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Development Agreements: Contracting for Vested Rights

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DEVELOPMENT AGREEMENTS: CONTRACTING FOR VESTED RIGHTS

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Abstract: The development process is risky for developers. They spend large sums of money on various development activities prior to receiving a municipality's approval to proceed with the project. Uncertainty exists because a municipality may enact a subsequent zoning regulation which renders the proposed use impermissible. A vested right protects developer investments from subsequent zoning change. This Note examines one method by which a developer can obtain a vested right: the development agreement. A development agreement is a contract between a municipality and a property owner/developer, through which the municipality agrees to freeze the existing zoning regulations in exchange for public benefits. This Note concludes that development agreements are readily enforceable, and are attractive tools in both early and late vesting states.

INTRODUCTION

The development process begins with a developer's dream. Typically, the developer then secures capital from lending institutions, hires architects and engineers to formulate plans, employs consultants to conduct various surveys regarding the characteristics of the land, and begins grading and infrastructure installations.[1] The developer incurs substantial debt, often spending millions of dollars on the early development phase.[2] Significantly, in late vesting states,[3] such activities occur *prior* to the developer receiving the municipality's approval to proceed with the project.[4] Developers risk their investments hoping the municipality will not enact a zoning ordinance which renders a

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[1] *See* Michael H. Crew, *Development Agreements after Nollan v. California Coastal Commission*, 22 URB. LAW. 23, 29 (1990); Interview with Jon Witten, Adjunct Professor of Land Use Planning, Boston College Law School (May 16, 2000) [hereinafter Witten Interview].

[2] *See* John J. Delaney, *Development Agreements Legislation: The Maryland Experience*, SB06 A.L.I.-A.B.A. 805, 810 (Aug. 15, 1996) [hereinafter Delaney, *The Maryland Experience*].

[3] For a definition of late vesting states, see *infra* notes 16 & 17 and accompanying text.

[4] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 809–10.

proposed use impermissible.[5] The developer is subject to the municipality's discretion and may be left stranded once the initial work and financing has been arranged, but before obtaining a vested right to develop.[6] A development agreement is a solution to the inherent uncertainty in the development process and a means by which developers can protect their investment.[7] A development agreement is a contract between a municipality and a property owner/developer, which provides the developer with vested rights by freezing the existing zoning regulations applicable to a property in exchange for public benefits.[8]

This Note concludes that development agreements are readily enforceable, and are attractive tools in both early and late vesting states. Part I of this Note discusses the vested rights principle, including its inflexible application in the infamous *Avco Community Developers, Inc. v. South Coast Regional Commission*[9] decision and recounts the risk a developer takes when commencing large development projects. Part II introduces development agreements as a solution to strict late vesting rules, and highlights the benefits that developers and municipalities receive by entering into an agreement. Part III presents development agreement legislation as valid contract zoning, and provides a comparative overview of common statutory provisions. Part IV focuses on the legal issues affecting the enforceability of development agreements. It discusses: (1) express enabling authority; (2) the tension between the reserved powers doctrine and the Contracts Clause of the United States Constitution, including the influential case, *United States Trust Co. v. New Jersey*;[10] (3) the Supreme Court decisions in *Nollan v. California Coastal Commission*[11] and *Dolan v. City of Tigard*,[12] which developed the "essential nexus" and "rough proportionality" requirements placed on exactions generally, and asks whether these burdens

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[5] *See id.*

[6] *See* Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L. J. 29, 30 (1981).

[7] *See* Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for its Application*, 1 J. LAND USE & ENVTL. L. 451, 456 (1985); Kramer, *supra* note 6, at 30.

[8] *See* John J. Delaney, *Development Agreements: The Road From Prohibition to "Let's Make a Deal!,"* 25 URB. LAW. 49, 52 (1993) [hereinafter Delaney, *Development Agreements*]; Barry R. Knight & Susan P. Schoettle, *Current Issues Related to Vested Rights and Development Agreements*, 25 URB. LAW. 779, 787–88 (1993).

[9] 553 P.2d 546 (Cal. 1976).

[10] United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

[11] Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

[12] Dolan v. City of Tigard, 512 U.S. 374 (1994).

should be placed on exactions imposed pursuant to development agreements; (4) whether a development agreement is a legislative act or an administrative act;[13] and (5) remedies for noncompliance. Part V then applies these legal issues to development agreements, and explores the utility of development agreements for early vesting states.

I. Vested Rights

A vested right allows development of a proposed use of land to proceed even when subsequent changes in zoning regulations render the proposed use impermissible.[14] A vested right protects a developer from a subsequent zoning change by freezing the existing zoning regulations applicable to an approved development, providing a right to proceed that cannot be taken away without due process.[15] As determined by state law, the right to develop vests at various points of the development process.[16] Accordingly, states can be categorized as "late vesting" or "early vesting."[17] Late vesting states "fail to address the realities involved in the approval process for multi-staged large-scale developments."[18] These types of developments require numerous governmental approvals, such as zoning, subdivision, and site plan permitting.[19] Costly development activities follow, in direct reliance on the governmental approvals.[20] For example, engineering, grading, dedications, and infrastructure installation often costs millions of dollars.[21] Consultants are hired to conduct surveys regarding water resources, topography, solid and hazardous wastes, wetlands, wildlife, transportation, and utilities.[22] Architects and engineers are also em-

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[13] This Note uses the term "administrative act" to refer to both adjudicative (discretionary) acts and non-adjudicative (non-discretionary) acts.

[14] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 807.

[15] *See* Kramer, *supra* note 6, at 30. An eminent domain proceeding is an example of due process. *See id.*

[16] *See* Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 Stetson L. Rev. 761, 761 (1993).

[17] Kessler, *supra* note 7, at 452.

[18] Delaney, *The Maryland Experience*, *supra* note 2, at 809.

[19] *See* Avco Cmty. Developers, Inc. v. Southern Coast Reg'l Comm'n, 553 P.2d 546, 549 (Cal. 1976) (Avco obtained zoning change, tentative and final subdivision map approval, rough grading permit, as well as approvals for constructing storm drains, culverts, street improvements, utilities, and similar facilities); Delaney, *The Maryland Experience*, *supra* note 2, at 809–10.

[20] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 809–10.

[21] *See Avco*, 553 P.2d at 549 (stating Avco spent $2,082,070 and incurred liabilities of $740,468); Delaney, *The Maryland Experience*, *supra* note 2, at 809–10.

[22] *See* Crew, *supra* note 1, at 29; Witten Interview, *supra* note 1.

ployed to formulate the plans, requiring the expenditures of a considerable amount of money.[23] Importantly, in late vesting states, these costly development activities occur *prior* to the issuance of the building permit.[24] As a result, after spending a large sum of money on various development activities, developers undertaking large projects in late vesting states face a great deal of uncertainty as they risk being without a remedy in the event of a sudden change in the zoning regulations.[25] "The lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning."[26]

A vested right puts such uncertainty to rest.[27] The underlying rationale of the vested rights doctrine is the principle of equitable estoppel.[28] In short, at some point in the development process, the municipality should be estopped from changing those zoning regulations that would prohibit the completion of the project or diminish the return on the developer's investment.[29] This point occurs when a developer has made a substantial change in position by incurring extensive obligations and expenses in good faith reliance on a governmental act such as an issued permit or authorization to commence development.[30] State law defines the precise point at which the right to develop vests, and state courts have applied two different rules: (1) the "last discretionary approval" rule; and (2) the "building permit" rule.[31]

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[23] *See* Crew, *supra* note 1, at 29; Witten Interview, *supra* note 1.

[24] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 809–10.

[25] *See id.*

[26] HAW. REV. STAT. § 46–121 (1996). In addition, the lack of certainty in the development process can cause higher interest rates on loans and increase costs due to vested rights litigation. *See* Crew, *supra* note 1, at 29.

[27] *See* Knight & Schoettle, *supra* note 8, at 788.

[28] *See* Avco Cmty. Developers, Inc. v. Southern Coast Reg'l Comm'n, 553 P.2d 546, 551 (Cal. 1976); Knight & Schoettle, *supra* note 8, at 781.

[29] *See* Curtin & Edelstein, *supra* note 16, at 763–64.

[30] *See* Life of the Land, Inc. v. City Council of Honolulu, 606 P.2d 866, 902 (Haw. 1980); *see also* Delaney, *The Maryland Experience*, *supra* note 2, at 807 ("The black-letter test for acquisition of vested rights is that a landowner will be protected when: (1) relying in good faith, (2) upon some act or omission of the government, (3) he has made substantial expenditures or otherwise committed himself to his substantial disadvantage prior to a zoning change."). *see generally* Knight & Schoettle, *supra* note 8, at 781–84 (summarizing the doctrine of equitable estoppel).

[31] *See* Curtin & Edelstein, *supra* note 16, at 764.

A. *The Last Discretionary Approval Rule*

Under the last discretionary approval rule, a developer obtains a vested right to complete a substantially commenced project upon aquiring the last discretionary approval necessary to complete the development.[32] This rule is lenient in some states and strict in others.[33] In Oregon, a state with a lenient version of the rule, the last discretionary approval may occur prior to a final approval involving discretion so long as the approval is based on a sufficiently defined proposal.[34] In *Milcrest Corp. v. Clackamas County*, a developer obtained a vested right to develop a 440-acre nonconforming planned unit development based on preliminary subdivision plat approval, even though a revised proposal including an additional 220 acres was later approved.[35]

Hawaii, on the other hand, strictly applies the last discretionary approval rule.[36] In *County of Kauai v. Pacific Standard Life Insurance Co.*, a developer purchased shoreline property and sought to develop condominium units and a hotel.[37] The Hawaii Supreme Court held that the last discretionary approval was the holding of a referendum on the applicable resort zoning ordinance.[38] The court reasoned that the referendum petition was certified prior to the planning commission granting a Special Management Area use permit, ordinarily the

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[32] *See* Milcrest Corp. v. Clackamas County, 650 P.2d 963, 966–67 (Or. Ct. App. 1982); Curtin & Edelstein, *supra* note 16, at 764. Discretionary approvals include "special" or "conditional" use permits, and variances, but do not include building permits. *See* WILLIAM D. VALENTE & DAVID J. MCCARTHY, JR., LOCAL GOVERNMENT LAW 547–48 (1992); *Building Permits, in* ZONING AND LAND USE CONTROLS ch. 48, at 32 (2000). Special use permits are authorized by the zoning ordinance, and granted or denied upon the discretion of the empowered adjudicatory board pursuant to express standards and criteria, often following negotiations between the developer and the board. *See* VALENTE & MCCARTHY, *supra*, at 547. Variances are not permitted by the zoning ordinance, but nevertheless are granted when, in the adjudicatory board's discretion, a unique hardship exists and a strict application of the zoning ordinance would be unconstitutional. *See id.* at 548. A building permit, however, does not constitute a discretionary approval; it is a permit by right as it must be issued so long as the developer fully complies with all of the applicable laws (e.g., zoning regulations, and building, health, fire, and housing codes). *See Building Permits*, *supra*, at 32.

[33] *See* Curtin & Edelstein, *supra* note 16, at 764.

[34] *See Milcrest Corp.*, 650 P.2d at 965–66; *see also* Curtin & Edelstein, *supra* note 16, at 765 (summarizing *Milcrest Corp.*).

[35] *See Milcrest Corp.*, 650 P.2d at 965–67; *see also* Curtin & Edelstein, *supra* note 16, at 765.

[36] *See* County of Kauai v. Pacific Standard Life Ins., 653 P.2d 766, 776 (Haw. 1982); *see also* Curtin & Edelstein, *supra* note 16, at 765 (summarizing *County of Kauai*).

[37] *See County of Kauai*, 653 P.2d at 770.

[38] *See id.* at 776.

final discretionary action for vested rights.[39] Certification under these circumstances enabled the voters to exercise their discretion regarding the proposed resort.[40] Consequently, the developer could not rely in good faith on the permit approval; rather, he could rely only on assurance from the voters.[41] The electorate, however, approved the referendum to repeal the resort zoning ordinance.[42] Thus, the developers did not obtain a vested right to develop and lost the $3,532,897.23 spent on the project following permit approval.[43]

B. *The Building Permit Rule*

Under the building permit rule, if a municipality changes its land use regulations, "a property owner cannot claim a vested right to build out a project unless he has obtained a building permit and performed substantial work and incurred substantial liabilities in good faith reliance upon the permit."[44] In *Avco Community Developers, Inc. v. South Coast Regional Commission*, the California Supreme Court reaffirmed this common law vested rights rule in California:

> It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws, prohibit construction authorized by the permit upon which he relied.[45]

The *Avco* court further stated that "neither the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of

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[39] *See id.* at 775–76. "Certification" refers to the county clerk attesting to the sufficiency of the referendum petition under the pertinent charter provisions, including, for example, a provision requiring that a certain number of signatures be obtained. *See id.* at 770.

[40] *See id.* at 775–76.

[41] *See id.* at 776.

[42] *See County of Kauai*, 653 P.2d at 776, 771.

[43] *See id.* at 776, 777 n.15, 779.

[44] DANIEL J. CURTIN, JR., CURTIN'S CALIFORNIA LAND USE AND PLANNING LAW 177–78 (19th ed. 1999). The ensuing presentation of the *Avco* decision follows the structure of Mr. Curtin's summary of vested rights and the *Avco* rule. *See id.*

[45] Avco Cmty. Developers, Inc. v. Southern Coast Reg'l Comm'n, 553 P.2d 546, 550 (Cal. 1976) (citations omitted); *see also* Curtin, *supra* note 44, at 177.

a vested right to build a structure which does not comply with the laws applicable at the time a building permit is issued."[46]

Plaintiff Avco owned 7,936 acres of land in Orange County, part of which was located within a coastal zone.[47] Prior to February 1, 1973, when the coastal zoning permit requirement became effective, Avco had obtained a zoning change as well as tentative and final subdivision map approval.[48] Pursuant to approvals issued by the county, Avco had finished or was in the process of constructing storm drains, improvements of utilities, and other similar facilities for the tract.[49] Significantly, Avco had not yet received a building permit.[50] Avco had spent approximately $2 million and incurred liabilities of $740,468 for development of the tract.[51] Avco claimed that it had a vested right to develop, and that it should be exempt from the coastal zoning permit requirement because it had received final discretionary approval and incurred substantial expenses in reliance on county authorizations.[52]

The California Supreme Court held that Avco did not have a vested right to proceed because it failed to meet the vested rights common law rule that a property owner has a vested right only if he performs substantial work in good faith reliance on a building permit.[53] The court stated that "[b]y zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit . . . ."[54] Therefore, the government could not be estopped from enforcing the California Coastal Zone Conservation Act of 1972, a law in effect at the time Avco would have applied for a building permit.[55] The court reasoned that a developer must comply with the laws in effect at the time a building permit is issued to prevent "seri-

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[46] *Avco*, 553 P.2d at 551; *see also* Curtin, *supra* note 44, at 177.

[47] *See Avco*, 553 P.2d at 548–49; *see also* Curtin, *supra* note 44, at 177.

[48] *See Avco*, 553 P.2d at 549; *see also* Curtin, *supra* note 44, at 177–78.

[49] *See Avco*, 553 P.2d at 549; *see also* Curtin, *supra* note 44, at 177–78.

[50] *See Avco*, 553 P.2d at 549; *see also* Curtin, *supra* note 44, at 178.

[51] *See* Avco Cmty. Developers, Inc. v. Southern Coast Reg'l Comm'n, 553 P.2d 546, 549 (Cal. 1976); *see also* Curtin, *supra* note 44, at 178.

[52] *See Avco*, 553 P.2d at 549–50, 552; *see also* Curtin, *supra* note 44, at 178.

[53] *See Avco*, 553 P.2d at 551; *see also* Curtin, *supra* note 44, at 178.

[54] *Avco*, 553 P.2d at 551; *see also* Curtin, *supra* note 44, at 178.

[55] *See Avco*, 553 P.2d at 551; *see also* Curtin, *supra* note 44, at 178.

ous impairment of the government's right to control land use policy."[56]

II. Development Agreements

Hawaii and California enacted development agreement legislation to mitigate the effects of the states' supreme court decisions in *County of Kauai* and *Avco,* which applied strict late vesting rules and thus disregarded the developers' expectations in complex, multi-stage projects.[57] A development agreement is a contract between a municipality and a property owner/developer, executed as part of the development approval process.[58] The municipality promises not to change the planning and zoning regulations applicable to the property in exchange for the developer's promise to abide by a defined set of conditions restricting the use of the property, and requiring a contribute land, public facilities, and/or money.[59] In *City of West Hollywood v. Beverly Towers,*[60] the California Supreme Court stated:

> [D]evelopment agreements between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvement, and construction are those in effect when the agreement is executed. . . . The purpose of . . . the development agreement is to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations.[61]

A development agreement extends benefits to both the developer and the municipality.[62] For the developer, the most important advantage is the settling of the uncertainty surrounding vested

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[56] *Avco,* 553 P.2d at 554; *see also* Curtin, *supra* note 44, at 178.

[57] Cal. Gov't Code §§ 65864–65869.5 (1997); Haw. Rev. Stat. §§ 46–121 to –132 (1996); *see* Curtin, *supra* note 44, at 181; 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, 1000 n.253, 1007 (1987).

[58] *See* Delaney, *Development Agreements, supra* note 8, at 52.

[59] *See* Knight & Schoettle, *supra* note 8, at 787–88.

[60] 805 P.2d 329 (Cal. 1991).

[61] *See id.* at 334 n.6, 334–35 (1991) (citations omitted).

[62] *See* Theodore C. Taub, *Development Agreements,* C629 A.L.I.-A.B.A. 555, 558 (1991).

rights.[63] The development agreement affords contractual vested rights by providing a "freeze period" during which conflicting laws and regulations enacted after project approval will not affect the approved development.[64] As a result, the developer's investment is protected from a subsequent zoning change that may jeopardize a long-term development project.[65] Moreover, developers can "bargain for support in the permitting process, including some assurance that if they concede certain public benefits, reviewing agencies will generally grant permit approvals in the shortest period of time possible."[66]

For the municipality, the development agreement provides certainty that public facilities and infrastructure necessary to support new growth will be built without delay.[67] Significantly, development agreements arguably allow municipalities to exact public benefits in excess of what would otherwise be permitted by "regulatory takings" rules.[68] In addition, a municipality may achieve adequate comprehensive planning.[69] Ordinarily, the lack of certainty in the development process damages municipalities through lengthy and costly litigation and administrative hearings regarding vested rights.[70] Such disputes divert municipal staff energies and public money from more productive planning efforts, deter development, slow the growth of the tax base, and interfere with the planning and development of public facilities.[71] Through the use of development agreements, however, municipalities can efficiently achieve long-range comprehensive plan-

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[63] *See* Crew, *supra* note 1, at 29.

[64] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 812. This "freeze period" is subject to certain exceptions. *See infra* note 100 and accompanying text.

[65] *See* Taub, *supra* note 62, at 559.

[66] MODEL DEV. AGREEMENT BYLAW § 04.0 (Cape Cod Commission 1990), *available at* <http://www.capecodcommission.org/bylaws/develagree.html> (visited May 17, 2000). In 1990, Massachusetts enacted the Cape Cod Commission Act which established the Cape Cod Commission as a regional planning and land use agency for Cape Cod. *Cape Cod Commission* <http://www.capecodcommission.org> (visited Aug. 4, 2000). The Model Development Agreement Bylaw referred to here "was prepared by the Cape Cod Commission to assist Cape Cod Towns that wish to incorporate development agreement authority into their local regulations." MODEL DEV. AGREEMENT BYLAW (Background). While recognizing that the Cape Cod Commission permits the use of development agreements, this Note focuses primarily on state statutes.

[67] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 811.

[68] *See* Curtin & Edelstein, *supra* note 16, at 782. For a discussion on whether the municipality can negotiate for exactions beyond what it could reasonably require under the normal exercise of its police power, see *infra* Parts IV.C, V.A.3.

[69] *See* Crew, *supra* note 1, at 30–31.

[70] *See id.* at 29.

[71] *See* Crew, *supra*.note 1, at 30; Knight & Schoettle, *supra* note 8, at 788–89.

ning goals (e.g., open space conservation, water and air quality protection, environmental mitigation, and affordable housing), avoid or reduce costly litigation and administrative proceedings, tailor regulations to the unique needs of individual projects and communities, and decrease the cost of development to the public as developers will no longer have high interest rates to pass on to consumers.[72] In light of the benefits to both developers and municipalities, development agreements are an attractive tool in late vesting states.[73]

III. Development Agreement Legislation as Valid Contract Zoning

A. *Contract Zoning*

Contract zoning refers to an ad hoc agreement between a municipality and a developer regarding rezoning.[74] In the traditional view, contract zoning is per se invalid, but courts are increasingly rejecting this approach and upholding certain forms of contract zoning.[75] Specifically, courts distinguish between bilateral and unilateral contracts.[76] A bilateral contract in which a *municipality* promises to rezone property is illegal because the municipality bypasses the notice and hearing phases of the legislative process, thereby depriving interested parties of due process.[77] On the other hand, a unilateral contract in which a *developer* makes a promise contingent on the municipality's act of rezoning is legal. Because the municipality does not promise to take action prior to the zoning hearing, it does not circumvent the legislative process.[78] In short, contract zoning is illegal

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[72] *See* Crew, *supra* note 1, at 30–31; Knight & Schoettle, *supra* note 8, at 788–89.

[73] *See* Crew, *supra* note 1, at 31; Kessler, *supra* note 7, at 455.

[74] *See* Delaney, *The Maryland Experience*, *supra* note 2, at 812.

[75] *See* Wegner, *supra* note 57, at 982–85, 987; *compare* Rando v. Town of N. Attleborough, 692 N.E.2d 544, 548, 549 n.6 (Mass. App. Ct. 1998) (citing *Dacy v. Village of Ruidoso*, 845 P.2d 793, 797–98 (N.M. 1992) as persuasive authority for upholding a payment promised by the developer rather than required by the municipality), *and* Old Canton Hills Homeowners Ass'n v. Mayor and City Council of Jackson, 749 So. 2d 54, 58, 60 (Miss. 1999) (relying on *Dacy* to uphold contingent zoning), *with Dacy*, 845 P.2d at 797–98 (striking down unilateral contract zoning because the Village attempted to zone without following the statutory process).

[76] *See Dacy*, 845 P.2d at 797–98; Wegner, *supra* note 57, at 987 ("It is much more likely that a unilateral promise, which the landowner makes contingent, of course, on the rezoning's becoming effective, would pass legal muster, than a bilateral promise in which the local government also agrees to take action, most probably to rezone.").

[77] *See Dacy*, 845 P.2d at 797.

[78] *See id.* at 797–98.

whenever it arises from a promise by a municipality to zone property in a certain manner, whether in a bilateral contract or unilateral contract initiated by the municipality.[79]

Development agreements take the form of bilateral contracts as the municipality and the developer exchange promises.[80] As such, absent legislative authority, development agreements constitute illegal contract zoning.[81] It is of critical legal consequence, therefore, that development agreements are entered into pursuant to express enabling legislation.[82] Thus recognizing the central importance of development agreement legislation, it is worth noting the basic provisions found in a typical development agreement statute.[83]

B. *Common Development Agreement Statutory Provisions*

In 1979, California became the first state to pass legislation enabling municipalities to enter into development agreements.[84] In 1985, Hawaii, following California's law as an example, became the second state to pass such legislation.[85] Currently, ten states have enacted development agreement legislation.[86]

Most statutes identify the public purposes and goals of a development agreement.[87] For example, the legislative findings and declarations in California's statute acknowledge the statute's purpose is to bring increased "certainty" and "assurance" to the development process.[88] "Certainty" and "assurance" are expected to "strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development."[89] Likewise, the legislative findings and declarations in Hawaii's statute

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[79] *See id.* at 797.

[80] *See* E. ALLAN FARNSWORTH, CONTRACTS 47 (3d ed. 1999).

[81] *See* David A. Callies, *Development Agreements*, *in* ZONING AND LAND USE CONTROLS ch. 9A, at 12, 17 (2000); Delaney, *The Maryland Experience*, *supra* note 2, at 812.

[82] *See* Callies, *supra* note 81, at 17.

[83] The following comparative overview examines only those development agreement statutes enacted in California, Florida, Hawaii, and Nevada. CAL. GOV'T CODE §§ 65864–65869.5 (1997); FLA. STAT. §§ 163.3220–.3243 (2000); HAW. REV. STAT. §§ 46–121 to –132 (1996); NEV. REV. STAT. §§ 278.0201–.0205 (1997).

[84] *See* Curtin, *supra* note 44, at 181.

[85] *See* Curtin & Edelstein, *supra* note 16, at 777–78.

[86] *See* Callies, *supra* note 81, at 17 (listing the ten states as follows: Arizona, California, Colorado, Florida, Hawaii, Idaho, Louisiana, Maryland, Nevada, and New Jersey); DANIEL P. SELMI & JAMES A. KUSHNER, LAND USE REGULATION 487 (1999).

[87] *See, e.g.*, CAL. GOV'T CODE § 65864; HAW. REV. STAT. § 46–121.

[88] *See* CAL. GOV'T CODE § 65864.

[89] *Id.*

points to "predictability," "public benefits," and the "vesting of development rights" as solutions to the problems caused by the "lack of certainty" in the development process.[90]

Generally, the statutes mandate that a development agreement *must* specify certain substantive terms.[91] For example, the statutes in California, Hawaii, Florida, and Nevada all provide that a development agreement *shall* include a description of the land subject to the agreement, the permitted uses of the property (including density, intensity, and the maximum height and size of the proposed buildings), provisions for reservation or dedication of land for public purposes, and the duration of the agreement.[92] Florida imposes a ten year maximum duration on development agreements, although they may be extended by mutual agreement of the parties following a public hearing.[93] In addition, the statutes in California, Hawaii, Florida, and Nevada provide that a development agreement *may* include commencement dates and completion dates for construction.[94]

Ordinarily, mutual consent is needed to amend or cancel the agreement, in whole or in part.[95] In Hawaii, however, if the county determines that a proposed amendment would "substantially alter" the original agreement, a public hearing must be held.[96] In addition, development agreement statutes allow the municipality to amend or cancel the agreement upon the developer's breach of the agreement.[97] In Hawaii, the developer must be given notice and a reasonable opportunity to cure the breach.[98] Finally, an agreement may be cancelled when doing so is essential to ensure public health, safety, or welfare.[99]

There are seven additional provisions worth noting. First, the most appealing aspect of a development agreement is that unless otherwise provided in the agreement, the applicable rules, regulations, and policies are those which are "in force at the time of the execution

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[90] HAW. REV. STAT. § 46–121.

[91] *See* Taub, *supra* note 62, at 560.

[92] CAL. GOV'T CODE § 65865.2; FLA. STAT. § 163.3227 (2000); HAW. REV. STAT. § 46–126; NEV. REV. STAT. § 278.0201 (1997).

[93] FLA. STAT. § 163.3229.

[94] *See* CAL. GOV'T CODE § 65865.2; FLA. STAT. § 163.3227; HAW. REV. STAT. § 46–126; NEV. REV. STAT. § 278.0201.

[95] *See, e.g.*, CAL. GOV'T CODE § 65868; HAW. REV. STAT. § 46–130.

[96] HAW. REV. STAT. § 46–130.

[97] *See, e.g.*, CAL. GOV'T CODE § 65865.1; HAW. REV. STAT. § 46–125.

[98] *See* HAW. REV. STAT. § 46–125.

[99] *See, e.g.*, CAL. GOV'T CODE § 65865.3; HAW. REV. STAT. § 46–127.

of the agreement."[100] Each state allows for varying exceptions to this "freeze period," allowing the municipality to apply newly enacted laws which are, for example, essential to the public health, safety, or welfare, or, not in conflict with those rules applicable to the property.[101] Second, an enabling statute is not always sufficient to grant a municipality the authority to enter into a development agreement.[102] In California and Hawaii, for example, a municipality must first pass an enabling ordinance establishing the details of development agreement "procedures and requirements" that the executive branch of the county must follow.[103] Third, under California law, the adoption of a development agreement is a "legislative" act subject to "referendum."[104] The Hawaii statute, in contrast, declares that the adoption of a development agreement is an "administrative" decision which is not, therefore, subject to referendum.[105] Fourth, the California statute requires that the municipality annually review compliance with the agreement, and authorizes the municipality to "terminate or modify the agreement" upon a finding of noncompliance.[106] The Nevada statute, in comparison, requires periodic review only once every two years.[107] Fifth, the statutes in California, Hawaii, and Florida provide that a development agreement is enforceable by "any party" to the contract.[108] Sixth, development agreement statutes require the holding of a "public hearing" prior to the adoption of a development agreement.[109] The California and Florida statutes require that "notice" be given to all affected property owners.[110] And seventh, all stat-

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[100] CAL. GOV'T CODE § 65866; HAW. REV. STAT. § 46–127.

[101] *See, e.g.*, CAL. GOV'T CODE §§ 65865.3, 65866; HAW. REV. STAT. § 46–127.

[102] *See* Callies, *supra* note 81, at 17.

[103] CAL. GOV'T CODE § 65865; HAW. REV. STAT. § 46–123.

[104] CAL. GOV'T CODE § 65867.5. The policy behind this rule is to guard against a lame duck city council approving a development agreement opposed by the public. *See* Wegner, *supra* note 57, at 1013. There is a possibility, however, that the California courts may characterize the adoption of a development agreement as an administrative act, even though the legislature has determined otherwise. *See id.*

[105] *See* HAW. REV. STAT. § 46–131. When including this provision in the Hawaii statute, the legislature may have been heavily influenced by *County of Kauai*, where the outcome of a voter referendum caused the developer to lose a large sum of money. *See* Wegner, *supra* note 57, at 1013 n.319; *supra* Part I.A.

[106] *See* CAL. GOV'T CODE § 65865.1.

[107] *See* NEV. REV. STAT. § 278.0205 (1997).

[108] *See* CAL. GOV'T CODE § 65865.4; FLA. STAT. § 163.3243 (2000); HAW. REV. STAT. § 46–127.

[109] *See, e.g.*, CAL. GOV'T CODE § 65867; HAW. REV. STAT. § 46–128.

[110] *See* CAL. GOV'T CODE § 65867; FLA. STAT. § 163.3225.

utes declare that a project proposed by a development agreement must be "consistent with the general plan."[111]

In short, development agreement legislation has rescued development agreements from being held invalid as illegal contract zoning.[112] The standards described above illustrate the common provisions contained in a typical development agreement statute.[113] With this basic understanding of how to draft a development agreement in mind, appreciation of legal issues which affect its enforceability is more readily achieved.

IV. Legal Issues Affecting the Enforceability of Development Agreements

This section discusses five distinct legal issues which affect the enforceability of a development agreement. First, as a threshold issue, a municipality must have express enabling authority to enter into a development agreement. The second issue focuses on the tension between the reserved powers doctrine and the Contracts Clause, and the third issue examines whether rules used during adjudicative takings should apply to exactions imposed pursuant to devevlopment agreements. The fourth issue considered is the significance of characterizing a development agreement as a legislative act or an administrative act. And finally, the fifth issue reviewed is remedies available to both the municipality and the developer in the event of noncompliance.

A. *Express Enabling Authority*

Municipalities may exercise only those powers expressly granted to them by the state.[114] A municipality, therefore, must have express

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[111] *See, e.g.*, Cal. Gov't Code § 65867.5; Haw. Rev. Stat. § 46–129. The general plan, also known as the "comprehensive plan," contains the municipality's land use policies and thus serves as a guideline for the legislature when drafting zoning ordinances. *See Comprehensive Plan, in* Zoning and Land Use Controls ch. 37, at 4–9 (2000). The rule is that zoning must be "in accordance" with the comprehensive plan. *See id.* at 4.

[112] *See* Callies, *supra* note 81, at 12, 17; Delaney, *The Maryland Experience, supra* note 2, at 812.

[113] *See* Cal. Gov't Code §§ 65864–65869.5; Fla. Stat. §§ 163.3220–.3243; Haw. Rev. Stat. §§ 46–121 to –132; Nev. Rev. Stat. §§ 278.0201–.0205 (1997); *see also* Callies, *supra* note 81, at 12–30 (providing a comparative review of state legislation); Taub, *supra* note 62, at 559–64 (same); Wegner, *supra* note 57, at 996–99 (same).

[114] *See* Kessler, *supra* note 7, at 469. Municipalities are creatures of the states and therefore lack inherent power. *See* Valente & McCarthy, Jr., *supra* note 32, at 46. Accordingly, Dillon's Rule holds that municipalities, dependent upon the state, possess only such powers as are expressly granted, those that are necessarily or fairly implied from express pow-

statutory authority to impose exactions as part of its regulatory permitting process.[115] Likewise, a municipality must have express enabling authority to enter into development agreements, through which municipalities negotiate exactions.[116] Otherwise, without the requisite authority, an agreement will be declared void as ultra vires.[117] Some states, however, require the municipality to pass an enabling ordinance setting out the details of development agreement procedures and requirements prior to entering into an agreement.[118] The enabling ordinance ensures that exactions negotiated through development agreements are not arbitrary and capricious.[119]

In *Nunziato v. Planning Board of Edgewater*, the planning board approved a site plan for the construction of a high rise condominium apartment building, conditioned upon the developer's agreement to

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ers, and those essential to the municipality's corporate status. *See id.* at 63 (citations omitted). Dillon's Rule requires strict construction of delegated powers to municipalities. *See id.* at 63–64. Home Rule provisions, however, have recognized local autonomy over matters of local concern and supports liberal construction of delegated powers, eroding the effects of Dillon's Rule. *See id.* at 63, 110. State law determines whether the state adheres to Dillon's Rule or Home Rule. *See id.* at 110–11. In a Dillon's Rule state, the authority to enter into development agreements must be expressly granted. *See id.* at 63. While it seems to follow that in a Home Rule state such authority may be derived from the broad power to govern local matters like zoning, there are some limits placed upon Home Rule which preclude reaching this conclusion. *See* Sylvania Elec. Prods., Inc. v. City of Newton, 183 N.E.2d 118, 124–26 (Mass. 1962) (Kirk, J., dissenting); Witten Interview, *supra* note 1. For instance, contract zoning is often prohibited by the legislature as an invalid method of imposing restrictions on the use of land. *See Sylvania*, 183 N.E.2d at 124–26 (Kirk, J., dissenting). Thus, even in a Home Rule state, the authority to enter into development agreements must be expressly granted to save an agreement from being held invalid as illegal contract zoning. *See id.*; Callies, *supra* note 81, at 12, 17; Delaney, *The Maryland Experience*, *supra* note 2, at 812.

[115] *See* Delaney, *Development Agreements*, *supra* note 8, at 53.

[116] *See id.* at 55. In *Giger v. City of Omaha*, however, the court upheld a development agreement even though the City of Omaha did not have express statutory authority to enter into such agreements. *See* 442 N.W.2d 182, 193 (Neb. 1989). The court found *implied* authority to implement conditional zoning in the city's "broad powers to regulate land uses as long as those regulations are within the police power." *Id.* The court concluded that the conditions imposed through conditional rezoning were within the proper exercise of the police power as they were "in the interest of public health, safety, morals, and the general welfare." *Id.* at 190, 193. Despite this anomalous case where a court found implied authority to enter into development agreements, express authority is preferred because it resolves the contract zoning issue and is better able to withstand reserved powers doctrine and ultra vires challenges. *See* Callies, *supra* note 81, at 17; Delaney, *The Maryland Experience*, *supra* note 2, at 812; Kessler, *supra* note 7, at 469–70.

[117] *See* Delaney, *Development Agreements*, *supra* note 8, at 55.

[118] *See* CAL. GOV'T CODE § 65865 (1997); HAW. REV. STAT. § 46–123 (1996).

[119] *See* Nunziato v. Planning Bd. of Edgewater, 541 A.2d 1105, 1110 (N.J. Super. Ct. App. Div. 1988).

pay $203,000 to the borough for its affordable housing fund.[120] The court held that the planning board's approval was arbitrary and capricious, and vacated the approval.[121] The court explained that such "impositions must be authorized by statute and implemented by municipal ordinance."[122] In *Nunziato*, the municipal body failed to enact an enabling ordinance and thus the money constituted an impermissible exaction.[123] The court reasoned that "[w]ithout [an ordinance establishing] legislated standards the possibilities for abuse in such negotiations between an applicant and a regulatory body . . . are unlimited."[124] Assuming that a municipality has the requisite authority, the development agreement may then face other legal issues.

B. *The Reserved Powers Doctrine and the Contracts Clause*

1. The Reserved Powers Doctrine

"[T]he legislature cannot bargain away the police power of a State."[125] Thus, a current legislature cannot use its contract power to bind future legislatures and limit their discretion in exercising the police power.[126] Known as the reserved powers doctrine, this rule requires a determination as to whether a municipality, upon entering into a development agreement, impermissibly bargains away its police power when it promises not to change the land use regulations applicable to the developer's property.[127] If a development agreement is found to bargain away the police power, it fails under the rule of "ini-

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[120] *See id.* at 1106, 1108.

[121] *See id.* at 1109–10.

[122] *Id.* at 1108.

[123] *See id.* at 1109.

[124] *Id.* at 1110. Nine years later, in *Swanson v. Planning Bd. of Hopewell*, Judge Stein wrote a concurring opinion reflecting his concern about unlawful exactions, even though the Supreme Court of New Jersey dismissed the appeal without reaching the merits as the statute of limitations had expired. *See* 692 A.2d 966, 966–67 (N.J. 1997). Pointing in part to the Appellate Division's reasoning in *Nunziato*, Judge Stein emphasized that exactions are lawful only when imposed pursuant to standards set forth by an enabling ordinance. *See id.* at 970.

[125] Stone v. Mississippi, 101 U.S. 814, 817 (1880).

[126] *See* Callies, *supra* note 81, at 7, 10.

[127] *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 23 (1977) ("This doctrine requires a determination of the State's power to create irrevocable contract rights in the first place, rather than an inquiry into the purpose or reasonableness of the subsequent impairment."); *see also* Wegner, *supra* note 57, at 965 n.31 (clarifying the common misuse of the phrase "reserved powers doctrine").

tial incapacity" and is *void ab initio.*[128] Otherwise, a development agreement is a valid and enforceable contract.[129]

In deciding whether a government contract is *void ab initio* under the reserved powers doctrine, the test is whether an essential attribute of state power has been contracted away.[130] To violate the reserved powers doctrine, a police power, such as zoning, must be contracted away in its entirety for a long period of time.[131] This Note proceeds assuming that municipalities do not violate the reserved powers doctrine upon entering into development agreements and that such contracts will be held enforceable.[132]

2. The Contracts Clause

The crucial problem surfaces as soon as a municipality enacts a new zoning ordinance that impairs a valid development agreement.[133] The Contracts Clause of the United States Constitution provides that "[n]o state shall . . . pass any . . . Law impairing the Obligation of Contracts."[134] Accordingly, a Contracts Clause claim may be brought when a state allegedly uses its legislative authority to impair an enforceable contract.[135] The framers drafted this clause to "encourage trade and credit by promoting confidence in the stability of contractual obligations."[136] This rationale provides sufficient reason to pro-

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[128] *See United States Trust*, 431 U.S. at 23; Wegner, *supra* note 57, at 965 n.31.

[129] *See United States Trust*, 431 U.S. at 23; Wegner, *supra* note 57, at 965 n.31.

[130] *See United States Trust*, 431 U.S. at 23–24; Kessler, *supra* note 7, at 465.

[131] *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 386–87 (1926) (holding that zoning is a legitimate exercise of state police power); Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 734 (1976) ("The effect of the [reserved powers] rule, however, is to void only a contract which amounts to a city's 'surrender,' or 'abnegation,' of its control of a properly municipal function."); Callies, *supra* note 81, at 7.

[132] *See infra* Part V.A.1 (whether municipalities violate the reserved powers doctrine upon entering into development agreements).

[133] *See* Kessler, *supra* note 7, at 465. Undoubtedly, a municipality is free to adopt such an ordinance without applying it to the property subject to the development agreement. The basis for the "crucial problem" discussed throughout this Note, therefore, lies in the improbable situation where the municipality, for some reason, seeks to apply the newly enacted ordinance and nullify the development agreement. This will occur, for instance, when the municipality enacts a law invoking the public health, safety, or welfare exception to the regulatory freeze. *See id.*

[134] U.S. CONST. art. I, § 10, cl. 1.

[135] *See* E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 678–81 (7th Cir. 1980) (holding that a Contracts Clause claim existed when the District used its legislative authority to prevent the plaintiff from fulfilling its contractual obligation while providing itself with a defense to a suit for damages).

[136] United States Trust Co. v. New Jersey, 431 U.S. 1, 15 (1977).

tect developers in development agreements.[137] In addition, the Contracts Clause applies to public contracts, such as development agreements between a government entity and a private party.[138] Unquestionably, the Contracts Clause requires a municipality to "keep its word" and implement the regulatory freeze once it enters into a development agreement.[139] The reserved powers doctrine, however, prohibits a municipality from contracting away its zoning power.[140] In short, the tension between these two provisions creates a problem when, after creating vested rights through an enforceable development agreement, the municipality enacts a new zoning ordinance which renders the approved development impermissible.[141]

a. *Impairment of Contract Compared with Breach of Contract*

While the reserved powers doctrine prohibits the contracting away of the police power, if the Contracts Clause is to have any meaning it must place some limit on the exercise of police power.[142] The United States Constitution, therefore, only prohibits impairment of contract; it does not prohibit a mere breach of contract.[143] "A governmental action becomes an impairment if a government acts in a way which makes performance of the contract illegal or impossible and thus gives the party defaulting on its obligation a defense to a breach of contract action for damages or other relief."[144] Hence, when distinguishing between breach of contract and impairment of contract, the court's central inquiry focuses on remedies: when an adequate remedy in damages exists, government action is characterized as a breach of contract that does not rise to the level of a contractual impairment.[145] When the government action consists of *passing a*

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[137] *See* Donald G. Hagman, *Development Agreements*, *in* 1982 ZONING & PLAN. L. HANDBOOK 189 (Fredric A. Strom ed. 1982).

[138] *See United States Trust*, 431 U.S. at 9–10 (covenant between Port Authority bondholders and the states of New York and New Jersey).

[139] Hagman, *supra* note 137, at 189.

[140] *See supra* Part IV.B.1.

[141] *See* Kessler, *supra* note 7, at 465.

[142] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 242 (1978).

[143] *See* E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 679 (7th Cir. 1980) (explaining how to determine whether a legislative act is an impairment of contract or a mere breach of contract); Hagman, *supra* note 137, at 189; Kramer, *supra* note 6, at 35–37; Wegner, *supra* note 57, at 968.

[144] Hagman, *supra* note 137, at 189; *see E. & E. Hauling*, 613 F.2d at 679; Kramer, *supra* note 6, at 35–37.

[145] *See E. & E. Hauling*, 613 F.2d at 679 ("The distinction [between a breach of a contract and impairment of the obligation of the contract] depends on the availability of a

law, an adequate remedy in damages generally does not exist because the law will be a sufficient defense, making it illegal or impossible for the defaulting party to fulfill its contractual obligation.[146]

Whether the government action amounts to an impairment of contract or a breach of contract affects the developer's potential remedy.[147] If the government action is merely a breach of contract, remedies such as damages, restitution, and specific performance are available to the private party.[148] When the government action constitutes a contractual impairment, however, the focus turns to whether the government is justified in breaking its contractual obligations.[149]

b. *Justification of an Impairment of Contract*

As a threshold, a governmental action must operate as a "substantial impairment" of a contractual relationship.[150] An impairment of contract may be justified and found constitutional if it is "*reasonable and necessary*" to serve an important public purpose.[151] The test formulated in *United States Trust Co. v. New Jersey* requires a balancing of the state's interest in the exercise of its police power against the degree of impairment of the private party's contractual expectations.[152] Factors considered include whether the private party heavily and reasonably relied on the contractual expectations, whether changed circumstances and unforeseen events led to the new law, and whether an alternative exists.[153] "In applying this [strict scrutiny] standard [to public contracts], however, complete deference to a legislative assessment of reasonableness and necessity is not appropriate because the State's self-interest is at stake."[154]

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remedy in damages in response to the state's . . . action.") (citing Hays v. Port of Seattle, 251 U.S. 233, 237 (1920)); Hagman, *supra* note 137, at 189; Kramer, *supra* note 6, at 35–37; Wegner, *supra* note 57, at 970.

[146] *See E. & E. Hauling*, 613 F.2d at 679–80; Hagman, *supra* note 137, at 189.

[147] *See* Hagman, *supra* note 137, at 187; Wegner, *supra* note 57, at 971.

[148] *See* Hagman, *supra* note 137, at 187. For a discussion on remedies for breach of contract, see *infra* Part IV.E.2.b.

[149] *See* Wegner, *supra* note 57, at 1036.

[150] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244 (1978).

[151] *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977) (emphasis added).

[152] *See United States Trust Co.*, 431 U.S. at 28–32; Wegner, *supra* note 57, at 974–75. One year later, in *Allied Steel*, the Court reaffirmed the test set forth in *United States Trust*. *See Allied Steel*, 438 U.S. at 244–47.

[153] *See Allied Steel*, 438 U.S. at 244–50; *United States Trust*, 431 U.S. at 28–32; *see also* Hagman, *supra* note 137, at 191 (listing the factors); Wegner, *supra* note 57, at 974–75 (discussing the balancing approach used by the Supreme Court).

[154] *United States Trust*, 431 U.S. at 25–26.

In *United States Trust*, the Supreme Court invalidated New Jersey's repeal of covenants which limited the use of Port Authority revenues.[155] The Court conducted a balancing test and reasoned that although the concern about mass transportation was legitimate, it did not outweigh the bondholders contractual expectations that their security interest would be preserved.[156] Significantly, in holding the repeal unnecessary and unreasonable, the Court found that the state could have employed a more moderate and equally viable alternative, and that the need for mass transportation had been foreseeable at the outset of the agreement, changing only in degree and not in kind.[157]

In short, the Contracts Clause will not prohibit government actions that impair public contract rights when the act is justified as *reasonable and necessary* to serve an important public purpose.[158] When the government impairment is justified the private party is not entitled to any relief.[159] On the other hand, if the government impairment is not justified, the court will issue an injunction prohibiting the municipality from enforcing the ordinance.[160]

C. *Adjudicative Takings: "Unconstitutional Conditions"*

1. Exactions Generally

The Takings Clause of the Fifth Amendment prohibits the government from taking private property for public use without paying just compensation.[161] The police power of the state, however, includes the authority to impose conditions and exactions on private development.[162] An exaction comprises "an assortment of techniques employed by local authorities to compel a developer, either by regulation, *negotiation, or simple leverage*, to exchange land, money, materials, or services for permission to develop."[163] The critical legal issue facing exactions generally is how far the municipality may go in imposing

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[155] *See id.* at 32.

[156] *See id.* at 28–32.

[157] *See id.*

[158] *See id.* at 25.

[159] *See* Wegner, *supra* note 57, at 976.

[160] *See id.* at 1037. For a discussion on the remedy for an unjustified impairment of contract, see *infra* Part IV.E.2.c.

[161] U.S. CONST. amend. V.

[162] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 843 (1987) (Brennan, J., dissenting).

[163] Crew, *supra* note 1, at 23–24 (emphasis added).

such conditions without violating the Takings Clause.[164] In *Nollan v. California Coastal Commission* and *Dolan v. City of Tigard*, the Supreme Court examined the constitutionality of exactions imposed as conditions upon development permits.[165]

a. *Nollan v. California Coastal Commission*

In *Nollan*, the Nollans sought a development permit to replace their small beachfront home with a three-bedroom house.[166] The California Coastal Commission granted the permit, subject to the condition that the Nollans dedicate a public access easement across a portion of their property along the beach.[167] The Commission justified the easement as necessary to alleviate the burdens caused by the proposed development, namely the public's obstructed view of the beach and their subsequent difficulty in realizing that those portions of the beach were available for use.[168] The Nollans challenged the condition, claiming that it effected a taking of their private property for public use without just compensation in violation of the Fifth and Fourteenth Amendments.[169] The Court agreed and held the condition unconstitutional because it lacked an "essential nexus" to the burdens the new development would create.[170] The permit condition, therefore, was "not a valid regulation of land use but 'an out-and-out plan of extortion'."[171] While the *Nollan* decision established the requirement of a nexus between the exaction imposed and the harm the development will cause, the Supreme Court in *Dolan* set forth the necessary "degree of connection between the exactions and the projected impact of the proposed development."[172]

b. *Dolan v. City of Tigard*

In *Dolan*, Florence Dolan owned a plumbing and electrical supply store and applied to the city for a permit to redevelop the site.[173] The City Planning Commission granted Dolan's permit application, sub-

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[164] *See* Curtin, *supra* note 44, at 221.
[165] *See* Dolan v. City of Tigard, 512 U.S. 374, 386–88 (1994); *Nollan*, 483 U.S. at 831–37.
[166] *See Nollan*, 483 U.S. at 828.
[167] *See id.*
[168] *See id.* at 828–29.
[169] *See id.* at 829.
[170] *See id.* at 837–39.
[171] *Nollan*, 483 U.S. at 837 (citation omitted).
[172] *Dolan*, 512 U.S. at 386.
[173] Dolan v. City of Tigard, 512 U.S. 374, 379 (1994).

ject to the conditions that she "dedicate the portion of her property lying within the 100-year floodplain for improvement of a storm drainage system along Fanno Creek and that she dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway."[174] Dolan challenged the dedication requirements as an uncompensated taking under the Fifth and Fourteenth Amendments.[175] The Court held that although an "essential nexus" existed between the conditions imposed and the burdens that the development would cause, the conditions were unconstitutional because they did not have a "*rough proportionality*" to the development's impact.[176] Moreover, the Court distinguished other cases involving *legislative* determinations as to land use regulations from the present case where "the city made an *adjudicative* decision to condition petitioner's application for a building permit on an individual parcel."[177]

In sum, through the *Nollan* and *Dolan* decisions, the Supreme Court has placed a dual burden on municipalities imposing adjudicative conditions: (1) the exaction must have an "essential nexus" to the burdens that the proposed development will cause; and (2) "rough proportionality" must exist between the exaction and the development's impact.[178] The important issue here is whether exactions imposed pursuant to development agreements are subject to the *Nollan* and *Dolan* requirements that apply generally to adjudicative conditions.[179] Resolution of this issue will turn upon "how willing the courts are to accept . . . the . . . 'voluntary' rationale."[180]

2. Should *Nollan* and *Dolan* Apply to Exactions Imposed Pursuant to Development Agreements?

Municipalities can obtain exactions through development agreements.[181] For example, a municipality may negotiate for the developer's promise to restrict the use of his property, to build public infrastructure, and to make cash payments, in exchange for the promise to vest development rights by freezing the applicable land use

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[174] *Id.* at 379–80.
[175] *See id.* at 382.
[176] *See id.* at 386–88, 391–95 (emphasis added).
[177] *Dolan*, 512 U.S. at 385 (emphasis added).
[178] *See id.* at 391; Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987).
[179] *See* Callies, *supra* note 81, at 30.
[180] *Id.* at 31.
[181] *See* Crew, *supra* note 1, at 27.

regulations for a specific period.[182] Assuming that development agreements are administrative acts, it appears that the *Nollan* and *Dolan* requirements should apply to prevent the type of "extortion" *Nollan* sought to eliminate.[183] The voluntary nature of the development agreement, however, suggests that developers ought to be bound by the agreed upon conditions, even if the conditions violate *Nollan* and *Dolan*.[184]

If *Nollan* and *Dolan* apply, exactions imposed pursuant to a development agreement must satisfy the "essential nexus" and "rough proportionality" requirements in the same manner as traditional forms of exactions.[185] Thus, *Nollan* and *Dolan* arguably apply to all exactions, whether voluntary or involuntary.[186] The reasoning here is to prevent the type of extortion that *Nollan* was designed to eliminate, as it is difficult to determine whether a developer truly accepted a condition voluntarily.[187] "[D]evelopers who depend on the affected projects for financial sustenance will often accede to, or even suggest, the unlawful exaction rather than face years of litigation and delay."[188] By applying the "essential nexus" and "rough proportionality" requirements to development agreement conditions, the developer is protected from a municipality's abuse of its "regulatory leverage" in an adjudicatory setting, where the risk for such extortion-like abuse is inherently high.[189]

On the other hand, and equally deserving of consideration, is the view against applying *Nollan* and *Dolan* to development agreement exactions, thereby allowing municipalities to exact in excess of what ordinarily would be permitted.[190] A municipality should arguably be able to exact as much as possible in return for vested rights as the

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[182] *See id.*

[183] *See id.* at 52–53. For a discussion on the characterization of a development agreement as an administrative act, see *infra* Part V.A.4. Such characterization is important here, however, because the form of extortion condemned by the *Nollan* court exists only in adjudicatory settings. *See Dolan*, 512 U.S. at 385; *Nollan*, 483 U.S. at 837.

[184] *See* Leroy Land Dev. v. Tahoe Reg'l Planning Agency, 939 F.2d 696, 698–99 (9th Cir. 1991); Crew, *supra* note 1, at 53. *See id.*

[185] *See* Callies, *supra* note 81, at 31–32; *see also* Crew, *supra* note 1, at 49, 53 (arguing that *Nollan* applies even where the developer has agreed to the condition).

[186] *See* Crew, *supra* note 1, at 49, 53.

[187] *See* Callies, *supra* note 81, at 31; Crew, *supra* note 1, at 52–53.

[188] Crew, *supra* note 1, at 38–39.

[189] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Ehrlich v. City of Culver City, 911 P.2d 429, 438–39 (Cal. 1996); Crew, *supra* note 1, at 52–53; Curtin, *supra* note 44, at 231–35 (summarizing *Ehrlich*, 911 P.2d 429).

[190] *See* Callies, *supra* note 81, at 30–32.

formation of a development agreement is a voluntary contract, which neither the developer nor the municipality is compelled to execute.[191] As a general rule, the right to develop one's property is *not* a governmental benefit, and therefore a municipality can condition its approval only by showing the reasonableness of the exaction.[192] In a development agreement, however, a municipality is not attaching exactions to the right to develop, but rather is promising to secure the developer's investment by not enforcing any subsequent changes in the zoning regulations that render the proposed use impermissible.[193] Thus, a development agreement may be seen as "convey[ing] a *governmental benefit* upon the developer, since '[i]t is well established that there is no federal Constitutional right to be free from changes in land use laws.'"[194] A municipality, therefore, under this view, should not be limited by *Nollan* and *Dolan*; rather, it should be permitted to exact as much as the developer is willing to voluntarily concede in exchange for vested rights.[195]

In *Meredith v. Talbot County*, a land developer and a planning officer voluntarily entered into a development agreement, under which the developer received immediate subdivision plat approval in exchange for his promise not to develop lots serving as a habitat for two endangered species.[196] The developer later attempted to invalidate the agreement as a product of duress.[197] The court held that the development agreement bound the developer because he made a "reasonable and informed" business decision which conferred benefits upon all the parties.[198] Significantly, the court stated that "[t]he fact that the decision was made in the face of likely adverse governmental action is of no consequence."[199]

Moreover, in *Leroy Land Development v. Tahoe Regional Planning Agency*, the developer wanted to rescind a settlement agreement with the Tahoe Regional Planning Agency that required on-site and off-site

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[191] *See id.*

[192] *See* Callies, *supra* note 81, at 32; Crew, *supra* note 1, at 23.

[193] *See* Callies, *supra* note 81, at 32.

[194] *Id.* (quoting Lakeview Dev. v. South Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990) (emphasis added).

[195] *See id.*

[196] *See* Meredith v. Talbot County, 560 A.2d 599, 601–02 (Md. Ct. Spec. App. 1989).

[197] *See id.* at 603.

[198] *See id.* at 604.

[199] *Id.*

mitigation measures.[200] The court held that "[s]uch 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."[201] The court refused to apply the takings analysis formulated in *Nollan* because the parties chose to avoid litigation by executing a settlement agreement supported by consideration.[202]

D. *Legislative Act or Administrative Act?*

A legislative act focuses on broad questions of public policy, affecting the population generally.[203] The adoption of a comprehensive zoning ordinance or amendment, for example, is a legislative act.[204] An administrative act, in contrast, applies general standards to the facts of a particular case.[205] The approval or denial of a special or conditional use permit, for instance, is deemed an administrative act.[206]

Whether the adoption of a development agreement is characterized as a legislative act or an administrative act is legally significant for a few reasons.[207] First, where permitted by a state constitution, legislative decisions are subject to voter repeal through referendum while administrative decisions are not.[208] Second, the heightened judicial scrutiny for due process violations under the *Nollan* and *Dolan* takings analysis applies to administrative acts, whereas the less onerous takings test formulated in *Agins v. City of Tiburon* applies to legislative acts.[209] Finally, the Contracts Clause only protects administrative determinations from a municipal impairment.[210]

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[200] *See* Leroy Land Dev. v. Tahoe Reg'l Planing Agency, 939 F.2d 696, 697–98 (9th Cir. 1991). Generally, a settlement agreement is the functional equivalent of a development agreement.

[201] *Id.* at 698.

[202] *See id.* at 698–99.

[203] *See* Wegner, *supra* note 57, at 1012.

[204] *See id.*

[205] *See id.*

[206] *See id.*

[207] *See* Kessler, *supra* note 7, at 470–71; *see generally*, Wegner, *supra* note 55, at 1010–14 (discussing the availability of referendum and initiative procedures).

[208] *See* Callies, *supra* note 81, at 22.

[209] *See* Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) ("The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests or denies an owner economically viable use of his land.").

[210] *See* Kessler, *supra* note 7, at 471.

E. *Remedies for Noncompliance*

1. Developer Noncompliance with Exactions and Conditions

A developer is required to comply with the exactions only if he proceeds with the project.[211] Once development begins, and pursuant to the authorizing statute, noncompliance is detected through periodic review of a development's progress.[212] When noncompliance is discovered, the municipality may terminate or modify the agreement, as long as the noncompliance is not excused by specific terms of the agreement.[213] Additional remedies available to the government for the developer's breach include "recourse to security devices . . . and reliance on applicable enforcement measures established by local ordinance."[214]

2. Municipal Noncompliance with Regulatory Freeze Provisions

a. *Legislative Takings*

Once the right to develop vests through a development agreement, the enactment of a new zoning ordinance which renders the approved development impermissible may effect a legislative taking.[215] The Supreme Court in *Agins* declared that land use regulation becomes a taking if it (1) does not substantially advance a legitimate state interest, *or* (2) denies an owner economically viable use.[216] In determining whether a regulation satisfies the second prong of the *Agins* test, courts generally look to the value in the owner's property as a whole rather than the value of the segment taken.[217] An owner has the burden of showing that he has been deprived of "*all* economically beneficial" uses of his land.[218] The critical factor to consider is the

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[211] *See* River Vale Planning Bd. v. E & R Office Interiors, Inc., 575 A.2d 55, 60 (N.J. Super. Ct. App. Div. 1990).

[212] *See, e.g.*, CAL. GOV'T CODE § 65865.1 (1997).

[213] *See, e.g., id.* "Typically, they excuse noncompliance only when acts of God intervene or the state governor declares an emergency." Wegner, *supra* note 57, at 1027–28.

[214] Wegner, *supra* note 57, at 1028.

[215] *See id.* at 1030–35.

[216] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

[217] *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 493–502 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 130–31 (1978).

[218] *See* Lucas v. Southern Carolina Coastal Council, 505 U.S. 1003, 1015 (1992) (emphasis added).

regulation's interference with an owner's "investment-backed expectations."[219]

If a legislative taking has occurred, the remedy varies depending on which prong of the *Agins* test has been violated and for how long the violation has occurred.[220] If the inconsistent ordinance does not substantially advance a legitimate state interest, the ordinance will be invalidated but damages will not necessarily be awarded.[221] On the other hand, if the regulation denies an owner all economically viable use of his land, the ordinance may be invalidated or amended, and damages may be awarded for the "temporary taking" that occurs while the regulation is in effect prior to a court's takings determination.[222] A municipality, however, retains the right to exercise its power of eminent domain and pay just compensation for its noncompliance with the freeze provision.[223]

b. *Breach of Contract*

An inconsistent zoning ordinance might also amount to a breach of contract.[224] Common law remedies for breach of contract include damages, restitution, and specific performance.[225] The award of damages is the "principal legal remedy" and the "common form of relief for breach of contract."[226] Damages are measured by the landowner's "expectation interest," which is the "actual value that the contract would have had to the injured party had it been performed."[227] Restitution requires that the party in breach "account for a benefit that has been conferred by the injured party."[228] To prevent "unjust enrichment," the party in breach must return the benefit received or pay a

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[219] *See Penn Cent. Transp.*, 438 U.S. at 124, 127 (1978) (citing Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), as the leading case discussing "investment-backed expectations"); *Keystone Bituminous*, 480 U.S. at 493–502.

[220] Witten Interview, *supra* note 1.

[221] *Id.*

[222] *See* First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 313, 321–22 (1987) (holding that the Just Compensation Clause requires the government to pay for "temporary" regulatory takings); Witten Interview, *supra* note 1.

[223] *See First English*, 482 U.S. at 321 ("Once a court determines that a taking has occurred, the government retains the whole range of options already available—amendment of the regulation, withdrawal of the invalidated regulation, *or exercise of eminent domain.*") (emphasis added).

[224] *See* Wegner, *supra* note 57, at 1035.

[225] *See id.* at 1035.

[226] FARNSWORTH, *supra* note 80, at 761, 784.

[227] *Id.* at 756, 784.

[228] *Id.* at 851.

sum of money equivalent to its value.[229] Specific performance is the "principal equitable remedy" for breach of contract, requiring "the promisor to render the promised performance."[230] Importantly, neither legal nor equitable relief is available if governmental noncompliance serves the public health, safety, or welfare.[231]

c. *Impairment of Contract*

Finally, the enactment of a new zoning ordinance which renders the approved development impermissible will constitute an unconstitutional impairment of contract if it cannot be justified as "reasonable and necessary."[232] The remedy for an unjustified contractual impairment is to issue an injunction prohibiting the municipality from enforcing the ordinance.[233] In this manner, an injunction has the same effect as ordering specific performance of the contract.[234] Although the Contracts Clause does not permit a court to award damages instead of specific performance of the contract, "interim damages," similar to those awarded in the takings context, are arguably available.[235] Lastly, although an unconstitutional impairment of contract by definition prevents a municipality from being excused from its noncompliance on health, safety, or welfare grounds, a municipality may assert its power of eminent domain and pay just compensation for its impairment.[236]

V. Analysis

A. *Applying the Legal Issues to Development Agreements*

As a threshold issue, a municipality must have express authority to enter into development agreements to avoid an agreement being declared void as ultra vires.[237] Express authority is derived from a state enabling statute.[238] Assuming that a municipality has the requisite authority, the development agreement may then face a reserved pow-

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[229] *See id.*
[230] *Id.* at 761, 770.
[231] *See* Wegner, *supra* note 57, at 1035.
[232] *See id.* at 1036–37.
[233] *See id.* at 1037.
[234] *See* Farnsworth, *supra* note 80, at 770–71.
[235] *See* Wegner, *supra* note 57, at 1037, 976 n.104.
[236] *See id.* at 1038.
[237] *See* Delaney, *Development Agreements*, *supra* note 8, at 55.
[238] *See id.*

ers doctrine challenge, as well as constitutional claims invoking the Contracts Clause and the Fifth Amendment Takings provision.[239] Additionally, whether the adoption of a development agreement is a legislative act or an administrative act must be determined, and the remedy issue must be resolved in the event of noncompliance.[240]

1. The Reserved Powers Doctrine

Municipalities are not likely to violate the reserved powers doctrine upon entering into development agreements.[241] While zoning represents an exercise of a municipality's police power, development agreements generally do not impermissibly contract away the zoning power—by its terms, a municipality retains some control over the agreement.[242] For instance, a municipality may modify or terminate an agreement upon discovering developer noncompliance or if required by the public health, safety, or welfare, and certain agreements limit the duration of the regulatory freeze.[243] Further, rather than contracting away the police power, development agreements constitute its reasonable exercise as they provide the required incentive for private investment in the planning process.[244] Thus, in *Giger v. City of Omaha*, the appellants claimed that the city bargained away its police power when it entered into a development agreement.[245] There, the Nebraska Supreme Court held:

> In sum, we find that there is not clear and satisfactory evidence to support the appellants' contention that the city has bargained away its police power. The evidence clearly shows that the city's police powers are not abridged in any manner and that the agreement is expressly subject to the remedies available to the city under the Omaha Municipal Code. Further, we find that the agreement actually enhances the city's

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[239] *See* Callies, *supra* note 81, at 5, 10, 30.

[240] *See id.*; SELMI & KUSHNER, *supra* note 86, at 498.

[241] *See* Callies, *supra* note 81, at 7, 9.

[242] *See id.* at 7. *Compare* Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 734 (1976) (holding city did not surrender its control of sewer operations), *and* Giger v. City of Omaha, 442 N.W.2d 182, 192 (Neb. 1989) (holding city's police powers were not abridged in any manner), *with* City of Belleview v. Belleview Fire Fighters, Inc., 367 So. 2d 1086, 1088 (Fla. Dist. Ct. App. 1979) (finding local government gave absolute control regarding fire fighting to a private corporation).

[243] *See, e.g.*, CAL. GOV'T CODE §§ 65865.1–.3 (1997).

[244] *See* Crew, *supra* note 1, at 28 n.33; Kessler, *supra* note 7, at 468.

[245] *Giger*, 442 N.W.2d at 192.

> regulatory control over the development rather than limiting it.[246]

Accordingly, development agreements are not likely to be found *void ab initio* in violation of the reserved powers doctrine—rather courts should readily declare them valid and enforceable contracts.[247]

2. The Contracts Clause

The enactment of a new zoning ordinance that impairs a valid development agreement amounts to a contractual impairment; it is not a mere breach of contract.[248] An impairment exists because such government action makes it illegal or impossible for the defaulting party to fulfill its contractual obligation, thereby providing a sufficient defense and precluding an adequate remedy in damages.[249] Specifically, passing the new zoning ordinance makes it illegal or impossible for the defaulting municipality to implement the regulatory freeze, thereby giving itself a defense to a breach of contract action for damages.[250] Moreover, protecting developers from new inconsistent legislation advances the purpose of the Contracts Clause to pro-

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[246] *Id.*

[247] *See* Callies, *supra* note 81, at 7, 9.

[248] *See* E. & E. Hauling, Inc. v. Forest Preserve Dist., 613 F.2d 675, 679 (7th Cir. 1980); Hagman, *supra* note 137, at 189; Kramer, *supra* note 6, at 35–37 ("Subsequent legislative action seeking to amend, modify, or repeal the development agreement would undoubtedly impair the obligation of contract . . . ."); Wegner, *supra* note 57, at 1036 (concluding that noncompliance with a regulatory freeze likely constitutes an impairment).

[249] *See E. & E. Hauling*, 613 F.2d at 679–81; Hagman, *supra* note 137, at 189; Kramer, *supra* note 6, at 35–37.

[250] *See E. & E. Hauling*, 613 F.2d at 679–81; Hagman, *supra* note 137, at 189; Kramer, *supra* note 6, at 35–37. It is beyond the scope of this Note to sufficiently explain why implementing the regulatory freeze becomes illegal or impossible upon the enactment of a new zoning ordinance. Briefly, however, there are at least two possible explanations. The first theory stems from case law and recognizes that the government act of enacting a new zoning ordinance consists of *passing a law*. *See E. & E. Hauling*, 613 F.2d at 679–80 (explaining the significance of the "[u]se of law" to prevent a party from fulfilling its contractual obligations). The law itself is something the municipality can point to when asserting a defense to a breach of contract action for damages. *See id.* Second, regarding the new zoning ordinance as an impairment will serve the provisions of the state enabling statutes which allow exceptions to the regulatory freeze for laws, such as zoning amendments, which are arguably essential to the public health, safety, or welfare. *See, e.g.*, CAL. GOV'T CODE § 65865.3 (1997); HAW. REV. STAT. § 46–127 (1996). Treating the new zoning ordinance as an impairment entitles it to survive the first prong of Contracts Clause analysis, and advance to the justification prong where it is determined whether the law is "reasonable and necessary" to serve an important public purpose. *See* United States Trust Co. v. New Jersey, 431 U.S. 1, 25 (1977).

mote confidence and stability in contractual obligations.[251] This especially holds true in the context of development agreements as the legislative findings and declarations in the statutes specifically provide that the purpose of entering into such agreements is to provide "certainty" and "assurance" in the development process.[252] Thus, the central issue becomes whether the contractual impairment is justified.[253]

Routine land use regulations are not likely to meet the "reasonable and necessary" standard mandated by *United States Trust*.[254] On balance, the degree of impairment of the developer's contractual expectations will usually outweigh a municipality's interest in the exercise of its zoning power.[255] Significantly, the developer is likely to heavily and reasonably rely on his contractual expectations as he will often spend a large sum of money and perform substantial work in good faith reliance on the regulatory freeze.[256] The "reasonable and necessary" strict scrutiny test can be satisfied, however, if a municipality shows that regulatory changes are the only way to address a public health or safety concern.[257] Under such circumstances, the municipality's interest will outweigh the developer's contractual expectations.[258]

To illustrate, consider two hypothetical zoning ordinances that may impair a valid development agreement. Both ordinances are presumptively treated as contractual impairments, and thus the key issue is whether the impairment is justified.[259] Suppose one ordinance raises minimum lot size requirements from one unit per ten acres to one unit per twenty acres. Applying strict scrutiny, this ordinance would likely qualify as a routine land use regulation and the municipality's interest in exercising its zoning power will not outweigh the developer's contractual expectations.[260] As such, it probably fails the justification prong of Contracts Clause analysis and, as mentioned supra during the discussion on remedies for noncompliance, the municipality will be required to comply with the regulatory freeze.[261] A second and more improbable hypothetical is an ordinance that regu-

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[251] *See United States Trust*, 431 U.S. at 15; Hagman, *supra* note 137, at 189.
[252] *See, e.g.*, CAL. GOV'T CODE § 65864.
[253] *See* Wegner, *supra* note 57, at 1036.
[254] *See id.* at 1037.
[255] *See United States Trust Co.*, 431 U.S. at 28–32.
[256] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 246 (1978).
[257] *See* Wegner, *supra* note 57, at 1037.
[258] *See United States Trust*, 431 U.S. at 28–32.
[259] *See* Wegner, *supra* note 57, at 1036.
[260] *See United States Trust*, 431 U.S. at 25–32; Wegner, *supra* note 57, at 1037.
[261] *See supra* Part IV.E.2.c.

lates building heights in a zone that was just discovered to be susceptible to earthquakes. Unlike the first law, this ordinance has a strong chance of surviving strict scrutiny if the regulation is the only way to respond to the earthquake concern, as then the municipality's interest in public safety will outweigh the developer's contractual expectations.[262] Thus, this second ordinance may be justified under the standard set forth in *United States Trust*, thereby permitting the municipality to apply the new law.[263]

The type of zoning ordinance likely to be passed after the execution of a valid development agreement will probably resemble the first hypothetical ordinance and amount to a routine land use regulation.[264] It is uncommon for an earthquake zone or a comparable public safety threat to suddenly appear, and therefore zoning ordinances rarely embrace such importance without forewarning. Thus realizing that a new inconsistent zoning ordinance will probably qualify as a routine land use regulation, and recognizing that such regulations are not likely to meet the "reasonable and necessary" strict scrutiny standard, it is presumable that the enactment of a new zoning ordinance renders the approved development impermissible and constitutes an unjustifiable contractual impairment in violation of the Contracts Clause.[265] The focus then turns to the appropriate remedy, and this issue will be addressed shortly.[266]

3. Adjudicative Takings: "Unconstitutional Conditions"

As entering into a development agreement is a voluntary act that conveys a governmental benefit upon the developer, a municipality should generally be able to bargain for exactions in exchange for vested rights free from the "essential nexus" and "rough proportionality" limitations imposed by *Nollan* and *Dolan*.[267] This view emphasizes the voluntary nature of the agreement and a basic principle of contract law, in light of the policy underlying the *Nollan* and *Dolan* decisions. "[T]he bargain test of consideration [has] shift[ed] the concern of judges from the substance of the exchange to the bargaining process."[268] So long as the bargaining process is voluntary, it is of no

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[262] *See United States Trust Co.*, 431 U.S. at 25–32; Wegner, *supra* note 57, at 1037.

[263] *See United States Trust*, 431 U.S. at 25; Wegner, *supra* note 57, at 976.

[264] *See* Wegner, *supra* note 57, at 1037.

[265] *See id.*

[266] *See infra* Part V.A.5.

[267] *See* Callies, *supra* note 81, at 32; SELMI & KUSHNER, *supra* note 86, at 499.

[268] FARNSWORTH, *supra* note 80, at 69.

constitutional significance that a developer accedes to otherwise unlawful exactions.[269] The bargaining process will likely be truly voluntary because the type of developer who negotiates with a municipality to execute a development agreement is probably in the business of large-scale development and, at the very least, can afford adequate legal representation; a municipality is unlikely to bargain with an inexperienced developer. Accordingly, the policy underlying *Nollan* and *Dolan* to prevent extortion in an adjudicatory setting is inapplicable as the developer is capable of making a reasonable and informed business decision.[270] The protective "essential nexus" and "rough proportionality" limitations should apply, however, when the developer is inexperienced because under these circumstances a municipality is primed to take advantage of its regulatory leverage.[271] Moreover, enabling ordinances passed by municipalities that define negotiation standards suffice to protect developers from abuse by ensuring that exactions negotiated through development agreements are not arbitrary and capricious.[272] In sum, a municipality should generally be able to exact conditions from the developer in excess of the *Nollan* and *Dolan* limitations because the voluntary bargaining process does not implicate the policy concern of preventing extortion.[273]

4. Legislative Act or Administrative Act?

The adoption of a development agreement should be considered an administrative act and therefore not subject to referendum.[274] A development agreement usually affects a single parcel or a small number of parcels of land, binds specific parties, and includes precise substantive findings concerning the permitted uses of the property, exactions and related conditions, as well as the duration of the agreement.[275] Additionally, development agreements contain procedural requirements such as public hearings and notice.[276] Considered together, these characteristics suggest that development agreements

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[269] *See* Callies, *supra* note 81, at 30.

[270] *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 837 (1987); Meredith v. Talbot County, 560 A.2d 599, 604 (Md. Ct. Spec. App. 1989).

[271] *See* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); *Nollan*, 483 U.S. at 837; Ehrlich v. City of Culver City, 911 P.2d 429, 438–39 (Cal. 1996).

[272] *See* Nunziato v. Planning Bd. of Edgewater, 541 A.2d 1105, 1110 (N.J. Super. Ct. App. Div. 1988).

[273] *See Nollan*, 483 U.S. at 837; Callies, *supra* note 81, at 30–32.

[274] *See* Callies, *supra* note 81, at 22.

[275] *See* Wegner, *supra* note 57, at 1013.

[276] *See id.*

are the products of administrative acts as opposed to legislative acts because they do not involve broad questions of public policy that affect the population generally.[277]

5. Remedies for Noncompliance

Periodic review of development progress will detect developer noncompliance, at which point the municipality may terminate or modify the agreement.[278] Municipal noncompliance, on the other hand, "raises questions involving the constitutional taking and impairment of contract doctrines, as well as common-law contract law."[279] As previously stated, the enactment of a new zoning ordinance which renders the approved development impermissible amounts to a contractual impairment; it is not a mere breach of contract.[280] Accordingly, breach of contract damages are not available. Moreover, a new inconsistent zoning ordinance is not likely to be justified as "reasonable and necessary" to serve an important public purpose.[281] Thus, municipal noncompliance in this instance amounts to an unconstitutional impairment of contract, as well as a legislative taking by virtue of violating the first prong of the *Agins* test.[282] The question then becomes, under which cause of action should a developer proceed: impairment of contract or regulatory taking?

In the event of municipal noncompliance, a developer should seek recovery under an impairment of contract theory because that doctrine provides the best opportunity to recover damages.[283] A new inconsistent zoning ordinance will be invalidated under both impairment of contract and regulatory taking theories, thereby ensuring that the development agreement will be performed.[284] However, as damages are not necessarily awarded for takings when the inconsis-

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[277] *See id.* at 1012.

[278] *See, e.g.*, CAL. GOV'T CODE § 65865.1 (1997).

[279] Wegner, *supra* note 57, at 1029–30.

[280] *See id.* at 1036.

[281] *See id.* at 1037.

[282] *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980) (stating first prong is whether law substantially advances legitimate state interests); Wegner, *supra* note 57, at 1037. Importantly, the second prong of *Agins* is not violated as a new inconsistent zoning ordinance does not deprive an owner of *all* economically beneficial uses of his land; it merely prohibits the presently desired development. *See Agins*, 447 U.S. at 260. Recall that damages may be awarded for a violation of prong two of *Agins*, but are not necessarily awarded for a violation of prong one. Witten Interview, *supra* note 1.

[283] Witten Interview, *supra* note 1.

[284] *See* Wegner, *supra* note 57, at 1037; Witten Interview, *supra* note 1.

tent ordinance does not substantially advance a legitimate state interest, it is clear that a developer's best opportunity to recover damages is to seek "interim damages" under impairment of contract theory.[285]

B. *Development Agreements Useful in Early Vesting States*

Undoubtedly, development agreements are advantageous to developers in late vesting states as they circumvent the ordinary development process and provide vested rights prior to the issuance of a building permit.[286] Development agreements are less beneficial in early vesting states because state law already codifies their main advantages.[287] That is, the right to develop vests early in the development process, usually once a certain type of discretionary permit has been approved.[288] In Massachusetts, for instance, vested rights may be obtained by receiving a special permit or submitting a definitive or preliminary subdivision plan to a planning board.[289]

Nevertheless, development agreements can provide advantages to developers and municipalities in early vesting states.[290] Similar to developers in late vesting states, developers in early vesting states are concerned with more than just freezing the existing zoning regulations as they too must receive various permits regarding issues such as health and safety.[291] Thus, like developers in late vesting states, developers in early vesting states can use development agreements to bargain for a streamlined regulatory review process.[292] In addition, development agreements may be useful to extend the time limitations often attached to special permits and subdivision plan approvals.[293] For example, in Massachusetts, a special permit must conform to subsequent zoning changes unless construction begins within six months after the issuance of the permit, while subdivision plans receive an eight year grace period following approval.[294] A developer in an early vesting state such as Massachusetts can bargain for an extension of the permissible time period for project completion.[295] The municipality

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[285] Witten Interview, *supra* note 1.

[286] *See* Crew, *supra* note 1, at 31; Kessler, *supra* note 7, at 452.

[287] *See* Kessler, *supra* note 7, at 455.

[288] *See id.* at 454.

[289] *See* MASS. GEN. LAWS ch. 40A, § 6 (1994).

[290] *See* Kessler, *supra* note 7, at 455.

[291] Witten Interview, *supra* note 1.

[292] *See* MODEL DEV. AGREEMENT BYLAW § 06.0.

[293] *See* MODEL DEV. AGREEMENT BYLAW § 06.0; Kessler, *supra* note 7, at 455.

[294] *See* MASS. GEN. LAWS ch. 40A, § 6.

[295] *See* Kessler, *supra* note 7, at 455.

will receive the customary public benefits such as parks, roads, or land, as well as assurance that development will proceed in a timely fashion.[296]

Conclusion

Development agreements are attractive solutions to the uncertainty and risk inherent in the development process. In late vesting states, they provide developers with vested rights earlier in the development process, where ordinarily a developer would not receive a vested right until the building permit is issued. As such, development agreements protect developers' investments from subsequent changes in zoning regulations which render proposed uses impermissible. In early vesting states, development agreements afford developers increased certainty in regard to the regulatory permitting process, and allow developers to extend the time period within which their project can be built-out. In exchange for vested rights and other assurances, municipalities are able to exact public benefits and achieve adequate comprehensive planning.

Development agreements are readily enforceable. Typically, states expressly delegate the power to enter into development agreements to municipalities through enabling legislation. Municipalities are not likely to violate the reserved powers doctrine upon entering into development agreements because municipalities retain some control over the agreements. The enactment of a new zoning ordinance inconsistent with the terms of a development agreement presumably amounts to a contractual impairment in violation of the Contracts Clause. Significantly, the contractual impairment will likely resemble a routine land use regulation that cannot be justified as "reasonable and necessary" to serve an important public purpose, thus entitling the developer to a remedy. Moreover, in light of the voluntary bargaining process, municipalities are able to exact public benefits in excess of what would otherwise be allowed by the regulatory takings rules. Further, development agreements should be characterized as administrative acts and not, therefore, subject to voter repeal through referendum. Finally, in the event of municipal noncompliance, a developer should seek recovery under impairment of contract theory because while both impairment of contract and regulatory taking doctrines invalidate the inconsistent ordinance and effectively require

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[296] *See id.*

the agreement to be performed, impairment of contract theory provides the developer with the best opportunity to recover damages.