximity to the newly created public benefit.

The bargaining away is tantamount to a giving, but more subtle and more destructive to the basic tenets of land use planning.<sup>10</sup> Whereas an overt giving such as the creation of twenty-seven acres of

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<sup>7</sup> See Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 1 (2004); see also Daniel D. Barnhizer, *Givings Recapture: Funding Public Acquisition of Private Property Interests on the Coasts*, 27 HARV. ENVTL. L. REV. 295, 300–05 (2003).

<sup>8</sup> “The conclusion seems to rest upon the assumption that in order to justify such exercise of the police power there must be ‘an average reciprocity of advantage’ as between the owner of the property restricted and the rest of the community . . . .” *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 422 (1922) (Brandeis, J., dissenting).

<sup>9</sup> See *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978); *Pa. Coal Co.*, 260 U.S. at 413. In *Penn Central*, Justice Brennan, writing for the majority, reviewed the Court’s takings jurisprudence:

In engaging in these essentially ad hoc, factual inquiries, the Court’s decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. So, too, is the character of the governmental action.

438 U.S. at 124 (citations omitted).

<sup>10</sup> See *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 369 (Mass. 2003).

public open space across from an office building is a transparent gift, the beneficiaries of this gift are not limited to immediate neighbors. Indeed, while the owners and tenants of One and Two International Place clearly are beneficiaries, perhaps they are merely incidental beneficiaries. Perhaps instead, the residents of the city of Boston and the Commonwealth of Massachusetts are the true winners in measuring benefit.

A different conclusion results where subsequent to the “public” giving, incremental petitions for rezoning or other private land use entitlements occur within proximity to the public works project. For example, only time will tell how many property owners that *could have* a view of the new greenway and public parks *but for* a zoning change will now petition the City Council for zoning relief.

Our concern for the derivative impacts of projects such as the Big Dig is particularly acute in non-plan states, such as Massachusetts, which do not require any rational connection between planning and land use controls.<sup>11</sup> For example, the Massachusetts Supreme Judicial Court (SJC) recently approved a town’s decision to rezone land for an energy facility where the rezoning was contingent upon the payment to the town of \$8 million.<sup>12</sup> Using this logic, property owners within feet, blocks, or even greater distances could simply purchase more beneficial zoning.<sup>13</sup> There is every indication that property owners are lining up to purchase more attractive zoning in the wake of this 2003 SJC ruling.<sup>14</sup>

The result can be noticeably different in plan states, which require a level of consistency between a plan and resulting regulatory instruments such as zoning and subdivision control.<sup>15</sup> A plan state re-

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<sup>11</sup> See *id.*; *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1022 (Mass. App. Ct. 2002).

<sup>12</sup> *Durand*, 793 N.E.2d at 363–64.

<sup>13</sup> See *id.* at 363.

<sup>14</sup> Equally remarkable to the holding in *Durand* is the SJC’s decision in *Zuckerman v. Town of Hadley*, 813 N.E.2d 843 (Mass. 2004). In *Zuckerman*, the SJC struck down a regulation limiting the number of lots within a subdivision that could be built upon within any 12-month period, concluding that the bylaw did not serve a permissible public purpose. *Id.* at 851. The SJC reprimanded the town for its failure to link the growth management regulation to studies or planning for future growth, but ignored the fact that no legal framework for developing such studies exists in the state. *Id.* at 848–49. Additionally, it ignored an earlier Appeals Court ruling that “[n]either the master plan itself nor the law requires that zoning be in strict accordance with a master plan.” See *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998).

<sup>15</sup> See Daniel J. Curtin, Jr., *Ramapo’s Impact on the Comprehensive Plan*, 35 URB. LAW. 135, 147 (2003).

quires an amendment to the comprehensive plan as a condition precedent to the adoption of the new and beneficial zoning.<sup>16</sup> Thus, while the results of bargaining in plan versus non-plan states may be the same—the zoning is changed—the process is very different.<sup>17</sup> In a non-plan state, the municipality has sold—bargained—some aspect of its land use controls in exchange for some promise.<sup>18</sup> This transaction is completed outside of a plan and has no relationship to a plan.<sup>19</sup> In a plan state, however, while the end result may be identical, the process ensures that the bargaining is in accordance and consistent with a plan or planning analysis.<sup>20</sup>

The result of the bargaining, whether in non-plan states or in plan states, is derivative of the public giving, which in many ways defines land use planning—or lack of it—in the United States. Rather than plan for the derivative uses or demands that would logically follow a public project—for example, gasoline service stations at exits off a state highway system—these needs develop independently and haphazardly following the completion of the project. This predictable outcome, however, need not follow large-scale projects such as the Big Dig; the result can be avoided by careful attention to, and respect for, the integrity of planning and zoning, and the rejection of the sale or bargaining away of land use control, which is an insidious form of givings.

As discussed below, while bargaining may be a basic human behavioral characteristic carried forward from the days of bartering and exchange in the public marketplace, bargaining without a plan against which the legitimacy of the bargain can be measured will lead to chaotic development.<sup>21</sup> This simple requirement—having a plan which guides growth, against which decisions regarding land use can be evaluated—is what separates plan states from non-plan states.<sup>22</sup> Plan states impose the guidance requirement; non-plan states do not.<sup>23</sup>

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<sup>16</sup> Jonathan Douglas Witten, *Carrying Capacity and the Comprehensive Plan: Establishing and Defending Limits to Growth*, 28 B.C. ENVTL. AFF. L. REV. 583, 592 (2001).

<sup>17</sup> See *id.* at 594–99.

<sup>18</sup> See *Durand*, 793 N.E.2d at 363–64, 369; *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1022–23 (Mass. App. Ct. 2002).

<sup>19</sup> The Massachusetts statute calling for a master plan does not require zoning to be subsequently in accordance with the plan, but rather merely that town officials, prior to making a decision, take land use into consideration. See MASS. GEN. LAWS ch. 41, § 81D (2002).

<sup>20</sup> See Curtin, *supra* note 15, at 147; see also Witten, *supra* note 16, at 594–99.

<sup>21</sup> See Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 URB. LAW. 75, 82 (2003).

<sup>22</sup> See *id.* at 76.

<sup>23</sup> See *id.*

We discuss below the clear distinction between plan and non-plan states using two extreme examples. In California, a true plan state, the courts have consistently ruled that land use ordinances, entitlements, requests, approvals, or the like, when inconsistent with the plan, are void *ab initio*.<sup>24</sup> In Massachusetts, a non-plan state, the courts have regularly ruled that ordinances need not be in accordance with a plan and that, as a legal or practical matter, a plan has no meaning.<sup>25</sup>

The problem encountered in non-plan states such as Massachusetts, as discussed below, is the absence of any predictive tool to determine the future of land use decisions.<sup>26</sup> Thus, particularly in the wake of large-scale projects as noted above, not only are subsidiary pressures to rezone for more financially attractive uses inevitable, but the results are also unpredictable. Whereas plan states provide for logical and predictable bargaining because the bargaining will be consistent with the plan,<sup>27</sup> non-plan states simply allow the bargaining in a manner that effectively resembles the unchecked mercantile market places of centuries past.<sup>28</sup>

There are, of course, a whole host of problems with the latter. First, as the bargaining is not tied to a plan, there are few bargains that will fail to pass court scrutiny.<sup>29</sup> Second, precisely because of the first problem, the neighborhood abutting the bargained-for land use has little, if any, opportunity to rationally contest the bargaining: since the bartering need not be consistent with a plan, anything goes.<sup>30</sup> Third, unlike produce for sale at a weekend farmer's market, the police powers are not a fungible product.<sup>31</sup> While a bushel of apples can readily be exchanged for a five-dollar bill, is it possible to quantify the price that should be paid for the requested rezoning?

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<sup>24</sup> See, e.g., *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317, 322 (Cal. 1990).

<sup>25</sup> See, e.g., *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998).

<sup>26</sup> See *id.*

<sup>27</sup> See Curtin, *supra* note 15, at 147.

<sup>28</sup> See Sullivan & Michel, *supra* note 21, at 82.

<sup>29</sup> See *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 363–64, 369 (Mass. 2003); *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1022–23 (Mass. App. Ct. 2002).

<sup>30</sup> See *Durand*, 793 N.E.2d at 363–64, 369; *McLean Hosp.*, 778 N.E.2d at 1022–23.

<sup>31</sup> “But the power of governing is a trust committed by the people to the government, no part of which can be granted away.” *Stone v. Mississippi*, 101 U.S. 814, 820 (1879).

A pragmatic response to this question is found in “development agreements,” which are contractual tools found in plan states.<sup>32</sup> A development agreement recognizes that the marketplace—especially in the land use context—is forever pressuring for change. However, development agreements also recognize that the bargaining must be consistent and in accordance with a rationally developed plan to avoid the uncertain and chaotic outcome of bargaining in its absence.<sup>33</sup>

### I. PLAN STATES CONTRASTED WITH NON-PLAN STATES

In dealing with the derivative benefit issue of future but definite public projects, such as Boston’s Big Dig, plan states’ zoning authorities’ bargaining to achieve the appropriate land use controls would be guided by their general plans, especially in those states where the general plan is considered a constitution for all future development.<sup>34</sup>

The importance of the [comprehensive plan<sup>35</sup> or] General Plan sprang from the model legislation for planning and zoning promulgated in 1926 and 1928 by the U.S. Department of Commerce under the leadership of the Secretary of Commerce Herbert Hoover. The [model] statutes were labeled the Standard State Zoning Enabling Act—1926 (SZE) and the Standard Planning Enabling Act—1928 (SPE). Section 3 of SZE stated that zoning and other regulations be “in accordance with a General Plan.”<sup>36</sup>

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<sup>32</sup> DAVID L. CALLIES ET AL., *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS AND THE PROVISION OF PUBLIC FACILITIES* 91 (2003).

<sup>33</sup> *See id.* at 103–04.

<sup>34</sup> *See id.*

<sup>35</sup> The term “comprehensive plan” is commonly called the “general plan” or “master plan.” The term “general plan” is being more commonly used today. Curtin, *supra* note 15, at 136 n.3.

<sup>36</sup> Curtin, *supra* note 15, at 135; *see also* A STANDARD STATE ZONING ENABLING ACT (Rev. ed. 1926), available at <http://www.planning.org/growingsmart/pdf/SZENablingAct1926.pdf>; A STANDARD CITY PLANNING ENABLING ACT (1928), available at <http://www.planning.org/growingsmart/pdf/CPEnablingAct1928.pdf>. The revised 1926 SZE emerged the same year that the Supreme Court delivered its decision in *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *See generally* Jay Wickersham, *Jane Jacobs’s Critique of Zoning: From Euclid to Portland and Beyond*, 28 B.C. ENVTL. AFF. L. REV. 547, 553 (2001).



### A. *Use of the Plan in the United States*

Regulation of land use in the United States occurs almost exclusively at the local level. Consequently, regulations and procedures vary widely from jurisdiction to jurisdiction, with varying degrees of success. From a national perspective, it is highly unlikely that Congress will undertake either land use regulation or an effort to standardize land use processes across the country. Consequently, reforms to deal with common problems likely will continue to develop at the local level.

Increasingly, local jurisdictions are implementing the comprehensive plan as part of their land use planning process. Although specifics vary widely, most jurisdictions with a comprehensive plan view it as the “constitution” for development within that community. Typically, all subsequent land use decisions must be “consistent” with the vision for growth and development reflected in the comprehensive plan.<sup>37</sup>

### B. *The California Model*

In California, land use regulations and approvals made by a city or county must, in most instances, be consistent with the city or county’s general plan.<sup>38</sup> The general plan has been declared by the California Supreme Court as the single most important document and the “constitution for all future development.”<sup>39</sup> Since the general plan has such primacy, any decision of a city or county affecting land use, development, or public works projects must be consistent with its general plan.<sup>40</sup> Under California Government Code section 65,860(a), for example, a zoning ordinance is consistent with a general plan only if: (1) the city or county has officially adopted such a plan; and (2) the various land uses authorized by the zoning ordinance are compatible with the objectives, policies, general land uses, and programs specified in the plan.<sup>41</sup>

In *City of Irvine v. Irvine Citizens Against Overdevelopment*, a California court of appeal held that a land use regulation is consistent with a city’s general plan where, considering all of its aspects, the ordinance

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<sup>37</sup> JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 33–39 (2d ed. 2002). See generally JOSEPH DIMENTO, *THE CONSISTENCY DOCTRINE AND THE LIMITS OF PLANNING* (1980).

<sup>38</sup> CAL. GOV’T CODE §§ 65,860(a), 65,867.5(c) (West 1997).

<sup>39</sup> *Leshar Communications, Inc. v. City of Walnut Creek*, 802 P.2d 317, 321 (Cal. 1990).

<sup>40</sup> See *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161 (Cal. 1990).

<sup>41</sup> CAL. GOV’T CODE § 65,860.

further the objectives and policies of the general plan and does not obstruct their attainment.<sup>42</sup> A city's finding that a land use regulation is consistent with its general plan can be reversed only if it is based on evidence from which no reasonable person could have reached the same conclusion.<sup>43</sup>

The California courts have stated that a land use regulation inconsistent with a general plan at the time of enactment is "invalid[] *ab initio*," meaning it was void when passed.<sup>44</sup> If a land use regulation becomes inconsistent with a general plan by reason of an amendment to the plan, or to any element of the plan, the regulation must be amended within a reasonable time so that it is consistent with the amended general plan.<sup>45</sup> Since general plan consistency is required, the absence of a valid general plan, or the failure of any relevant elements thereof to meet statutory criteria, "precludes the enactment of zoning ordinances and the like."<sup>46</sup>

To ensure that a Machiavellian community cannot avoid the planning requirements embodied in the statute by repeatedly and routinely amending its plan to achieve its zoning objectives, the legislation limits the number of times mandatory elements of the plan may be amended per year to four.<sup>47</sup>

### C. Other States

Nearly all states, in following the Standard Zone Enabling Act, require that zoning take place "in accordance with" some sort of comprehensive or master plan.<sup>48</sup> States vary, however, in the degree to which the comprehensive plan is made a significant or decisive factor in evaluating land use regulations, although over time there has been a slow and incremental trend nationwide toward it having quasi-

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<sup>42</sup> 30 Cal. Rptr. 2d 797, 803 (Cal. Ct. App. 1994).

<sup>43</sup> *A Local & Reg'l Monitor v. City of Los Angeles*, 20 Cal. Rptr. 2d 228, 239 (Cal. Ct. App. 1993).

<sup>44</sup> *Bldg. Indus. Ass'n, Inc. v. City of Oceanside*, 33 Cal. Rptr. 2d 137, 146 (Cal. Ct. App. 1994); see also *Leshar Communications*, 802 P.2d at 322; *City of Irvine*, 30 Cal. Rptr. 2d at 803; *deBottari v. Norco City Council*, 217 Cal. Rptr. 790, 794 (Cal. Ct. App. 1985).

<sup>45</sup> CAL. GOV'T CODE § 65,860(c) (setting forth the rule for zoning ordinances).

<sup>46</sup> *Res. Def. Fund v. County of Santa Cruz*, 184 Cal. Rptr. 371, 373 (Cal. Ct. App. 1982).

<sup>47</sup> CAL. GOV'T CODE § 65,358(b). In addition, plan amendments are subject to detailed review pursuant to the California Environmental Quality Act and public hearings before the local planning commission and local legislative body. See CAL. GOV'T CODE § 65,350; CAL. PUB. RES. CODE §§ 21,000–21,177; see also DANIEL J. CURTIN, JR., CALIFORNIA LAND USE AND PLANNING LAW 29 (24th ed. 2004).

<sup>48</sup> CALLIES ET AL., *supra* note 32, at 41.

constitutional status.<sup>49</sup> As categorized by one of the nation's foremost commentators on the subject of the comprehensive plan, the states currently fall into three major classifications with respect to the role of the comprehensive plan in the land use regulatory process.<sup>50</sup>

The first category, the "unitary view" states, represents probably a majority of the states.<sup>51</sup> In this category, the comprehensive plan is accorded no special significance, meaning there is no requirement that local governments prepare a plan that is separate from zoning regulations.<sup>52</sup> Examples of states falling into this category and having recent judicial decisions upholding the "unitary view" are Arkansas,<sup>53</sup> Connecticut,<sup>54</sup> Illinois,<sup>55</sup> New York,<sup>56</sup> and, as discussed below, Massachusetts.

States in the second category, termed the "planning factor" states, give some significance to the comprehensive plan, if one exists, as a factor in evaluating land use regulations, but do not make it the exclusive factor.<sup>57</sup> The weight to be given the plan varies from state to state. Examples of states in this category are Missouri,<sup>58</sup> Montana,<sup>59</sup> and New Jersey.<sup>60</sup>

The third category of states, called "plan as the constitution or the law" states, are those which, like California, grant the general plan quasi-constitutional status in regulating ordinances and other actions

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<sup>49</sup> *Id.*

<sup>50</sup> See Edward J. Sullivan, *Comprehensive Planning*, 36 URB. LAW. 541, 541 (2004); Curtin, *supra* note 15, at 137. See generally Sullivan & Michel, *supra* note 21 (tracing developments in the role of the comprehensive plan since a 1975 article was published).

<sup>51</sup> See Sullivan, *supra* note 50, at 541.

<sup>52</sup> See *id.*

<sup>53</sup> *Rolling Pines Ltd. P'ship v. City of Little Rock*, 40 S.W.3d 828, 833–34 (Ark. Ct. App. 2001).

<sup>54</sup> *Heithaus v. Planning & Zoning Comm'n*, 779 A.2d 750, 759 (Conn. 2001).

<sup>55</sup> *City of Chi. Heights v. Living Word Outreach Full Gospel Church & Ministries, Inc.*, 749 N.E.2d 916, 920 (Ill. 2001) (failing to list accordance with the comprehensive plan as a criterion for special uses).

<sup>56</sup> *Yellow Lantern Kampground v. Town of Cortlandville*, 716 N.Y.S.2d 786, 789 (N.Y. App. Div. 2000).

<sup>57</sup> See Sullivan, *supra* note 50, at 541.

<sup>58</sup> *Fairview Enters., Inc. v. City of Kansas City*, 62 S.W.3d 71, 82 (Mo. Ct. App. 2001).

<sup>59</sup> *Greater Yellowstone Coalition, Inc. v. Bd. of County Comm'rs*, 25 P.3d 168, 171 (Mont. 2001).

<sup>60</sup> *Med. Ctr. at Princeton v. Township of Princeton Zoning Bd. of Adjustment*, 778 A.2d 482, 502–03 (N.J. Super. Ct. App. Div. 2001).

of the local government in implementing the plan.<sup>61</sup> Other states within this category include Florida,<sup>62</sup> Oregon,<sup>63</sup> and Washington.<sup>64</sup>

Clear-cut policies and goals in a city's or county's general plan, which guide all developments and approval of development agreements, would assure that any bargaining for land use entitlements adheres to the public goals and policies in the adopted general plan, thus preventing piecemeal, ad hoc, or arbitrary and capricious decisions.<sup>65</sup>

In California and other plan states, "the general plan is the most important legal planning tool" for city and county officials to utilize in their efforts to regulate development.<sup>66</sup> It is unequivocally the "constitution for all future development."<sup>67</sup> The goals and policies of the general plan can be used not only in managing growth, regulating development, and imposing land use regulations, but also in imposing dedications and impact fees on new projects, rezoning, and other approvals, especially those not directly authorized under state law.<sup>68</sup> Examples in California "include dedications for libraries, police stations, and fire station sites, and fees for affordable housing or child day care centers, provided there is a legally established nexus."<sup>69</sup>

In states such as California, Florida, Oregon, and Washington, for example, since the general plan is the controlling document, it provides protection against "knee-jerk," Gallup poll-like land rezonings, insures appropriate due process, and leads to better-conceived planning to achieve the goals and policies of the municipality.<sup>70</sup> Therefore, when derivative benefits are being considered, they must be weighed against the goals and policies of the plan as a whole.

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<sup>61</sup> See Sullivan, *supra* note 50, at 541.

<sup>62</sup> Buck Lake Alliance, Inc. v. Bd. of County Comm'rs, 765 So.2d 124, 127 (Fla. Dist. Ct. App. 2000).

<sup>63</sup> Jackson County Citizens' League v. Jackson County, 15 P.3d 42, 48-49 (Or. Ct. App. 2000).

<sup>64</sup> Ahmann-Yamane, LLC v. Tabler, 19 P.3d 436, 441 (Wash. Ct. App. 2001).

<sup>65</sup> See A STANDARD STATE ZONING ENABLING ACT § 3 n.22 (Rev. ed. 1926), available at <http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf>.

<sup>66</sup> Curtin, *supra* note 15, at 149.

<sup>67</sup> Leshar Communications, Inc. v. City of Walnut Creek, 802 P.2d 317, 321 (Cal. 1990).

<sup>68</sup> Curtin, *supra* note 15, at 149.

<sup>69</sup> *Id.*

<sup>70</sup> See Udell v. Haas, 235 N.E.2d 897, 900-01 (N.Y. 1968).

#### D. *The Massachusetts “Model”*

Unlike each of the states discussed above and a great many others, Massachusetts does not require or even encourage cities and towns to plan.<sup>71</sup> The very notion of “planning in Massachusetts” is an oxymoron.<sup>72</sup> The courts have responded to challenges to rezonings or the issuance of adjudicative permits that argue “inconsistency with a plan” by summarily ruling that a master plan has no legal meaning in Massachusetts.<sup>73</sup>

The American Planning Association has criticized the Massachusetts Zoning Act as contradictory, too “confusing,” and “outdated,”<sup>74</sup> while the Massachusetts Appeals Court has characterized the vested rights portion of the Act as “infelicitous.”<sup>75</sup> The results of such an “anti-planning” platform are far-reaching. The Massachusetts courts have held that cities and towns:

- are free to engage in rezoning of property conditioned upon the payment of money—lots of money;<sup>76</sup>

<sup>71</sup> See generally MASS. GEN. LAWS ch. 40A (2002) (failing to mention a comprehensive plan).

<sup>72</sup> Two notable exceptions exist. The Martha’s Vineyard Commission Act, 1974 Mass. Acts 637, and the Cape Cod Commission Act, 1989 Mass. Acts 716, provide for planning consistency among the Vineyard’s six towns and Cape Cod’s 15 municipalities. Section 9(d) of the Cape Cod Commission Act provides that if a town prepares a plan consistent with the regional plan prepared by the Cape Cod Commission, the town may elect to impose impact fees and enter into development agreements. Towns wishing to execute development agreements must then adopt the terms and conditions of the Commission’s Model Development Agreement Bylaw. See Cape Cod Comm’n, *An Introduction to the Cape Cod Commission Model Bylaws and Regulations Project* (Nov. 5, 2002) (drafted for the Commission by Jonathan Douglas Witten in 1997), <http://www.capecodcommission.org/bylaws>.

<sup>73</sup> “Neither the master plan itself nor the law requires that zoning be in strict accordance with a master plan.” *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998). Section 81D of chapter 41 of the Massachusetts General Laws requires planning boards to “make a master plan,” but provides no requirement that regulations adopted by the city or town be consistent with the plan. MASS. GEN. LAWS ch. 41, § 81D. The plan is adopted by a majority of the members of the planning board, not the local legislative body. See *id.* The verb “planning” does not appear once in the entirety of the Massachusetts Zoning Act or the Subdivision Control Law. See *id.* ch. 40A; *id.* ch. 41, § 81L.

<sup>74</sup> See AM. PLANNING ASS’N, *PLANNING FOR SMART GROWTH: 2002 STATE OF THE STATES 71* (Feb. 2002), available at <http://www.planning.org/growingsmart/pdf/states2002.pdf>.

<sup>75</sup> *Fitzsimonds v. Bd. of Appeals*, 484 N.E.2d 113, 115 (Mass. App. Ct. 1985); see also Joel S. Russell, *Massachusetts Land-Use Laws—Time for a Change*, LAND USE L. & ZONING DIG., Jan. 2002, at 3; Jon Witten, *Affordable Housing—At What Price?*, LAND USE L. & ZONING DIG., Jan. 2002, at 6, 6, 8 (labeling the Massachusetts land use system as “dysfunctional,” “Byzantine,” and “promoting anarchy”).

<sup>76</sup> *Durand v. IDC Bellingham, LLC*, 793 N.E.2d 359, 369 (Mass. 2003).

- are free to engage in rezoning of property conditioned upon completion of specific public improvements;<sup>77</sup>
- are not bound by the goals or policies of a locally adopted plan—if one exists—in their legislative or adjudicative decisionmaking;<sup>78</sup> and
- cannot impose long-term growth management devices, regardless of whether they have a planning basis.<sup>79</sup>

## II. BARGAINING AWAY THE POLICE POWER: WHAT GOES WRONG IN NON-PLAN STATES

Without a plan to guide or control land use decisionmaking, land use regulations—zoning, subdivision control, health, and design guidelines—are for sale.<sup>80</sup> Since there is no basis upon which zoning decisions are made, almost any decision will be perceived by a reviewing court as rational.<sup>81</sup>

This is unfortunate, and ironic, as the rational basis standard is applied by the courts in land use matters to ensure broad deference to the actions of city or county legislative bodies.<sup>82</sup> A reviewing court will not substitute its judgment for that of the legislature, and the legislature is granted an enviable presumption of validity.<sup>83</sup> This broad grant of power, without a simultaneous legislative requirement that regulations be in accordance with a plan, leaves cities and towns free to zone as they please, and just as free to bargain that power away.<sup>84</sup>

Two recent Massachusetts state court holdings highlight the risk of allowing cities and towns to bargain away their regulatory tools without adherence to a plan.<sup>85</sup> In *Durand v. IDC Bellingham, LLC*, a decision remarkable for the court's willingness to sanction an overt

<sup>77</sup> *McLean Hosp. Corp. v. Town of Belmont*, 778 N.E.2d 1016, 1023 (Mass. App. Ct. 2002).

<sup>78</sup> *Rando*, 692 N.E.2d at 550.

<sup>79</sup> *Zuckerman v. Town of Hadley*, 813 N.E.2d 843, 849 (Mass. 2004).

<sup>80</sup> See, e.g., *Durand*, 793 N.E.2d at 363–64, 369; *McLean Hosp.*, 778 N.E.2d at 1023.

<sup>81</sup> The Massachusetts statute calling for a master plan does not require zoning to be subsequently in accordance with the plan, but rather merely that town officials, prior to making a decision, take land use into consideration. See MASS. GEN. LAWS ch. 41, § 81D (2002).

<sup>82</sup> See, e.g., *McLean Hosp.*, 778 N.E.2d at 1022 (holding that if a zoning action is not arbitrary, local judgment on the subject should be sustained).

<sup>83</sup> See *id.*

<sup>84</sup> See, e.g., *Durand*, 793 N.E.2d at 369; *McLean Hosp.*, 778 N.E.2d at 1023; *Rando v. Town of N. Attleborough*, 692 N.E.2d 544, 550 (Mass. App. Ct. 1998).

<sup>85</sup> See *Durand*, 793 N.E.2d at 369; *McLean Hosp.*, 778 N.E.2d at 1023.

trade of zoning for cash, the SJC upheld a rezoning that was directly and indisputably linked to the payment of an \$8 million gift.<sup>86</sup> The court upheld the payment-for-rezoning scheme, citing the rational basis test: “In general, there is no reason to invalidate a legislative act on the basis of an ‘extraneous consideration,’ because we defer to legislative findings and choices without regard to motive. We see no reason to make an exception for legislative acts that are in the nature of zoning enactments . . . .”<sup>87</sup> Only the dissenting justices seemed concerned about issues of enforceability—what happens if the beneficiary of the rezoning breaches?—and the public policy issues raised where “needy” cities and towns see their zoning powers as for sale to the highest bidder.<sup>88</sup>

In *McLean Hospital Corp. v. Town of Belmont*, the Appeals Court upheld a rezoning linked to a land owner’s conveyances of surplus parcels to the town and to off-site improvements to be made by the land owner. The court concluded that if the zoning action by itself is a valid exercise of the police powers, such validity is not negated by bargaining, provided that the bargaining is related to the property subject to the rezoning.<sup>89</sup>

In both cases, then, the courts conclude that a *promise by a petitioner* is different from a *requirement imposed* as a condition precedent by the municipality.<sup>90</sup> The courts also appear to conclude that if the rezoning would have been permissible without the promise, then the promise did not induce or influence the legislative action.<sup>91</sup> Finally, while the Appeals Court appears to require some nexus between the rezoning and the proffered—or extracted—promise, the SJC appears to conclude that the rational basis test allows cities and towns to bar-

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<sup>86</sup> 793 N.E.2d at 368–69.

<sup>87</sup> *Id.* at 369. Three justices filed an opinion concurring in part and dissenting in part, finding that it was a bare “sale of the police power because there is nothing in the record to legitimize the \$8 million offer as ‘intended to mitigate the impact of the development upon the town’ . . . .” *Id.* at 371 (Spina, J., concurring in part and dissenting in part) (quoting *Rando*, 692 N.E.2d at 548). They suggest, however, that if the \$8 million offer had been directly linked to the impacts caused by the proposed power plant, as opposed to a cash gift of \$8 million unconnected to any specific impact, the agreement to rezone in exchange for payment would not have been inappropriate. *Id.* (Spina, J., concurring in part and dissenting in part).

<sup>88</sup> *Id.* at 371. “Sadly, these circumstances demonstrate government and private interests at their shameful worst, and are most likely to involve the most needy towns.” *Id.*

<sup>89</sup> *McLean Hosp.*, 778 N.E.2d at 1021 (finding that legitimacy of zoning actions is not lessened by “ancillary agreements not involving consideration extraneous to the property being rezoned”).

<sup>90</sup> See *Durand*, 793 N.E.2d at 369; *McLean Hosp.*, 778 N.E.2d at 1023.

<sup>91</sup> See *Durand*, 793 N.E.2d at 369; *McLean Hosp.*, 778 N.E.2d at 1023.

gain freely whether or not the offer or extraction is related to the rezoning.<sup>92</sup> Both courts send a similar, clear message.<sup>93</sup>

Of concern is that the courts are approving the end result rather than focusing on the process of bargaining or the risks associated with it. If the end result is permissible—almost always so when the rational basis standard is applied—the process of getting there is secondary.<sup>94</sup>

As discussed in Part III, plan states have adopted a means of providing for the same flexibility witnessed in cases like *Durand* and *McLean Hospital*, but commensurate with the due process protections so clearly lacking in those cases.<sup>95</sup> It is the development agreement that has successfully bridged the gap between unfettered bargaining and rigid, inflexible zoning.<sup>96</sup> We believe that development agreements are a valuable and vital tool for overcoming the dangers associated with the former and the problems inherent in the latter.

### III. DEVELOPMENT AGREEMENTS—CONTROLS AND OPPORTUNITIES IN THE BARGAINING PROCESS

Many states have authorized the use of development agreements mainly for the purpose of giving developers some assurance that a project can be completed once all land use and discretionary approv-

<sup>92</sup> See *Durand*, 793 N.E.2d at 369; *McLean Hosp.*, 778 N.E.2d at 1023.

<sup>93</sup> See *Durand*, 793 N.E.2d at 369; *McLean Hosp.*, 778 N.E.2d at 1023.

<sup>94</sup> Massachusetts leads the nation in “ends versus means” legislation regarding the development of affordable housing as well. Rather than adopt a plan or policy for the creation of below market rate dwelling units, Massachusetts holds onto a 35-year-old statute that permits the avoidance of all locally adopted regulations where a developer sells or rents 25% of the new dwellings below market rates. The remaining 75% of the dwellings are constructed without adherence to local regulations and unencumbered by density, height, bulk or otherwise traditional zoning controls. The statute has, not surprisingly, resulted in the construction of over 30,000 new dwelling units. But the due process costs are extensive. See generally Jonathan Douglas Witten, *The Cost of Developing Affordable Housing: At What Price?*, 30 B.C. ENVTL. AFF. L. REV. 509 (2003); Christopher Baker, Note, *Housing in Crisis: A Call to Reform Massachusetts’s Affordable Housing Law*, 32 B.C. ENVTL. AFF. L. REV. 165 (2005).

<sup>95</sup> See Witten, *supra* note 94, at 516–20.

<sup>96</sup> See, e.g., CALLIES ET AL., *supra* note 32; INST. FOR LOCAL SELF GOV’T, DEVELOPMENT AGREEMENT MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTEREST (2002); Daniel J. Curtin, Jr., *Effectively Using Development Agreements to Protect Land Use Entitlements: Lessons from California*, 25 ZONING & PLAN. L. REP. 33 (2002) [hereinafter Curtin, *Effectively Using Development Agreements*]; Daniel J. Curtin, Jr., *Exactions, Dedications and Development Agreements Nationally and in California: When and How Do the Dolan/Nollan Rules Apply?*, in INST. FOR LOCAL GOV’T STUDIES, CTR. FOR AM. & INT’L LAW, PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING, AND EMINENT DOMAIN (33d ed. 2003); Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719 (2001).



als have been obtained.<sup>97</sup> However, as development agreements have come into more frequent use, an increasing number of local government units have begun using them to obtain benefits for the public which ordinarily could not be obtained using the normal land use process.<sup>98</sup> So far, thirteen states have adopted legislation enabling local governments to enter into development agreements with property owners or developers.<sup>99</sup> In addition, some states, such as Texas, allow the use of development agreements in the absence of any such state legislation.<sup>100</sup>

#### A. *Development Agreements—The California Statute*

In 1979, the California Legislature enacted a statute establishing a property development agreement procedure.<sup>101</sup> The principal provisions of the legislation governing development agreements are as follows:

- Cities and counties are given express authorization to enter into a development agreement and may adopt procedures to do so by resolution or ordinance.<sup>102</sup>
- The development agreement is enforceable by any party to the agreement, notwithstanding a change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city.<sup>103</sup>

<sup>97</sup> See INST. FOR LOCAL SELF GOV'T, *supra* note 96, at 19–21.

<sup>98</sup> See *id.* at 14.

<sup>99</sup> See ARIZ. REV. STAT. ANN. § 9-500.05 (West 1996 & Supp. 2000); CAL. GOV'T CODE § 65,864 (West 1997); COLO. REV. STAT. §§ 24-68-101 to -106 (2000); FLA. STAT. ANN. § 163.3220 (West 2000); HAW. REV. STAT. § 46-123 (1993); IDAHO CODE § 67-6511A (Michie 1995 & Supp. 2000); LA. REV. STAT. ANN. § 33:4780.22 (West 1988 & Supp. 2000); NEV. REV. STAT. 278.0201 (1997); N.J. STAT. ANN. § 40:55D-45.2 (West 1991); OR. REV. STAT. § 94.504 (1999) (enacted into law in 1993 by the Legislative Assembly but not made a part of the Oregon Revised Statutes until much later); S.C. CODE ANN. § 6-31-10 (Law. Co-op. Supp. 2000); VA. CODE ANN. § 15.2-2303.1 (Michie 1997) (applies only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1000 acres); WASH. REV. CODE ANN. § 36.70B.170 (West 1991 & Supp. 2000).

<sup>100</sup> See R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH L. REV. 955, 957–58 (2001).

<sup>101</sup> CAL. GOV'T CODE §§ 65,864–65,869.5.

<sup>102</sup> *Id.* § 65,865.

<sup>103</sup> *Id.* § 65,865.4; see also *City of W. Hollywood v. Beverly Towers, Inc.*, 805 P.2d 329, 334 n.6 (Cal. 1991); 76 Op. Att'y Gen. Cal. 227 (1993).

- Unless otherwise provided by the development agreement, the applicable rules, regulations, and policies are those that are in force at the time of the execution of the agreement.<sup>104</sup>
- A city's or county's exercise of its power to enter into a development agreement is a legislative act. It must be approved by ordinance; it must be consistent with the general plan and any specific plan; and is subject to repeal by referendum.<sup>105</sup>
- There is a ninety-day statute of limitations to challenge the adoption or amendment of a development agreement approved on or after January 1, 1996.<sup>106</sup>
- A city or county may terminate or modify a development agreement if it finds, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with its terms or conditions.<sup>107</sup>

### B. *Contracting Away the Police Power*

Not infrequently, those who challenge projects governed by development agreements will argue that such agreements are invalid because the local governmental unit is "contracting away" its police power.<sup>108</sup> The courts have not been persuaded by this argument.<sup>109</sup>

For example, in *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, an area residents' association contended that because San Luis Obispo County had entered into a development agreement freezing zoning for a project for a five-year period before the project was ready for construction, the county improperly contracted away its zoning authority.<sup>110</sup> In holding for the county, the court noted that "land use regulation is an established function of local government," thereby providing the authority for a locality to enter into contracts to carry out that function.<sup>111</sup> The county's development agreement required that the project be devel-

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<sup>104</sup> CAL. GOV'T CODE § 65,866.

<sup>105</sup> *Id.* § 65,867.5; *see also* *Native Sun/Lyon Cmty. v. City of Escondido*, 19 Cal. Rptr. 2d 344, 354 (Cal. Ct. App. 1993); *Midway Orchards v. County of Butte*, 269 Cal. Rptr. 796, 800 (Cal. Ct. App. 1990).

<sup>106</sup> CAL. GOV'T CODE § 65,009(c)(4).

<sup>107</sup> *Id.* § 65,865.1.

<sup>108</sup> *See Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors*, 100 Cal. Rptr. 2d 740, 747-48 (Cal. Ct. App. 2000).

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.* at 748.

oped in accordance with the county's general plan; did not permit construction until the county had approved detailed building plans; retained the county's discretionary authority in the future; and allowed a zoning freeze of limited duration only.<sup>112</sup> The court found that the zoning freeze in the county's development agreement was not a surrender of the police power but instead "advance[d] the public interest by preserving future options."<sup>113</sup>

In another case, *Stephens v. City of Vista*, the plaintiffs purchased property to develop an apartment complex of approximately 140 to 150 units.<sup>114</sup> Several years later, the City of Vista lowered the elevation of the access street to the property, frustrating the owners' contemplated use; the City subsequently also downzoned the property.<sup>115</sup> The owners sued.<sup>116</sup> The owners and the City eventually entered into a settlement agreement providing for approval of a specific plan and zoning that permitted construction of a maximum of 140 units.<sup>117</sup> After rezoning the property, the City denied a site development plan, in part because it wanted the owners to reduce the density.<sup>118</sup> The owners then renewed their lawsuit against the City.<sup>119</sup>

The City argued that the settlement agreement unlawfully contracted away its police power.<sup>120</sup> The court disagreed.<sup>121</sup> It first noted that when the City entered into the settlement agreement, it understood that it was obligated to approve 140 units.<sup>122</sup> Further, relying on *Morrison Homes Corp. v. City of Pleasanton*,<sup>123</sup> the court held that while generally a city cannot contract away its legislative and governmental functions, this rule applies only to void a contract that amounts to a city's "surrender" of its control of a municipal function.<sup>124</sup> Simply contracting for a guaranteed density and exercising its discretion in the site development process did not constitute surrendering control of all of its land use authority.<sup>125</sup>

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<sup>112</sup> *Id.* at 748–49.

<sup>113</sup> *Id.*

<sup>114</sup> 994 F.2d 650, 652 (9th Cir. 1993).

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 653.

<sup>119</sup> *Id.*

<sup>120</sup> *Stephens*, 994 F.2d at 654.

<sup>121</sup> *Id.* at 655.

<sup>122</sup> *Id.* at 657.

<sup>123</sup> 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976).

<sup>124</sup> *Stephens*, 994 F.2d at 655.

<sup>125</sup> *Id.* at 656.

In *City of Glendale v. Superior Court*, the court held that in entering into a fixed-term lease as a lessor, a city had not contracted away its eminent domain power to condemn the lessee's leasehold interest and take back the property.<sup>126</sup> Unlike *Stephens*, where the City agreed to approval of 140 units as part of a settlement,<sup>127</sup> in *City of Glendale* the issue of possible condemnation was not raised in the contract nor in closing negotiations.<sup>128</sup> Accordingly, the court did not find an implied waiver of the eminent domain power.<sup>129</sup>

### C. Not Subject to the Nollan/Dolan Heightened Scrutiny Standard

In the landmark takings cases of *Nollan v. California Coastal Commission*<sup>130</sup> and *Dolan v. City of Tigard*<sup>131</sup> the U.S. Supreme Court adopted a heightened scrutiny standard to determine the validity of local agency exactions.<sup>132</sup> However, since development agreements are adopted as a result of negotiations between the local agency and a developer, they are not subject to the *Nollan/Dolan* heightened scrutiny standard.<sup>133</sup>

In *Leroy Land Development v. Tahoe Regional Planning Agency*, a federal appeals court held that a developer who voluntarily enters into an agreement with a public agency cannot subsequently challenge a mitigation obligation of the agreement as a taking.<sup>134</sup> Here, the developer entered into a settlement agreement under which it agreed to certain restrictions on development.<sup>135</sup> After the U.S. Supreme Court decided *Nollan*, the developer sought to challenge the restriction as a taking.<sup>136</sup> The Court of Appeals for the Ninth Circuit rejected the challenge, holding that regardless of whether the restriction would have violated the Fifth Amendment Takings Clause if imposed as a

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<sup>126</sup> 23 Cal. Rptr. 2d 305, 313 (Cal. Ct. App. 1993).

<sup>127</sup> *Stephens*, 994 F.2d at 652.

<sup>128</sup> See *City of Glendale*, 23 Cal. Rptr. 2d at 311–12.

<sup>129</sup> *Id.*

<sup>130</sup> 483 U.S. 825 (1987).

<sup>131</sup> 512 U.S. 374 (1994).

<sup>132</sup> *Dolan*, 512 U.S. at 374; *Nollan*, 483 U.S. at 837–38.

<sup>133</sup> See *Leroy Land Dev. v. Tahoe Reg'l Planning Agency*, 939 F.2d 696, 699 (9th Cir. 1991). For further discussion on this issue, 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 (2001).

<sup>134</sup> 939 F.2d at 698.

<sup>135</sup> *Id.* at 697–98.

<sup>136</sup> *Id.* at 698.

condition of development, it could not be found invalid because the developer had voluntarily agreed to the condition:

The threshold issue is whether, assuming arguendo that the mitigation provisions would constitute a taking under *Nollan* if imposed unilaterally by TRPA [the Tahoe Regional Planning Agency], they can be viewed as a “taking” when consented to as a part of a settlement agreement. We hold that they cannot. The mitigation provisions at issue here were a negotiated condition of Leroy’s settlement agreement with TRPA in which benefits and obligations were incurred by both parties. Such a contractual promise which operates to restrict a property owner’s use of land cannot result in a “taking” because the promise is entered into voluntarily, in good faith and is supported by consideration. Indeed we have found only one case in which an agreement negotiated before *Nollan* was challenged as a “taking” after *Nollan*, and it reached the same conclusion we reach. To allow Leroy to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind. We therefore hold that a takings analysis as articulated in *Nollan* is inapplicable where, as here, parties choose to terminate or avoid litigation by executing a settlement agreement supported by consideration.<sup>137</sup>

There is a further problem with attempting to challenge a development agreement fee, especially in California. Under a line of state cases starting with *Pfeiffer v. City of La Mesa*, acceptance and use of a land use approval waives any right to challenge the condition.<sup>138</sup> In response, the California Legislature enacted the pay-under-protest statute, Government Code section 66,020, which allows a developer to protest and challenge a fee or condition without waiving the benefit of the permit.<sup>139</sup> However, this provision is part of the Mitigation Fee Act and applies only to development fees as defined in section 66,000.<sup>140</sup> Because fees imposed under a development agreement

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<sup>137</sup> *Id.* at 698–99 (citations omitted). The court in *Meredith v. Talbot County* reached the same conclusion. 560 A.2d 599, 604–05 (Md. Ct. Spec. App. 1989).

<sup>138</sup> See 137 Cal. Rptr. 804, 806 (Cal. Ct. App. 1977).

<sup>139</sup> CAL. GOV’T CODE § 66,020 (West 1997).

<sup>140</sup> *Id.* §§ 66,000(b), 66,020.

are expressly excluded from that definition, they are not subject to the protection of section 66,020.<sup>141</sup>

In light of *Leroy Land*, more cities and counties are interested in using development agreements to obtain exactions that might not be valid were the heightened *Nollan/Dolan* standard applicable, but that would be valid under *Leroy Land*, because voluntarily entered into by the developer.

In dealing with derivative benefits and the resultant bargaining, when a local agency and a property owner or developer engage in a development agreement, they still must adhere to the goals and policies of the local agency's general plan, at least in California, Hawaii, Idaho, and other states that require consistency of such agreements with the general plan.<sup>142</sup> This is yet another factor that differentiates plan states from non-plan states such as Massachusetts. In a plan state, the bargaining is constrained and therefore predictable.<sup>143</sup> In a non-plan state, the only constraints are those imposed by the rational basis standard of review.<sup>144</sup>

#### IV. USING THE PLAN TO MINIMIZE DERIVATIVE BARGAINING AND TO ENSURE DUE PROCESS

The California Supreme Court's characterization of the general plan as the "constitution"<sup>145</sup> is instructive guidance for non-plan state legislatures. Without a constitution-like framework within which land use decisions are made, zoning becomes, as witnessed by the Massachusetts cases described in Parts I.D and II, "nothing more than just a Gallup poll."<sup>146</sup>

With a general plan in place, the development agreement can be an effective and flexible tool, benefiting public and private sectors alike. The plan's guidance establishes what is and what is not within the ambit of permissible negotiation.<sup>147</sup> As such, the plan ensures due

<sup>141</sup> *Id.* § 66,000(b); *see id.* § 66,020.

<sup>142</sup> *See* CALLIES ET AL., *supra* note 32, at 103–04.

<sup>143</sup> *See* CALLIES ET AL., *supra* note 32, at 103; INST. FOR LOCAL SELF GOV'T, *supra* note 96, at 26.

<sup>144</sup> *See* Witten, *supra* note 94, at 514.

<sup>145</sup> *Citizens of Goleta Valley v. Bd. of Supervisors*, 801 P.2d 1161, 1171 (Cal. 1990).

<sup>146</sup> *Udell v. Haas*, 235 N.E.2d 897, 901 (N.Y. 1968); *see* Charles M. Haar, "In Accordance with a Comprehensive Plan," 68 HARV. L. REV. 1154, 1158 (1955) (expressing concern that unchecked zoning authority could "operate in an arbitrary and discriminatory fashion" rather than being directed properly "to the health, safety, welfare, and morals of the community").

<sup>147</sup> *See* INST. FOR LOCAL SELF GOV'T, *supra* note 96, at 26.

process; it necessitates predictable outcomes; and it puts the public on proper notice as to what those outcomes could be. Without the general plan, the bargaining sky is, literally, unlimited.

Finally, much has been made of the term “smart growth” in recent years.<sup>148</sup> The American Planning Association’s *Growing Smart* project produced a comprehensive treatise designed to assist states, cities, and towns in adopting meaningful planning legislation and planning tools to implement the plans.<sup>149</sup> The project was a collaborative effort with an unassailable conclusion: smart growth—as well as the use of development agreements to assist in that growth—requires planning for growth.<sup>150</sup> We argue that planning for growth requires the adoption of general plans to set the framework for such planning.

Land use regulation and the bargaining of any element of that regulation in the absence of planning is inherently arbitrary.<sup>151</sup> That courts in non-plan states have not yet reached this conclusion is beyond our understanding. We predict, however, that such a day is coming. To avoid the unpleasant consequences accompanying a court’s conclusion that a municipality’s zoning regulation is void, we urge non-plan states to look across their borders to what plan states have accomplished and the protections these states have guaranteed to future generations.

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<sup>148</sup> See Curtin, *Effectively Using Development Agreements*, *supra* note 96, at 33. See generally AM. PLANNING ASS’N, *GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE* (Stuart Meck ed., 2002).

<sup>149</sup> See generally AM. PLANNING ASS’N, *supra* note 148.

<sup>150</sup> See *id.* at A-9 (comments from Paul S. Barru, Directorate Member for the Built Environment, stating that an assumption on which the treatise is based is that “Smart Growth means planning for growth”).

<sup>151</sup> See Witten, *supra* note 16, at 593.