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LAW CLERK

IN THE SUPREME COURT
OF THE STATE OF IDAHO

LINDA CISZAK, individually; RONALD G. WILSON and LINDA A. WILSON, husband and wife; BILL DOLE and MARION DOLE, husband and wife; MIKE ANDERSON and RAYELLE ANDERSON, husband and wife; JOE CULBRTTH and SHARON CULBRTTH, husband and wife; KIRK HOBSON and KIMBERLY HOBSON, husband and wife; SETH MOULDING and JENNIFER MOULDING, husband and wife; CASY NEAL and KRISTIN NEAL, husband and wife; WILLIAM GIRTON and DOLLY GIRTON, husband and wife,

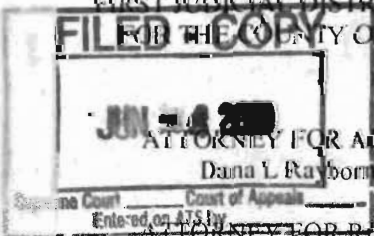
Plaintiffs/Appellants,

vs

KOOTENAI COUNTY BOARD OF COMMISSIONERS and COEUR D'ALENE PAVING, INC.,

Defendant/Respondents ,

CLERK'S RECORD ON
APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI



ATTORNEY FOR APPELLANTS
Dana L Rayborn Wetzel

ATTORNEY FOR RESPONDENTS
Jethelyn H Harrington
Michael Chapman

37562

SUPREME COURT DOCKET 37562-2010

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STATE OF IDAHO
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DEPUTY

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF

IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LINDA CISZEK, individually; RONALD G. WILSON and LINDA A. WILSON, husband and wife; BILL DOLE and MARIAN DOLE, husband and wife; MIKE ANDERSON and RAYELLE ANDERSON, husband and wife; JOE CULBRTTH and SHARON CULBRTTH, husband and wife; KIRK HOBSON and KIMBERLY HOBSON, husband and wife; SETH MOULDING and JENNIFER MOULDING, husband and wife; CASY NEAL and KRISTIN NEAL, husband and wife; and WILLIAM GIRTON and DOLLY GIRTON, husband and wife,	Case No. CV-08-7074
Petitioners/Plaintiffs,	CERTIFICATE OF FOREIGN LAW
vs.	
BOARD OF COMMISSIONERS, KOOTENAI COUNTY, STATE OF IDAHO,	
Respondent/Defendant.	

Dana L. Rayborn Wetzel certifies as follows:

At all relevant times, I have been attorney for Petitioners/Plaintiffs, LINDA CISZEK, individually; RONALD G. WILSON and LINDA A. WILSON, husband and wife; BILL DOLE and MARIAN DOLE, husband and wife; MIKE ANDERSON and RAYELLE ANDERSON, husband and wife; JOE CULBRTTH and SHARON CULBRTTH, husband and wife; KIRK HOBSON and KIMBERLY HOBSON, husband and wife; SETH MOULDING and JENNIFER MOULDING, husband and wife; CASY NEAL and KRISTIN NEAL, husband and wife; and WILLIAM GIRTON and DOLLY GIRTON, husband and wife (collectively "CISZEK").

PETITIONERS'/PLAINTIFFS' MEMORANDUM IN SUPPORT OF DECLARATORY JUDGMENT, filed herewith, contains citations of law and authorities from jurisdictions outside the State of Idaho. Copies of those cases are attached for the Court's review.

DATED this 4th day of August, 2009.

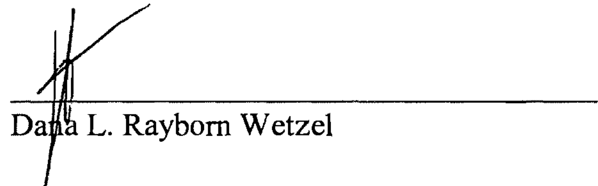
WETZEL, WETZEL
& HOLT, P.L.L.C.

By
Dana L. Rayborn Wetzel
Attorneys for CISZEK

CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 4th day of August, 2009, I served the foregoing document upon:

___ U.S. Mail _✓_ Hand Delivered ___ Overnight Mail ___ Facsimile 446-1621		Jethelyn H. Harrington Kootenai County Department of Legal Services P.O. Box 9000 Coeur d'Alene, Idaho 83816-9000 *Attorney for Defendant*
___ U.S. Mail _✓_ Hand Delivered ___ Overnight Mail ___ Facsimile 667-7625		Michael Ryan Chapman Chapman Law Office, PLLC Services P.O. Box 1600 Coeur d'Alene, Idaho 83816 *Attorney for Coeur d' Alene Paving*



Dana L. Rayborn Wetzel

due to "excusable neglect." The trial court denied respondent's motion, concluding that her motion was not filed within a reasonable time after entry of judgment, that she had not shown excusable neglect, and that she had not pled a meritorious defense. Respondent appeals.

Legal Services of the Blue Ridge, Inc. by Louise Ashmore, Boone, for respondent-appellant.

Rebecca B. Knight, Asheville, for petitioner-appellee Buncombe County Dept. of Social Services.

Richard Schumacher, Asheville, for petitioner-appellee guardian ad litem.

EAGLES, Judge.

[1] Rule 60(b)(1) of the North Carolina Rules of Civil Procedure allows the trial court to relieve a party from a final judgment for "[m]istake, inadvertence, surprise, or excusable neglect." G.S. 1A-1, Rule 60(b)(1). A Rule 60(b)(1) motion must be made within a reasonable time, *Brady v. Town of Chapel Hill*, 277 N.C. 720, 178 S.E.2d 446 (1971); G.S. 1A-1, Rule 60(b)(1), and the movant must show both the existence of one of the stated grounds for relief, and a "meritorious defense." *Howard v. Williams*, 40 N.C.App. 575, 253 S.E.2d 571 (1979). Even if we were to assume that respondent filed her motion within a reasonable time and had pled a meritorious defense, respondent failed to show "excusable neglect."

[2-4] Although the decision to set aside a judgment under Rule 60(b)(1) is a matter within the trial court's discretion, *Sawyer v. Goodman*, 63 N.C.App. 191, 303 S.E.2d 632, *disc. rev. denied*, 309 N.C. 823, 310 S.E.2d 352 (1983), what constitutes "excusable neglect" is a question of law which is fully reviewable on appeal. *Thomas M. McInnis & Assoc., Inc. v. Hall*, 318 N.C. 421, 349 S.E.2d 552 (1986). However, the trial court's decision is final if there is competent evidence to support its findings and those findings support its conclusion. *Wynnewood Corp. v. Soderquist*, 27 N.C. App. 611, 219 S.E.2d 787 (1975). Whether the movant has shown excusable neglect must be determined by his actions at or before entry of judgment. *Norton v. Sawyer*, 30 N.C.App. 420, 227 S.E.2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). Here, the relevant findings of the trial court show, as a matter of law, an absence of excusable neglect.

[5, 6] When a party is duly served with a summons, yet fails to give her defense the attention which a person of ordinary prudence usually gives her important business, there is no excusable neglect. *East Carolina Oil Transport v. Petroleum Fuel & Terminal Co.*, 82 N.C.App. 746, 348 S.E.2d 165 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987). The trial court found that respondent was personally served with the summons, and a copy of the petition. Respondent also received an enclosed notice, which informed her of her right to have a court appointed attorney if she could not afford to hire counsel, and provided a telephone number for her to call to have an attorney appointed. The court found that respondent saw the telephone number but failed to call, either to get an attorney or to request a continuance. The trial court also found that respondent was unemployed at the time and was receiving money, food and gas from police and charitable organizations. Respondent returned to North Carolina in February 1987, in her own car, by obtaining food and gasoline at various police stations and churches. The court found no evidence that respondent was unable to return to North Carolina by that method in December or January. These findings establish that respondent failed to use ordinary prudence to defend the action against her. Consequently, the trial court properly concluded that respondent did not show excusable neglect.

Respondent does not argue that the trial court's findings are unsupported by the evidence. Instead, she contends that the court's findings, and other evidence not addressed in the findings, regarding her poor financial situation and her limited ability to understand the importance of the petition, establish excusable neglect. We do not agree.

The trial court found that respondent was unemployed and was receiving food and money from charitable organizations. Other evidence shows that she was living in a trailer, rent-free, was caring for her nine year old daughter, had lost her driver's license, had tried calling DSS on two occasions, and had no money to travel to North Carolina. Respondent's poor financial condition, however, does not account for her failure to call or write court authorities, or to make further attempts to contact DSS. Moreover the record contains no evidence that respondent made any effort to seek local legal counsel or attempt to get financial or other assistance from the Texas Department of Social Services, or the charitable organizations which were providing her with money, food, and gasoline; nor can we speculate that such efforts would have been unavailing. In addition, her return to North Carolina in February belies her argument that she was financially unable to return for the hearing in January. In fact, respondent testified that she could have returned to North Carolina in January but did not think about it because she was worrying about finding work, caring for her other child, and the termination of her relationship with Douglas' father. Respondent's financial situation may, indeed, have been a difficult one but, under the circumstances, it does not constitute excusable neglect.

[7] Respondent's claim that she was confused about the summons and what she should do in response also fails to establish excusable neglect. A party may not show excusable neglect by merely establishing that she failed to obtain an attorney and was ignorant of the judicial process. *See Gregg v. Steele*, 24 N.C.App. 310, 210 S.E. 2d 434 (1974). Similarly, the fact that the movant claims he did not understand the case, or did not believe that the court would grant the relief requested in the complaint, has been held insufficient to show excusable neglect, even where the movant is not well educated. *See Boyd v. Marsh*, 47 N.C.App. 491, 267 S.E.2d 394 (1980). Respondent could read and write and there is no evidence she was suffering from a mental incapacity. *Cf. Wynnewood Corp. v. Soderquist, supra.* The evidence shows that respondent knew both the nature of the proceedings against her and her obligation to return to North Carolina for the hearing. Under the circumstances, respondent's failure to take action to defend her case is not excusable neglect.

Absent a showing of excusable neglect, whether the movant pled a meritorious defense becomes immaterial. *Bundy v. Ayscue*, 5 N.C.App. 581, 169 S.E.2d 87, *appeal dismissed*, 276 N.C. 81, 171 S.E.2d 1 (1969). Therefore, we need not address respondent's remaining argument regarding the admission of allegedly irrelevant evidence concerning the merits of the petition for termination.

Affirmed.

COZORT and SMITH, JJ., concur.

John Michael ALDERMAN and Gloria R. Alderman; Rupert L. Bynum, Jr. and Joyce M. Bynum; George Bowie and Anne Bowie; F.C. Burgner; Elsie C. Goff; William C. Fischer and Sandra Fischer; Robert P. Blair; James E. Pruchniak; Joseph K. Ward and Charlotte Ward; George Clark Thompson and Carol S. Thompson

v.

CHATHAM COUNTY and the Board of County Commissioners of Chatham County, including Earl D. Thompson, Henry Dunlap, Jr., Gus Murchison, Jr., C.W. Lutterloh; Carl Thompson and Calvin Roberson and wife, Mary C. Roberson.

No. 8715SC401.

Court of Appeals of North Carolina.

April 19, 1988.

Surrounding landowners brought suit alleging that county and its board of

y commissioners acted unlawfully in rezoning tract from Residential Agricultural 40-30 to Mobile Home District and sought declaratory judgment that commissioners' action in that regard was illegal, invalid and void. The Superior Court, Chatham County, Thomas H. Lee, J., declared the rezoning invalid, and applicants appealed. The Court of Appeals, Johnson, J., held that rezoning amendment constituted illegal spot zoning and contract zoning.

Affirmed.

1. **Zoning and Planning** ⚡675

As a legislative function, county's act of amending its zoning ordinance is entitled to presumption of validity. G.S. § 153A-344.

2. **Zoning and Planning** ⚡21.5, 34, 155, 156

Legislative act of enacting or amending zoning ordinance is invalid if it is unreasonable, arbitrary, or unequal exercise of legislative power. G.S. § 153A-344.

3. **Zoning and Planning** ⚡35, 162

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

See publication Words and Phrases for other judicial constructions and definitions.

4. **Zoning and Planning** ⚡35

Spot zoning is beyond authority of county or municipality unless there is clear showing of reasonable basis.

5. **Zoning and Planning** ⚡167

Rezoning amendment, whereby 14.2 acre tract was rezoned from Residential Agricultural 40-30 to Mobile Home District, constituted illegal spot zoning, where 14.2 acre tract was part of much larger area of over 500 acres which was zoned RA 40-30 for low density single family residential and agricultural use, rezoning permitted owners to utilize property without having to meet subdivision requirements, and there was no reasonable basis for county's action.

6. **Zoning and Planning** ⚡160

Rezoning amendment, whereby 14.2 acre tract was rezoned from Residential Agricultural 40-30 to Mobile Home District, constituted illegal contract zoning, where rezoning was accomplished as direct consequence of conditions agreed to by applicant rather than as valid exercise of county's legislative discretion.

This is a civil action by plaintiffs for a declaratory judgment invalidating an amendment to a zoning ordinance adopted by the Chatham County Board of Commissioners.

Gunn & Messick, by Paul S. Messick, Jr. and Robert L. Gunn, Pittsboro, Faison, Brown, Fletcher & Brough by Michael Brough, Chapel Hill, for defendants-appellants.

Epting & Hackney by Robert Epting, Chapel Hill, for plaintiffs-appellees.

JOHNSON, Judge.

Plaintiffs' complaint alleged that defendant Chatham County and its Board of County Commissioners had acted unlawfully in rezoning Calvin and Mary C. Roberson's 14.2 acre tract from Residential Agricultural 40-30(RA 40-30) to Mobile Home District (MH District) for 14 lots and sought the court's declaratory judgment that defendant commissioners' 17 March 1986 action in that regard was illegal, invalid, and void, on grounds, *inter alia*, that the action of the County Commissioners constituted spot zoning and contract zoning.

The trial court's findings of fact established the following:

The Robersons are owners of 14.2 acres of land located south of State Road 1700 and west of Mount Gilead Baptist Church Road. The 14.2 acre tract is adjacent to the south side of Parker's Creek which flows into the Parker's Creek impoundment

on Jordan Lake, where the Parker's Creek campground and recreation areas are located. Some of the plaintiffs are owners of single family homes located on lots which are contiguous with and adjoin the southern boundary of the Robersons' 14.2 acre property, and the remaining plaintiffs are owners of single family residences located on lots in the same nearby vicinity and generally south and west of the 14.2 acre tract.

Plaintiffs' lands and the Robersons' 14.2 acre tract are a small part of a much larger area of land totalling 500 acres which was originally zoned Residential Agricultural 20 (RA-20) when the county first adopted its zoning ordinance in 1968.

Prior to defendants' 30 January 1986 rezoning request for the 14.2 acre tract, defendant Calvin Roberson had sought to have their land (including the 14.2 acre tract) rezoned from low density residential use to mobile home park use on six different occasions. On 23 July 1973, defendant Calvin Roberson requested that the county rezone 40 acres then zoned RA-20 (including the 14.2 acre tract at issue) for a trailer park. On 1 October 1973, this request was denied by unanimous vote of the defendant Chatham County Commissioners.

On 17 October 1974, defendant Calvin Roberson sought to have 20 acres (adjacent to the 14.2 acre tract at issue) rezoned to mobile home use for a trailer park of 40 mobile homes. The County Planning Board opposed the rezoning on grounds that such use could jeopardize the planned Parker's Creek impoundment and recreation area at the Jordan Reservoir. However, on 9 June 1975, the County Commissioners, by a 3-2 vote, voted to rezone 16 of the 20 acres for a mobile home park at a density of not more than two trailers per acre.

On 13 September 1983, the Chatham County Planning Board considered the Robersons' request to expand their trailer park from the 16 acres rezoned on 9 June 1975, into the adjacent portion of their property south of Parker's Creek, which included the 14.2 acre tract at issue. Neither the Planning Board nor the County Commissioners took further action on this request because they failed to present any survey or other evidence to support their claim that the land was located in an unzoned township. On 29 September 1983, defendant Calvin Roberson requested that their 20 acres located west of Mount Gilead Church Road (including the 14.2 acres at issue) be rezoned from RA 40-30 to Mobile Home District.

On 11 October 1983, before the Planning Board, defendant Calvin Roberson stated that the purpose of the request was to spread out the existing thirty-two trailer lots and add 18 more on larger lots, which on its south side bordered the plaintiffs' lots and homes. In addition, he stated that he had State approval for a package treatment plant to serve the trailer park.

On 8 November 1983, the Planning Board considered the request again. Plans submitted at the meeting showed that the parcel for which rezoning was requested contained sixteen acres. It was learned that no approval for a package treatment plant to serve the proposed trailer park had been given by the State. After the County Planner advised the Board that the rezoning request (for twenty-four units on 16 acres) did not conform to the density recommended in the Land Development Plan, the Board voted 5-3 to deny the request.

On 9 January 1984, the Chatham County Commissioners again considered the rezoning request. At that meeting, defendant Commissioner Carl Thompson made the motion to deny the rezoning request, and "strongly recommended" that the Robersons submit a plan that would provide an adequate buffer between their property and the adjoining property owners. Two commissioners voted to approve the rezoning request and two voted to deny the request. Defendant Chairman Earl Thompson broke the tie and voted against the rezoning request, stating that his concern was a larger buffer zone and the potential density in the proposed trailer park.

On 9 April 1985, the Planning Board considered their request that a 16.2 acre tract (including the 14.2 acre tract at issue)

›ned from RA 40–30 to MH District mobile homes. The Planning Board this request pending State action on obersons' permit application for a ;e sewage treatment plant. On 14 ·y 1986, before the Planning Board, lant Calvin Roberson requested that zoning request not be taken off the

30 January 1986, the Robersons sub- the rezoning request at issue, ask- iat the 14.2 acres (adjacent on its side to plaintiffs' lands, which was 'act that was part of the property ered in the five previous rezoning sts) be rezoned from RA 40–30 to MH ct for 14 mobile home lots. On 11 ary 1986, the Planning Board con- d the request. At that meeting, de- nt Calvin Roberson stated that they ed their request from 24 lots to 14 because they felt that the 14 lots be more in line with the Land Devel- it Plan. He also stated that they trying to get a package treatment approved by the State to serve the rty, including the 32 units already ved on the 16 acres which he and his owned.

intiff John Alderman stated that he ›urchased his lot (adjacent to the 14.2 tract's south boundary) from the Ro- ns. Plaintiff Alderman stated that at me he purchased his lot, Calvin Rober- iad verbally promised him that no mo- iomes would be placed behind Alder- s lot. The Planning Board voted to nmend that the 14.2 acres be rezoned RA 40–30 to MH District for 14 lots.

13 March 1986, the Chatham County missioners held a public hearing to public comment on the Robersons' est. Defendant Calvin Roberson stat- iat they sought to have the 14.2 acres ied so that they could expand their ing trailer park. He stated that the ning Board had approved their request that they had met all requirements as buffer zones, low density, and sew- systems.

any persons spoke in opposition to the ested rezoning change. Plaintiff Alderman reiterated his position that he would not have purchased his lot but for the Robersons' assurance that they would not build on the 14.2 acres unless they decided to build for their children. Other persons had opposition to trailer parks being built but not individual mobile homes. These parties stated that they were against an increase in density allowed in MH District; that the expansion of the trailer park was unwarranted because the Robersons had not utilized the land rezoned in 1975; that their attempts to have the land rezoned had been denied during the last ten years; that there existed no change of circumstances in condition to warrant the rezoning; that there were a number of lots off Mount Gilead Church Road zoned for mobile homes; that there already existed in the community another trailer park in addition to the Robersons', and that any additional trailer parks would affect the single family character of the area.

On 17 March 1986, the rezoning request was granted by the defendant County Commissioners. The minutes of the meeting simply indicate that "Commissioner Dunlap moved, seconded by Commissioner Murchison and passed unanimously to approve the request .... that 14.2 acres on the south side of SR 1700 (Mt. Gilead Church Road) be zoned from Residential Agricultural to Mobile Home District for fourteen lots."

On 22 April 1986, plaintiffs filed their complaint against the respective defendants. On 23 June 1986, defendants filed their answers. On 14 October 1986, the case was tried by the trial judge, sitting without a jury. After reviewing the evidence and stipulations of the parties, and after making findings of fact and conclusions of law, the trial court declared that the rezoning by the Board of Commissioners was invalid and enjoined the Robersons from developing a mobile home park unless validly rezoned by the Board of Commissioners. From the judgment of the trial court, defendants appealed.

Defendants bring forth three Assignments of Error for this Court's review. For the following reasons, we affirm the judgment of the trial court.

By their first Assignment of Error, defendants contend that the trial court erred in concluding that the rezoning of the Robersons' property was illegal spot zoning. We disagree.

[1–3] G.S. sec. 153A–344 expressly gives counties the power to amend their zoning ordinances. As a legislative function, the county's act of amending its zoning ordinance is entitled to a presumption of validity. *A–S–P Associates v. City of Raleigh,* 298 N.C. 207, 258 S.E.2d 444 (1979). The legislative act of enacting or amending a zoning ordinance is invalid if it is unreasonable, arbitrary, or an unequal exercise of legislative power. *Id.*

"Spot zoning" is defined as:

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

Blades v. City of Raleigh, 280 N.C. 531, 549, 187 S.E.2d 35, 45 (1972).

[4] Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purposes of the enabling statute. G.S. sec. 153A–341; *Godfrey v. Union County Bd. of Commissioners,* 61 N.C.App. 100, 300 S.E.2d 273 (1983). Because it zones a small area differently than a much larger area surrounding it, spot zoning, by definition, conflicts with the whole purpose of planned zoning. 2 Rathkopf, The Law of Zoning and Planning Section 28.02 (1987). Therefore, unless there is a "clear showing of a reasonable basis," spot zoning is beyond the authority of the county or municipality. *Blades,* 280 N.C. at 549, 187 S.E.2d at 45.

First, defendants argue that a relatively small area is required for spot zoning per *Blades, supra,* and that the 14.2 acres involved is part of a larger tract of approximately 41 acres *owned by the Robersons.* (emphasis supplied). Furthermore, defendants argue that since the 14.2 acres rezoned adjoins the Robersons' existing 16 acre tract zoned MH District, then the rezoning was merely an extension of the existing MH District. Defendant's argument is misplaced.

[5] It is undisputed that at the time the application came before the Board, the Robersons' 14.2 acre tract was part of a much larger area of over 500 acres which was zoned RA 40–30 for low density single family residential and agricultural use. Trailer parks were not a permitted use in the RA 40–30 zone, although individual trailers could be used as single family residences within the RA 40–30 zone. If mobile homes were to be used for single family residences, subdivision requirements had to be met, which included surveying and platting the individual lots upon which trailers would be placed, and paving the subdivision roads. The rezoning of the property by the Commission to MH District permitted the Robersons to utilize the property without having to meet the subdivision requirements. Thus, the rezoning singled out a "relatively small parcel owned by a single person ... so as to relieve the small tract from restrictions to which the rest of the area is subjected." *Blades, supra.*

This was the basis for the trial court's finding of fact No. 24 which states:

> The development standards applicable to Mobile Home Districts under the Chatham County Zoning Ordinance are different from and less stringent than the development standards applicable to the development of subdivisions under RA 40–30 zoning; in particular, individual lots do not have to be surveyed for development in a Mobile Home District, while such surveys are required for lots subdivided in a RA 40–30 subdivision; and, in an RA 40–30 subdivision with as many as four lots, roads would have to be paved, while in a Mobile Home District with less than 15 lots, the roads do not have to be paved. Thus, the March 17, 1986 rezoning of Defendant Roberson's 14.2 acre tract from RA 40–30 to MH District for 14 mobile home lots relieved that tract

from restrictions to which the remaining RA 40–30 area, including the Plaintiffs' said properties, were and remain subjected.

Thus, the rezoning amendment here clearly constitutes spot zoning. The rezoned area was only 14.2 acres and was uniformly surrounded by property zoned RA 40–30. The remaining question then is whether there was a reasonable basis for the county's action in spot zoning the 14.2 acre land.

An examination of the record reveals that the county has failed to show a reasonable basis for rezoning the 14.2 acre tract from RA 40–30 to MH District. Among the factors to be considered when determining whether there is a reasonable basis for spot zoning are: (1) change in conditions, (2) particular characteristics of the area being rezoned, and (3) the classification and development of nearby land. *Chrismon v. Guilford County,* 85 N.C. App. 211, 354 S.E.2d 309 (1987).

In their brief, defendants give no analysis as to whether there was a reasonable basis to justify the rezoning. Nevertheless, there is no indication of any change in conditions in the immediate area of the property which would justify the rezoning. The record reveals no increase in Mobile Home use within the 500 acre tract with the exception of the 16 acre tract adjacent to plaintiffs' land. At the time defendants were not using all of the 32 spaces allowed in their existing trailer park.

In reference to the particular characteristics of the area being rezoned, G.S. 153A–341 states that, among other things, zoning regulations should be made with reasonable consideration to "the character of the district and its peculiar suitability for particular uses." An examination of the record reveals that there is no indication that the 14.2 acre lot was unsuitable for residential use for which it was previously zoned. In fact, the evidence established that: the recommended tract was in an area designated, rural and low density, that the individual trailers could be used as single family residences within the RA 40–30 zone and that trailer parks were not a permitted use in the RA 40–30 zone.

Finally, in determining whether a rezoning was invalid as spot zoning, our courts have also considered the classification and development of nearby land. In the case *sub judice,* the majority of the land surrounding the rezoned 14.2 acres was uniformly zoned RA 40–30, and consisted of 500 acres. The classification and development of nearby land is not consistent with MH District considering the fact that mobile homes may be used as single family residences within the RA 40–30 zone. Furthermore, in 1986, the county turned down an application to rezone property to MH District within two miles of the 14.2 acre tract.

[6] In its second Assignment of Error, defendants contend that the trial court erred in concluding that the rezoning constituted illegal contract zoning. We disagree.

> A county's legislative body has authority to rezone when reasonably necessary to do so in the interests of the public health, safety, morals or general welfare. Ordinarily[,] the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously. However[,] to avoid contract zoning, all the areas in each class must be subject to the same restrictions. If the rezoning is done in consideration of an assurance that a particular tract or parcel will be developed in accordance with a restricted plan this is contract zoning and is illegal.

Willis v. Union County, 77 N.C.App. 407, 409, 335 S.E.2d 76, 77 (1985).

The record establishes that on 9 April 1985, the Planning Board considered the request that 16.29 acres (which included the 14.2 acres at issue) be rezoned from RA 40–30 to MH District for 24 lots for mobile homes. Subsequently, on 30 January 1986, the Robersons submitted the rezoning request at issue, requesting that 14.2 acres of their remaining land be rezoned from RA 40–30 to MH District for 14 mobile home lots.

On 11 February, 1986, before the Planning Board, when asked why they changed their request from 24 lots to 14 lots, Calvin Roberson stated that he felt the 14 lots would be more in line with the Land Development Plan. The Land Development Plan does not specifically address mobile home parks but instead addresses density of land use. Subsequently, on 17 March 1986, after having denied their five previous rezoning requests the rezoning request was approved by defendant Board of County Commissioners. The record reflects that at that meeting, no discussion was made of the rezoning request.

We believe that the record reveals that the only justification for allowing the rezoning of the property was only if the amount of lots was reduced to coincide with the density requirements of the county. There was no determination that the Board based its rezoning on the basis that the site was suitable for all uses permitted under MH District Zoning.

The land was rezoned in consideration of an assurance that the 14.2 acre tract would be developed in accordance with a restricted plan. The rezoning here was accomplished as a direct consequence of the conditions agreed to by the applicant rather than as a valid exercise of the county's legislative discretion. As a result, such action by defendant Commissioners constituted contract zoning.

We have reviewed defendants' final Assignment of Error, and find it meritless and without need for discussion.

For the reasons herein assigned, the judgment of the trial court is

Affirmed.

WELLS and COZORT, JJ., concur.

PANNILL KNITTING COMPANY, INC.

v.

GOLDEN CORRAL CORPORATION, Edenton Housing Partnership, Bernard P. Burroughs and wife, Anne J. Burroughs and Thurman E. Burnette, Trustee.

No. 871SC783.

Court of Appeals of North Carolina.

April 19, 1988.

Appeal was taken from judgment the Superior Court, Chowan County, George M. Fountain, J., entered in action challenging second foreclosure sale of property described in deed of trust. The Court of Appeals, Orr, J., held that evidence was insufficient to establish that second foreclosure sale on portion of property described in deed of trust violated statutory provisions.

Affirmed.

Phillips, J., filed dissenting opinion.

Mortgages ⚷**369(7)**

Evidence was insufficient to establish that second foreclosure sale on portion of property described in deed of trust was void on theory it violated statutory provisions; party challenging sale faile present evidence indicating whether of trust foreclosed upon expressly aut rized trustee to sell property in parcels upon default or whether property was actually described in separate parcels in the instrument. G.S. §§ 45–21.8, 45–21.9.

This case arises out of the second foreclosure sale instituted under a purchase money deed of trust dated 14 January 1982 from L.F. Amburn, Jr., and William B. Gardner to Max S. Busby, trustee for Bernard P. Burroughs, grantee. This deed of trust, duly recorded in Book 137, page 672 of the Chowan County Public Registry, created a lien upon all of Amburn's and Gardner's interest in the property described

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Elections for New Castle County and leave the people of that County without any provision for exercising their right of franchise at subsequent general or special elections held in that County. On the contrary, the provisions of Chapter 182 of Volume 46 of the Laws of Delaware disclose the intention of the Legislature to continue in existence the Department of Elections for New Castle County but to change its membership from nine members to eleven members. The method adopted by the Legislature to bring about this change having been found to be unconstitutional, the Department of Elections for New Castle County consisting of nine members, as provided for by Paragraph 1746, Section 2 of Chapter 57, of the Revised Code of 1935, as amended, is still in existence and is the legally constituted Department of Elections for New Castle County.

We find the case of Equitable Guarantee and Trust Company v. Donahoe, supra, to be contrary to the weight of authority in this country and for that reason it is hereby overruled.

HARRINGTON, Chancellor:

As I view it, the determination of this case does not require any consideration of the rule stated in Equitable Guarantee and Trust Company v. Donahoe, 3 Pennewill 191, 49 A. 372; but if the question is pertinent, I agree with the conclusion of the majority of the court that it was incorrectly decided.

I am, however, unable to agree with the majority conclusion that Section 3, Chapter 182, Volume 46, Laws of Delaware, violated the Constitution, and with their refusal to permit a reargument of that question.

One of the conclusions in their original opinion was that the legislature could not provide for the selection of statutory State officers by persons having no connection with the State government, and that committees of political parties were mere private corporations not within that rule. The recent cases of Smith v. Allwright, 321 U.S. 649, 64 S.Ct. 757, 88 L.Ed. 987, 151 A.L.R. 1110, and Rice v. Elmore, 4 Cir., 165 F.2d 387, cited by the petitioners in support of their motion for a reargument seem to have sufficient bearing on that question to require some consideration. Both involved the acts of political parties in primary elections, and in each it was argued that such committees were mere private organizations, not subject to the equal protection clause of the Federal Constitution. The contentions made were rejected.

In Smith v. Allwright, supra, the court said [321 U.S. 649, 64 S.Ct. 765]:

"We think that this statutory system for the selection of party nominees for inclusion on the general election ballot makes the (political) party which is required to follow these legislative directions an agency of the state in so far as it determines the participants in a primary election. The party takes its character as a state agency from the duties imposed upon it by state statutes; the duties do not become matters of private law because they are performed by a political party."

The principle stated in Nixon v. Condon, 286 U.S. 73, 52 S.Ct. 484, 76 L.Ed. 984, 88 A.L.R. 458, was, therefore, applied.

In Rice v. Elmore, supra, the legislature had repealed all statutory provisions relating to holding primary elections by political parties, but the court said [165 F.2d 391]:

"When these officials participate in what is a part of the state's election machinery, they are election officers of the state de facto if not de jure, and as such must observe the limitations of the Constitution. Having undertaken to perform an important function relating to the exercise of sovereignty by the people, they may not violate the fundamental principles laid down by the Constitution for its exercise."

Applying these cases to the Delaware statutory provisions set out in the earlier minority opinion, it seems reasonable to conclude that the chairmen of the executive committees of the major political parties, to whom the power to name certain statutory officers was given by Section 3, Chapter 182, Volume 46, Laws of Delaware, are in some respects State agents. If that be true, that Act would seem to be consistent with the Constitution even under the theory of the majority of the court.

TERRY, J., concurs.

ANSCHELEWITZ v. BOROUGH OF BELMAR.

No. A–282.

Supreme Court of New Jersey.

May 2, 1949.

1. Municipal corporations ⚷225(5)

A municipality cannot act as an individual does, but it must proceed in conformity with statutes, or in absence of statute agreeably to the common law by ordinance or resolution or motion, and this is especially so where real property is concerned.

2. Municipal corporations ⚷719(4)

Where borough minute book showed resolution authorizing borough attorney to draft lease of boardwalk concessions, and thereafter lease prepared by concessionaire and not by borough solicitor was executed by mayor and clerk, and schedule of payments under lease was never passed upon in public meeting, and municipality never expressed itself officially on terms thereof, lease was void, and commission could properly authorize advertising to lease concessions to others.

Appeal from former Supreme Court.

Certiorari proceeding by Leon Anschelewitz to set aside a resolution of the Borough of Belmar, a municipal corporation, authorizing advertisements for bids to lease certain concessions on the Borough's boardwalk. From a judgment of the former Supreme Court, 137 N.J.L. 617, 61 A.2d 293, prosecutor appeals.

Judgment affirmed.

Milton M. Unger and Milton M. & Adrian M. Unger, all of Newark, for appellant.

Ward Kremer, of Asbury Park, and Harry R. Cooper, of Belmar, for respondent.

VANDERBILT, Chief Justice.

The prosecutor, Leon Anschelewitz, had for some years leased from the defendant, Borough of Belmar, all of its boardwalk concessions and then sublet them at substantial profit to himself. One of these leases was made in March, 1945, for a term of three years, expiring November 1, 1947, at a rental of $6,700 for the entire term. By his own admission the prosecutor conceded that he received more than this sum through subletting for merely a single summer season. In February, 1947, while the 1945 lease was still effective, the prosecutor requested the borough officials to consider a new lease to him. Pursuant to a suggestion of the then mayor and the other borough commissioner (the third commissioner having died in January) the prosecutor appeared at a regular meeting of the Borough Commission held on February 4, 1947, bringing with him a draft of a new lease for a four year period commencing, singularly, February 4, 1947, and terminating February 4, 1951, at a total rental of $11,500. The lease was executed by the mayor and acting borough clerk on behalf of the borough and by the prosecutor that same evening in a side room after the public meeting.

Although the minute book of the borough, which was introduced in evidence on the taking of depositions in this matter, shows a notation of a resolution having been passed by the mayor and his fellow commissioner at the meeting of February 4, 1947, authorizing the borough attorney to draft a lease of the concessions, two experienced newspaper reporters, who testified that they were present from the opening of the meeting until adjournment, said that they heard no such resolution introduced or adopted. Their accounts of the meeting published in their newspapers bear them out for they contained no reference whatever to any such resolution or lease. They also attended the next commission meeting held on February 11th and listened to the reading of the minutes of the meeting of February 4th, but there was no mention of the resolution or of the lease. All this is significant because of the interest in the community in a widely publicized case in nearby Asbury Park involving the leasing of certain of its boardwalk concessions without advertising, and in the bearing of that litigation on the same problem in Belmar. The oncoming municipal election in May was casting its shadow before it.

During the succeeding months a hotly contested election campaign was waged,

with one of the chief issues centering on the practice of the incumbents of leasing the boardwalk concessions without advertising for bids. At various campaign meetings and in a number of campaign releases the then mayor stated only that the concessions leased to the prosecutor were held by him under the three-year lease of 1945. Not once did he mention the lease executed on February 4, 1947. In April, one of the opposition candidates, Howard Hayes, sought to examine the municipal minutes and records, but was refused permission by the then mayor until after the election on May 13th. Following an application by Hayes for a writ of mandamus to permit such inspection, the mayor capitulated and Hayes and a companion examined the minute books. Hayes testified on the taking of depositions that he looked at the minute book with care, but found no reference whatever to the February, 1947, lease. When he asked the acting borough clerk to show him all leases, the 1947 lease was not produced.

The incumbents were defeated at the election and a new board of commissioners took office on May 20, 1947. On the occasion of the organization meeting, the 1947 lease came to public light for the first time, when the acting borough clerk turned it over to the new mayor with the statement that she had put it in her general files at the time of its execution and had forgotten to refile it with the other leases of the borough and that while cleaning out her files preparatory to turning over her duties to the new borough clerk she had just run across it. In her testimony she claimed she had forgotten all about it when asked by Hayes to produce all leases.

Thereupon the new board of commissioners, although recognizing the 1945 lease and accepting the prosecutor's tendered rental in payment only to the amount due on this lease for the summer of 1947, refused to consider itself bound by the 1947 lease. On March 9, 1948 the board adopted a resolution authorizing the leasing of the boardwalk concessions on bids after public advertisement and directed the borough clerk to advertise for bids. The bids received on all of the concessions in the aggregate for a single year exceeded the rental agreed to be paid by the prosecutor for the full four years under the 1947 lease.

The prosecutor thereafter applied for and was granted a writ of certiorari to review the resolution of March 9, 1948, contending that it was invalid in view of the prior commitment made by the borough to him under the lease of February, 1947. After argument the former Supreme Court held (1) that there was no statutory requirement that the borough could lease only upon advertisement and bids, (2) that the resolution of February 4, 1947 awarding the lease to prosecutor "was not publicly and legally adopted and therefore of no force and effect," and (3) that the rule of law prohibiting a collateral attack upon municipal ordinances or resolutions did not prevent the court in a case involving fraud and bad faith "from looking to evidence concerning the approval of the resolution beyond the minute book of the municipality," 1948, 137 N.J.L. 617, 61 A.2d 293, 296. From this judgment the prosecutor appeals.

It will serve no useful purpose to review at length all the extraordinary circumstances surrounding the lease and the resolution of February 4, 1947. Too many acts and statements are left unexplained. Why execute a lease in February, 1947, effective immediately, when the existing lease of 1945 did not expire until November? The prosecutor explains that he wanted security in order to make improvements on the leased property. The borough officials on their part, feared another depression. But where in the new lease is there any provision for such improvements? Except for dates and amounts it is identical with the old lease. The resolution of February 4th authorized the borough solicitor to draw up a lease and provided for "payments outlined in lease," but where is the proof of compliance with the resolution? The borough solicitor was not even called as a witness. But why such a resolution at all, when the prosecutor had brought a new lease with him and the borough officials had obligingly signed it? Why did the borough commissioners fail to act on the lease at a public meeting? Why did the then mayor refuse to permit an inspection of the minute book and leases by an interested citizen until subjected to judicial pressure? Why did the acting municipal clerk thereafter conceal the resolution and the lease until the election was over and the new commission was about to organize? Why did the then mayor throughout the campaign conceal the existence of the 1947 lease? Why if the 1947 lease were to take effect immediately, notwithstanding the fact that the 1945 lease did not expire until November, 1947, was there no release of the unexpired term of the 1945 lease? Was the prosecutor to pay rent from February to November under each lease? One might continue indefinitely asking pertinent questions nowhere answered by the evidence.

[1, 2] We agree wtih the former Supreme Court that the lease of February 4, 1947, with the prosecutor, was illegally executed, but we prefer to base our judgment on the single ground that there never was any municipal action authorizing the execution of the lease presented to the borough commission on February 4, 1947 and executed by it on that day. A municipality cannot act as an individual does. It must proceed in conformity with the statutes, or in the absence of statute agreeably to the common law, by ordinance or resolution or motion. City of Burlington v. Dennison, Err. & App. 1880, 42 N.J.L. 165, N. J. Good Humor, Inc., v. Bradley Beach, Err. & App. 1939, 124 N.J.L. 162, 11 A.2d 113. Especially is this so where real property is concerned. The only official action that purports to justify the lease of February 4th is the resolution of that date. But the resolution did not authorize the lease brought to the meeting by Anschelewitz. The resolution merely authorized "the borough solicitor to draw up (sic) lease with Leon Anschelewitz for the following concessions (listing eight) all located adjacent to the Boardwalk in the Borough of Belmar, New Jersey, for the term commencing February 4, 1947, and expiring on February 4, 1951, at the term rental of Eleven Thousand Five Hundred ($11,500.00) Dollars, payments outlined in lease."

The lease in controversy is not the lease authorized in the resolution. The lease in controversy was prepared by Anschelewitz; the lease the resolution contemplates was to be prepared by the borough solicitor. Apparently the borough solicitor never prepared a lease, why not we are not told. It may well be he was never asked to do so. In any event, it is significant that he was not called as a witness. Moreover, the resolution goes no further than to authorize the borough solicitor to prepare a lease, which the commission was free to accept or reject. The actual execution of a lease is nowhere authorized by resolution. Nor have the schedule of payments under the lease, which were to emerge for the first time in the lease to be prepared by the borough solicitor, ever been pas[illegible] upon in public meeting by the borou[illegible] commission. That obviously would be impossible until the borough solicitor submitted his draft of a lease to the commission. The schedule of payments of rent in a lease is one of its most vital terms. Conceivably the lessee might have had in mind payment of the entire rent on the last day of the four-year term, the lessor on the first day. The municipality has never expressed itself officially on one of the most important terms of a lease, nor had the prosecutor been heard on that subject. At no time was the municipality bound to accept the lease to be submitted to it by the borough solicitor. It necessarily follows that the lease of February 4, 1947, prepared by the prosecutor and signed by the mayor and acting borough clerk on February 4, 1947 is entirely unauthori[illegible] and therefore void and illegal.

Having reached this conclusion on basis of the inadequacy of the resolution of February 4, 1947, a conclusion which is peculiarly inescapable in view of the many suspicions and entirely unexplained circumstances surrounding the transaction, we do not find it necessary to pass at this time on the specific holdings of the former Supreme Court, but they will be reserved for later consideration in appropriate cases.

The judgment below is affirmed.

For affirmance: Chief Justice VANDERBILT and Justices CASE, OLIPHANT, BURLING and ACKERSON—5.

For reversal: None.

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LEXSEE 3 NY.2D 434

Atlantic Beach Property Owners' Association, Inc., et al., Respondents, v. Town of Hempstead, Appellant

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

3 N.Y.2d 434; *144 N.E.2d 409*; *165 N.Y.S.2d 737*; *1957 N.Y. LEXIS 903*

April 4, 1957, Argued
July 3, 1957, Decided

PRIOR HISTORY: *Atlantic Beach Property Owners' Assn. v. Town of Hempstead, 1 A D 2d 1028*, reversed.

Appeal, by permission of the Court of Appeals, from a judgment of the Appellate Division of the Supreme Court in the second judicial department, entered May 31, 1956, unanimously affirming a judgment of the Supreme Court, entered in Nassau County upon a decision of the court at Special Term (D. Ormonde Ritchie, J.), granting an injunction to plaintiffs.

DISPOSITION: Judgment reversed and matter remitted to Special Term for further proceedings not inconsistent with the opinion herein, with costs in all courts.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant town challenged an order of the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which affirmed a judgment granting an injunction to respondent association in respondent's claim to uphold the restrictive covenants accompanying park land granted to and accepted by the town.

OVERVIEW: The association granted certain land to the town to be used exclusively by its members and to be maintained by the town. The association sought enforcement of the restrictive covenant on grounds that the covenant contained in the dedication deed required the town board to maintain these beach areas in perpetuity as a public park district for the benefit of its lot owners and to the exclusion of property in other tracts or of other members of the public for whose benefit the town board was authorized, in its discretion, to extend the park or the park facilities under statute. The appellate court affirmed the judgment in favor of the association and the town sought review. The court reversed the judgment and found that the town board could not legally have accepted land for park purposes on condition that the board renounce powers and duties which the legislature had conferred upon town boards in the creation, enlargement, or administration of town park districts.

OUTCOME: The court reversed the judgment in favor of the association with costs and dismissed the association's complaint without prejudice to any rights which it may have to damages or other compensation by reason of the appropriation of easements or other property rights inhering in them under the grant, or to any other and different relief to which they may be entitled.

LexisNexis(R) Headnotes

Governments > Local Governments > Administrative Boards
Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Procedure
Real Property Law > Restrictive Covenants > General Overview
[HN1] Hempstead, N.Y., Town Law §§ 190-194 and Nassau County, N.Y. Civil Divisions Act § 222.0 authorize enlargement by town boards of the boundaries of park districts and other public districts. Hempstead, *N.Y., Town Law § 198(4)* empowers town boards to sell any property acquired for park purposes and to apply the proceeds to the purchase of other property for park purposes, and allows town boards to fix reasonable charges for the use of parks by persons other than inhabitants and taxpayers of such districts.

Governments > Local Governments > Administrative Boards
Governments > Local Governments > Ordinances & Regulations
[HN2] Agreements by which the public powers of a municipality are surrendered without express permission of the legislature are beyond the powers of the municipality and void.

Governments > Local Governments > Property
Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > General Overview
Transportation Law > Bridges & Roads > General Overview
[HN3] Grants of land to a town for parks, buildings or structures, or for any other public use are put on a parity. Land may be limited in dedication deeds to use for streets, parks, athletic fields and buildings may be dedicated for art galleries, sports or civic center purposes, but the use must be public. A use is not public where public benefit is incidental to a private benefit.

HEADNOTES

Municipal corporations -- authority over parks -- Town of Hempstead may not be enjoined from permitting use of beach areas by persons other than owners or resident tenants of land within beach tract on theory that covenants contained in deed to town require town to maintain beach areas in perpetuity as public park district for benefit of lot owners only -- gifts may be made to town on conditions but use must be public -- power to extend park district (*Town Law, §§ 190-194*; Nassau County Civil Divisions Act, § 222.0) cannot be curtailed by conditions in deed to town.

1. Plaintiff association and its grantor, in 1941, executed and recorded a "declaration" setting aside nine parcels of land abutting on the ocean at Atlantic Beach in the town of Hempstead as "beach areas" for the exclusive use of residents of lots designated on a map of a subdivision developed by the Association's grantor. In 1951 the Association deeded these beach areas to the Town of Hempstead for park purposes subject to a covenant by the town not to permit use of the park by any persons except owners or resident tenants of lots in the Atlantic Beach tract, their families or guests. A town park district was organized as a public district under *article 12 of the Town Law*. Thereafter, by resolution of the town board an area known as Inlet Estates, to the east of this park district, was admitted into the park district. In this action injunctive relief has been granted solely against the Town of Hempstead and based entirely on the theory that the covenants contained in the dedication deed by the Association to the town require the town to maintain these beach areas in perpetuity as a public park district for the benefit of lot owners in the Atlantic Beach tract and of them alone. The Town of Hempstead has been enjoined from permitting the use of these beach areas by persons other than the owners or resident tenants of land within the Atlantic Beach tract. The complaint in this action in which plaintiffs sought such an injunction should be dismissed.

2. Under subdivision 8 of *section 64 of the Town Law*, gifts may be made to a town upon terms or conditions but the use thereof must be public.

3. The power to extend the park district conferred on the town board by the Town Law (§§ 190-194) and the Nassau County Civil Divisions Act (§ 222.0) cannot be and is not abrogated or curtailed by the covenants or conditions contained in the dedication deed by the Association to the town in 1951.

4. The dismissal of the complaint is without prejudice to any rights which plaintiffs may have to damages or other compensation by reason of the appropriation of easements or other property rights inhering in them under the "declaration" or to any other and different relief to which they may be entitled.

COUNSEL: *John A. Morhous, Town Attorney*, for appellant. I. The covenant restricting the use of the beach and bay areas cannot be construed to limit such use to the residents of the original district. (*Ward v. Union Trust Co., 172 App. Div. 569*; *People ex rel. City of New York v. Nixon, 229 N. Y. 356.*) II. The restrictions in the deed as construed by the courts below prevent extension of the park district and are void. (*Parfitt v. Ferguson, 159 N. Y. 111*; *Wells v. Village of East Aurora, 236 App. Div. 474*; *Belden v. City of Niagara Falls, 230 App. Div. 601*; *Witmer v. City of Jamestown, 125 App. Div. 43.*) III. The injunction puts an inequitable burden on the residents of the extended area.

Charles E. Lapp, Jr., for respondents. I. The threatened action of defendant violated the plain meaning of the covenants in the deed. Were the terms of the deed to be considered ambiguous, their purpose, intent and proper interpretation are apparent from the nature of the property and the circumstances under which the deed was delivered. (*Beth Israel Hosp. Assn. v. Moses, 275 N. Y. 209*; *Campbell v. Town of Hamburg, 156 Misc. 134*; *Weil v. Atlantic Beach Holding Corp., 285 App. Div. 1080, 1 N Y 2d 20.*) II. The covenants and restrictions are valid and enforcible. (*Beth Israel Hosp. Assn. v. Moses, 275 N. Y. 209*; *Campbell v. Town of Hamburg, 156 Misc. 134.*)

JUDGES: Dye, Froessel and Burke, JJ., concur with Van Voorhis, J.; Desmond, J., dissents in an opinion in which Conway, Ch. J., and Fuld, J., concur.

OPINION BY: VAN VOORHIS

OPINION

[*436] [**409] [HN1] [***738] Sections 190-194 of the Town Law and section 222.0 of the Nassau County Civil Divisions Act authorize enlargement by town boards of the boundaries of park districts and other public districts. *Section 198* (subd. 4) of the Town Law empowers town boards to sell any property acquired for park purposes and to apply the proceeds to the purchase of other property for park purposes, and allows town boards to fix reasonable charges for the use of parks by persons other than inhabitants and taxpayers of such districts. The issue on this appeal concerns whether the Town Board of the Town [**410] of Hempstead is deprived of these powers by negative covenants, exclusive easements or restrictions contained in a dedication deed of land for park purposes accepted by the town in 1951.

Plaintiff Atlantic Beach Property Owners' Association, Inc. (hereafter called the Association) and its grantor in 1941 * executed and recorded what is termed a declaration, setting aside nine parcels of land abutting on the ocean at Atlantic Beach in the town of Hempstead, Long Island as "beach areas" for the exclusive use of residents of lots designated upon a map of a subdivision developed by the Association's grantor. This was a private transaction between private individuals and corporations. In 1951 the Association deeded these beach areas to the Town of Hempstead for park purposes, but subject to covenant by the town not to permit use of the park by any persons except owners or resident tenants of lots in the Atlantic Beach tract, their families or guests. A town park district was organized as a public district under *article 12 of the Town Law*. Several years later a new subdivision was developed by others known as Inlet Estates alongside of this park district upon the east. The lot owners of Inlet Estates did not object to helping to pay necessary charges for the park district, but they wanted to get into it upon any reasonable terms, consequently they circulated a petition for the annexation of Inlet Estates to the Atlantic Beach Park District which was ordered, pursuant to statute, by a resolution of the town board admitting [***739] Inlet Estates into this park district on June 9, 1953. The Association and some of the owners of lots within the Atlantic Beach subdivision object to the extension of this park district so as to annex any land which was not part of the Atlantic Beach [*437] tract. The town board takes the position that the owners of lots in Inlet Estates are citizens and property owners in the town of Hempstead, entitled to the equal protection of the laws along with the Association and owners of lots in the Atlantic Beach tract. They contend that the Town Law and the Nassau County Civil Divisions Act contemplate that growing communities like the Town of Hempstead will not remain static, and that in the wisdom of the Legislature the town board has been empowered to extend and enlarge park districts which is its duty if the occasion requires. It is argued that the town board is a public body organized for the government of the town and the securing of the common interests of the people of Hempstead and of the public. These are public officers and their statutory powers, it is contended, cannot be abrogated or curtailed by private agreement. Consequently it is asserted that the restrictive covenants contained in the deed by the Association to the town purporting to limit these beach areas for the use of people in the Atlantic Beach tract are ineffective to limit the power of the town board to extend the park district in the interest of the whole community.

* In 1942 a similar "declaration" was made respecting certain "bay areas" which are not at issue in this action.

The situation thus disclosed resolves itself into several components: by private covenant in the declaration executed and recorded in 1941, these beach areas were limited to use by lot owners in the original tract, their families and guests, after which the Association appears to have been powerless to devote them to other uses without their consent. This declaration was in the nature of a restrictive covenant or a grant of exclusive easements running with the land. Having entered into this private agreement with its predecessor in title and the lot owners, the Association could not deed these beach areas to the town except subject to these exclusive easements or restrictive covenants. The dedication deed delivered by the Association to the Town of Hempstead in 1951, by assuming to impose parallel restrictions, probably amounted to a conveyance of these areas subject to the declaration made by the Association in 1941 provided that the town could legally accept the lands on those terms. The town had [**411] constructive notice of the declaration from its having been recorded. We entertain little doubt that whatever private rights became vested in lot owners in the Atlantic Beach tract by this declaration could have been enforced and perhaps may [*438] yet be enforced against the town and against owners of lots in the new subdivision known as Inlet Estates. Neither the Association nor the town board could absolve these beach areas from private restrictions to which [***740] they were subject except by the lot owners' consents or by condemnation of their exclusive easements to the use of the areas.

The difficulty with plaintiffs' position in this action, as it seems to us, is that the injunctive relief asked and granted is not based on private easements reserved for the benefit of lots in the Atlantic Beach tract by the declaration of 1941. That declaration is not mentioned in the complaint nor in the opinion of the trial court. The relief granted is solely against the Town of Hempstead and is based entirely upon the theory that the covenants contained in the dedication deed by the Association to the town in 1951 require the town board to maintain these beach areas in perpetuity as a public park district for the benefit of lot owners in the Atlantic Beach tract and of them alone. It may be that without extinguishing these private easements to exclusive use of the beach areas the town board lacked power to form this park district in the beginning, or that by extending it in derogation of their rights these property owners became entitled to damages or to be otherwise compensated for the appropriation of their property rights. The town board could not legally have accepted land for park purposes on condition that the board renounce powers and duties which the Legislature has conferred upon town boards in the creation, enlargement or administration of town park districts. [HN2] Agreements by which the public powers of a municipality are surrendered without express permission of the Legislature are beyond the powers of the municipality and void (10 McQuillin on Municipal Corporations [3d ed.], § 29.07, p. 190 *et seq.; Parfitt v. Ferguson, 159 N. Y. 111*; *Wells v. Village of East Aurora, 236 App. Div. 474*; *Belden v. City of Niagara Falls, 230 App. Div. 601*; *Witmer v. City of Jamestown, 125 App. Div. 43*). This town board could not divest itself of powers which the Legislature has deemed advisable to adapt park districts to the needs of growing communities. Unless power to enlarge such a district had been included in these statutes the Legislature might have seen fit to withhold power to form park districts, rather than to grant it in such manner as to enable public parks to be limited by agreement to the use of particular private individuals.

[*439] Plaintiffs do not allege any unlawful exercise of power by the town board in establishing the park district in the beginning due to these clauses in the private declaration instrument of 1941 imposing restrictions running with the land which may have been inconsistent with the acceptance of the property by the town board for a park district at the outset; plaintiffs in their complaint assert no right, title or interest in the land, but on the contrary want these areas to be used as a public park district with whatever benefits accrue from town maintenance, but they wish this to be done exclusively for themselves and others in the Atlantic [***741] Beach tract to the exclusion of property in other tracts or of other members of the public for whose benefit the town board is authorized, in its discretion, to extend the park or the park facilities under statutes in such case made and provided.

The relief granted by the judgment appealed from consists, to be sure, in restraining the Town of Hempstead from permitting the use of these beach areas by persons other than the owners or resident tenants of land within the Atlantic Beach tract, but the opinion of Special Term and the factual allegations in the complaint as well as the stipulation of facts on which the action was tried demonstrate that the town is not restrained as a trespasser, or by reason [**412] of any right or easement in the land arising from the declaration document, but that the effect is to grant mandatory relief to compel the town board to administer these areas as a public park for plaintiffs' private benefit and to the exclusion of all others who are entitled to participate under the subsequent action of the town board in admitting Inlet Estates pursuant to power conferred by the Town Law and the Nassau County Civil Divisions Act.

To be sure, the basis for Special Term's decision, affirmed without opinion by the Appellate Division, is *section 64* (subd. 8) of the Town Law, which provides: "Gifts to town. May take by gift, grant, bequest or devise and hold real and personal property absolutely or in trust for parks or gardens, or for the erection of statues, monuments, buildings or

structures, or for any public use, upon such terms or conditions as may be prescribed by the grantor or donor and accepted by said town, and provide for the proper administration of the same."

[HN3] Grants of land to a town for parks, buildings or structures, or for any other public use are put on a parity. Land may be [*440] limited in dedication deeds to use for streets, parks, athletic fields or the like. Buildings may be dedicated for art galleries, sports or civic center purposes. But the use must be public, and a use is not public where public benefit is incidental to a private benefit (*Denihan Enterprises v. O'Dwyer, 302 N. Y. 451, 458*, per Froessel, J.). Under *section 64* (subd. 8) of the Town Law, for example, a dedication deed of land to a town could limit its use to street purposes, but could not have a condition attached that the street shall be used only by inhabitants of a designated tract or subdivision (*People v. Grant, 306 N. Y. 258*).

It is possible that plaintiff Association and the lot owners in the Atlantic Beach tract might obtain an injunction preventing the use of these beach areas for park purposes unless the Town of Hempstead perfects its title by condemning or otherwise acquiring the exclusive easements which vested in the lot owners by the declaration instrument recorded [***742] in 1941. We are not required to pass upon that issue on this appeal. Here plaintiffs have obtained what is, in effect, a mandatory injunction compelling the town board to operate these areas as a public park for the benefit of these lot owners alone, being forever prohibited from exercising the statutory power of enlarging the boundaries of the park district or admitting others to the use of the park on a suitable financial basis.

We do not pass upon whether the owners of lots in the Atlantic Beach tract are entitled to damages or compensation in some form for the appropriation of whatever exclusive private easements they acquired under the declaration of 1941, nor on any question of reversion due to possible breach of condition by the town in enlarging the district. We hold merely that the power to extend the park district conferred on the town board by sections 190-194 of the Town Law and section 222.0 of the Nassau County Civil Divisions Act cannot be and is not abrogated or curtailed by the covenants or conditions contained in the dedication deed by the Association to the town in 1951.

The judgment should be reversed with costs, and the complaint dismissed without prejudice to any rights which plaintiffs may have to damages or other compensation by reason of the appropriation of easements or other property rights inhering in them under the declaration of 1941 (Ex. 2) or to any other and different relief to which they may be entitled.

DISSENT BY: DESMOND

DISSENT

[*441] Desmond, J. (dissenting) In 1951 defendant town accepted from the corporate plaintiff, without consideration, a deed of certain water-front property. The deed contained this language:

"This conveyance of the foregoing lands to the Town of Hempstead is made for the [**413] establishment of the above described lands as parks within the Atlantic Beach Park District, said District to include all lands shown on the aforementioned maps.

"And the party of the second part does hereby covenant and agree with the party of the first part as follows:

"1. That it will not permit the aforesaid beach areas to be used by any persons except the owners and/or resident tenants of land within the district and situated north of the center line of Ocean Boulevard as shown on the aforementioned map, together with the immediate families and non-paying house guests of the said owners and/or resident tenants;

"2. That it will not permit the aforesaid bay areas to be used by any persons other than the owners and/or resident tenants of land within the district and situate north of the center line of Ocean Boulevard as [***743] shown on the aforementioned map, together with the immediate families and non-paying house guests of said owners and/or resident tenants and other than the owners and/or resident tenants of land within the district and situated south of the center line of Ocean Boulevard as shown on the aforementioned map, together with the members of any and all beach clubs located on said land."

In direct violation of that covenant the town in 1953 extended the Atlantic Beach Park District to include a new subdivision adjoining the Atlantic Beach area for the benefit of whose residents the above covenants were made. This suit is brought to restrain that violation. The courts below validly granted the injunction.

The facts are undisputed. The Atlantic Beach community was founded in 1926 by the filing of subdivision maps including the beach-front lands the use of which is in dispute here. The developer of Atlantic Beach, selling several hundred lots, reserved to itself title to the beach. In 1941 and 1942 a corporation which had acquired title to the beach-front lands executed and recorded a "declaration" restricting the use of those beach areas to the owners and residents of lots shown on the Atlantic Beach subdivision maps. Later there was formed by and for the benefit of those property owners, plaintiff Atlantic Beach Property Owners' Association, Inc., which took and held title [*442] to the reserved properties until 1951. Meanwhile boathouses and other facilities had been built on the beaches for the use of the owners and occupants of the benefited area. All other persons were kept off the beaches. The large expense for maintenance of these facilities was borne by plaintiff Association but some of the residents of Atlantic Beach failed or refused to pay their shares of those costs. Someone thought up the idea of establishing a park district so that title to the beach areas would be in a public corporation empowered to assess the Atlantic Beach property owners for their proportions of the expense burden. Pursuant to statute (see *Town Law, art. 12,* and Nassau County Civil Divisions Act, § 222.0) and after public hearings, etc., the town board in 1950 established the Atlantic Beach Park District. The new district comprised the Atlantic Beach subdivisions. Pursuant to the plan, plaintiff Association in 1951 conveyed the beach front to the town, for the park district, by deed containing the restrictions set forth in the first paragraph of this opinion. In 1953 the town, acting under *section 190 et seq.* of the Town Law and section 222.0 of the Nassau County Civil Divisions Act, extended the Atlantic Beach Park District to include a new, adjoining subdivision owned by persons not associated in interest with plaintiffs. The purpose of the park district extension was, of course, to allow the residents of the newly developed residential area to use the beaches in defiance of the restrictive covenants.

[***744] There is no doubt as to the meaning of those restrictions and there should be no doubt of their validity. Express authorization for the acceptance by a town of such a conditional gift is in subdivision 8 of *section 64 of the Town Law*: "8. Gifts to town. May take by gift, grant, bequest or devise and hold real and personal property [**414] absolutely or in trust for parks or gardens, or for the erection of statues, monuments, buildings or structures, or for any public use, upon such terms or conditions as may be prescribed by the grantor or donor and accepted by said town, and provide for the proper administration of the same." Such a grant as this is no new thing (see *Campbell v. Town of Hamburg, 156 Misc. 134* [1935], and cases cited). The arrangement made in 1950 did not produce the anomaly of a "private park" maintained by public funds for the use of a few. The Atlantic Beach subdivision lot owners, several hundred in number and already owning the right to use the beaches to the exclusion of the public, continued that situation and preserved [*443] that right by setting up the park district consisting of their properties only. They themselves continued as before to pay the expense, the only difference being that it was now collected through assessments levied by those same lot owners against themselves through the park district. The town did not provide them with a park. They provided it for themselves. The deed to the town was a mere step in accomplishing all this. The town had no interest of its own, paid nothing for the deed and has been put to no expense. Plainly, the town in attempting to destroy the restrictions by the device of extending the park district is guilty of wrongdoing.

The attempted justification is that pertinent statutes have always authorized the extension of park districts and that the 1950-1951 transaction was subject to that power. But those "Improvement District" sections (*§ 190 et seq.*) of the Town Law must be read with subdivision 8 of *section 64 of the Town Law* (*supra*). The latter statute, authorizing the town to take a conditional gift of real property, must in common sense and good morals mean that the town is bound to comply with the conditions in the grant. For that purpose and to that extent subdivision 8 of *section 64 of the Town Law* must override *section 193 of the Town Law* when necessary to enforce the conditions of this valid gift. This does not mean that the town in accepting the gift voluntarily and illegally surrendered its governmental power to extend this park district. It never had any power, governmental or otherwise, to open up the Atlantic Beach water front to newcomers. Its general authority to enlarge park districts was by law subject to its obligation to comply with the conditions it had agreed to in the grant. The power to extend and the duty to live up to the conditions are here mutually exclusive. If we must make a choice, we should hold legal that course of official conduct which is in accord with right and morality.

[***745] Plaintiffs are entitled to court protection of their rights and injunction is the proper remedy. The injunction here granted did no more than restrain the town from permitting the use of the beach areas by persons other than owners and residents of Atlantic Beach. Such was the burden the town assumed by acceptance of the deed. It is not for us to tell the parties how or whether the town by condemnation or otherwise may remove that burden.

The judgment should be affirmed, with costs.

Tax Court indicated that the term was to be given its "usual meaning in law," citing *State Tax Comm. v. Whitehall,* 214 Md. 316, 320, 135 A.2d 298 (1957). The Tax Court correctly noted that, contrary to MSBA's contention, the issue of the proper construction of the term "educational" was not addressed by this Court in *Md. State Fair v. Supervisor,* 225 Md. 574, 172 A.2d 132 (1961). That case involved taxes sought to be levied against certain property of the Maryland State Fair and Agricultural Society, Inc., which operated the Maryland State Fair. It was conceded that the Society was an educational institution; the concession was based largely on an opinion of then Attorney General Hall Hammond that the Society was an educational organization entitled to a sales tax exemption under the statute. 36 Op.Att'y Gen. 303 (1951). It was there noted that the Society, in its conduct of the State Fair, was a nonprofit organization incorporated "to save the State Fair for the benefit of Maryland farmers, breeders and those interested in the conservation of natural resources, as well as of the general public and the citizens of the State." *Id.* at 304. The opinion sets forth a number of cases throughout the country holding that a State Fair is an educational institution or organization, notwithstanding its incidental amusement programs. Those cases, according to the Attorney General, found State Fairs to be educational because they were planned and managed for the general welfare of the people to inform them about the resources of the region in matters pertaining to agriculture and industry, and methods by which they may be conserved, utilized, and improved. In finding the Society exempt from sales tax, the Attorney General stressed that the State Fair had been exempt from property taxes since 1867 and that this was a "clear indication of a public policy that such organizations are entitled to exemption" to further educational purposes. *Id.* at 309. Finding no such indication of a similar public policy in favor of exempting the MSBA, and after considering the evidence, the Tax Court concluded that that organization was not primarily educational.

While the Tax Court purported to apply the "usual meaning in law" of the word "educational," as used in § 326(i), we are unable to glean from its opinion what it found that meaning to be. In determining that the MSBA was not primarily an educational organization, the Tax Court emphasized that the Association has a "professional orientation," that the bulk of its services are provided to its own members, and that the members pay dues to receive them. Upon this premise, the Tax Court appeared to make a *per se* determination that the MSBA's educational activities were but an incidental by-product of the Association's overall function to promote and protect the professional interests of its members. To apply such a test, we think, would constitute an error of law; it would propogate too restrictive a view of the "educational organization" exemption of § 326(i), one plainly at odds with the legislative intention.

[3] As in *Supervisor v. Group Health Ass'n, supra,* involving the meaning of the word "charitable," whether an organization is primarily educational requires a careful examination of its stated purposes, the actual work performed by it, and in particular the nature and extent of its educational activities. Merely because education is provided to dues paying members of the Association and not directly to the public does not, contrary to the intimation in the *Minnesota State Bar* case, disentitle the organization to the exemption. In other words, because the MSBA's educational activities may be predominantly for its members is not alone determinative of whether the Association is an educational organization in the sense contemplated by § 326(i).

[4] To be entitled to an exemption based solely on the educational organization exemption, the organization's focus must be shown to be primarily educational. In the context of a tax exemption statute, *Black's Law Dictionary* 461 (5th ed. 1979) defines "educational purposes" of an educational organization to encompass "systematic instruction in any and all branches of learning from which a substantial public benefit is derived." This is consistent with the general rule that exemption from taxation must be for a public purpose. *Wilson v. Board of Co. Comm'rs,* 273 Md. 30, 44, 327 A.2d 488 (1974); *Katzenberg v. Comptroller,* 263 Md. 189, 197, 282 A.2d 465 (1971); *Kimball-Tyler v. Balto. City,* 214 Md. 86, 97, 133 A.2d 433 (1957). *See also* 71 Am.Jur.2d *State and Local Taxation,* §§ 307, 362, and 382 (1973). Manifestly, the term "educational institution or organization" in § 326(i) is not limited to schools, colleges or universities. Through its various functioning parts, the MSBA does provide a measure of systematic instruction to and for its members to enhance their ability to better serve the public good, a well-recognized public purpose. And some of the Association's educational pursuits are aimed more directly at educating the public on law-related matters of substantial public importance. We thus look to the entity seeking exemption as an educational organization as a whole to ascertain its primary or dominant purpose. *See, e.g.,* Annotation, *Exemption of Charitable or Educational Organization from Sales or Use Tax,* 59 A.L.R.3d 748–773 (1974); Annotation, *What are Educational Institutions or Schools within State Property Tax Exemption,* 34 A.L.R.4th 698–754 (1984). And *see generally* 68 Am.Jur.2d. *Sales and Use Taxes* § 116 (1973). We therefore shall direct that the case be remanded to the Tax Court to apply the proper legal test to the facts as it finds them in making this determination.

III.

[5] The MSBA argues that the Tax Court also made an error of law in interpreting § 326(i) to require that it be primarily charitable *or* primarily educational, as opposed to being primarily a charitable *and* educational organization. In this regard the MSBA points out that the parties are in agreement that the organization must be primarily educational or charitable or a combination of both, to be accorded the exemption; and that if it spends over half its budget on either educational or charitable activities, or both, it is an organization which qualifies for the exemption.

The Tax Court's opinion does not indicate with any degree of clarity whether it considered the MSBA's charitable and educational activities as a combination, or only separately, in making its decision. We think the correct test for measuring an organization's tax exempt status under § 326(i) is to consider its charitable and educational activities in combination in determining its exempt status. *See City of Nome v. Catholic Bishop of No. Alaska,* 707 P.2d 870, 880 (Alaska 1985). Accordingly, the case will be remanded to the Tax Court to determine (1) the degree to which the MSBA conducts educational programs and activities within the ambit of § 326(i); (2) whether education is the Association's primary purpose; and (3) if the Association's focus is not primarily educational, whether the combination of its charitable and educational activities together mount up to an organization engaged primarily in educational and charitable pursuits under the statute.

JUDGMENT OF THE CIRCUIT COURT FOR BALTIMORE CITY VACATED; CASE REMANDED TO THAT COURT WITH DIRECTIONS THAT IT REMAND THE CASE TO THE MARYLAND TAX COURT FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION; COSTS TO ABIDE THE RESULT.

GILBERT, J., concurs in the result.

314 Md. 675

ATTMAN/GLAZER P.B. COMPANY

v.

MAYOR AND ALDERMEN OF ANNAPOLIS.

No. 115, Sept. Term, 1986.

Court of Appeals of Maryland.

Feb. 8, 1989.

Motion for Reconsideration Denied March 28, 1989.

Company brought three appeals from decisions of city council denying its applica-

tions for conditional use of property and denying temporary use and occupancy permit. The Circuit Court, Anne Arundel County, James C. Cawood, Jr., J., affirmed. Company appealed to Court of Special Appeals which also affirmed. Petition for certiorari was granted. The Court of Appeals, McAuliffe, J., held that while municipality could enter into binding agreement concerning aspects of case when case was on appeal, it could not lawfully bind itself to future zoning or conditional use decision.

Affirmed.

1. **Zoning and Planning** ⚷13

Mayor and aldermen could not by agreement lawfully bind themselves to future zoning or conditional use decision since municipality could not contract away exercise of its zoning powers.

2. **Estoppel** ⚷62.4

A municipality is not estopped to assert its own illegal action.

Steven R. Migdal (Manis, Wilkinson, Snider & Goldsborough, Chartered, on the brief) Annapolis, for appellant.

Gary M. Elson, Asst. City Atty. (Jonathan A. Hodgson, City Atty., on the brief), Annapolis, for appellee.

Argued before MURPHY, C.J., ELDRIDGE, COLE, RODOWSKY, COUCH * and McAULIFFE, JJ., CHARLES E. ORTH, Jr., Associate Judge of the Court of Appeals (retired, Specially Assigned).

McAULIFFE, Judge.

We are here concerned with the extent to which a municipality may "settle" the appeal of a zoning or similar land use case. We conclude that although a municipality may enter into a binding agreement concerning certain aspects of a land use case on appeal, it may not contract away the exercise of its zoning power.

The property in question is bounded by Northwest, Calvert, and Clay Streets in the City of Annapolis, and is currently improved by a four-story office building. The property has had a rather difficult development history, involving the urban renewal efforts of the city, litigation between the city and the developer, and a cloudy zoning classification picture. The property consists of two parcels, 7D and 17, which were acquired and assembled by the city as a part of an urban renewal project. When originally placed in the city's Urban Renewal Plan,[1] parcel 7D was designated for neighborhood commercial and business use, and parcel 17 for residential use. Attman/Glazer P.B. Company (hereinafter "AG") successfully bid for the right to develop the land, and in 1977 filed an application for a change in the Urban Renewal Plan. Proposing construction of a commercial office building, AG asked that the two parcels be designated for commercial use and that approval be given for construction.

AG's 1977 application is not in this record. We infer from the records which are before us that AG originally sought two things: a change in the classification of the property in the Urban Renewal Plan, and approval of a conditional use. Precisely what effect a change in classification in the Urban Renewal Plan was intended to have on the underlying zoning classification of the property is not clear. It does not appear that the various use designations approved in the Urban Renewal Plan ever found their way onto the city's zoning map by means of a comprehensive (or other) map amendment. Rather, it appears that at the time, all parties considered the changes made in the Urban Renewal Plan to be fully effective for purposes of development, without the necessity of corresponding changes to the zoning map, and apparently without the necessity of resubdividing the property before construction.

* Couch, J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

1. Code provisions dealing with urban renewal were codified at Chapter 20A of the Annapolis City Code (1969). Following recodification, the current provisions are now contained in Chapter 2.56 of the Code of the City of Annapolis (1986).

We note that the procedures followed in the amendment of the Urban Renewal Plan were virtually the same as those prescribed for a zoning map amendment. These procedures involved consideration and recommendation by the Annapolis Planning and Zoning Commission, notice to the public, and a public hearing before the ultimate zoning authority, the mayor and aldermen sitting as the city council.[2] For purposes of this case, we need not decide the current zoning classification of this property, or the effect of any inconsistency that may currently exist between the requirements of the city's urban renewal code and its zoning code.[3] Nor need we decide whether the conditional use mechanism was properly or necessarily utilized in this case.[4] The parties proceeded on the assumption that reclassification of the property in the Urban Renewal Plan was sufficient in lieu of formal rezoning, and that conditional use approval was required. Indulging those same assumptions in this case allows us to reach the question of a municipality's right to "settle" a zoning appeal, and we therefore proceed on that basis.

AG's initial request was granted, and by Resolution 58–77 the mayor and aldermen amended the Urban Renewal Plan to change the designation of Parcels 7D and 17 to commercial use. The resolution also permitted the erection of a professional office building, on the condition that the owner of the building provide 252 parking spaces. Those spaces could be located onsite, or on other property within 500 feet of the building. By Resolution 66–77, a conditional use for the proposed office building was approved. That conditional use authorization expired when AG was unable to undertake construction within a prescribed time. A new application for conditional use was filed, and by Resolution 1–81 the mayor and aldermen granted a new conditional use, requiring 18 on-site parking spaces and 238 additional parking spaces within 600 feet of the property. The resolution further provided that in lieu of providing some or all of the 238 additional spaces, the owner could make available to the building's tenants or their employees a comparable number of passes for use on the city's shuttle bus system.

Construction of the building commenced, albeit only after AG obtained a writ of mandamus from the Circuit Court for Anne Arundel County directing the city to issue a building permit.[5] Shortly thereafter, AG

2. Prior to 1985, the name and style of the municipal corporation was "mayor and aldermen of the City of Annapolis." As a result of changes in the city charter, the name of the municipal corporation is now "City of Annapolis."

3. At the time the city approved AG's initial request for redesignation, § 22–30(f) of the Code of the City of Annapolis provided that in the event of an inconsistency between the Urban Renewal Plan and the zoning code, the provisions of the plan would govern. However, that language was repealed by Ordinance 12–81, effective November 17, 1981.

4. The term "conditional use" is not defined in Article 66B of the Maryland Code (1988 Repl. Vol.), which comprises the grant of authority from the State to municipalities to exercise zoning powers. A conditional use is, however, essentially the same as a special exception, which is defined by state law at Article 66B, § 1.00. According to the Annapolis City Code, a conditional use is one which, because of its unique characteristics, cannot properly be classified as a permitted use in any particular district or districts. Accordingly, in addition to the uses that are expressly permitted in each zone, the Annapolis zoning code specifies conditional uses that may be appropriate in that zone if certain criteria are met and appropriate conditions imposed. The problem in this case stems from the fact that an office building is a permitted use in a commercial district, and is neither a permitted nor conditional use in a residential zone. The city suggests that at the time permission was being sought for the construction of this office building, the city code required that the application be treated as if it were a part of a planned development, and thus the conditional use process was required. Although § 2.08 of Article 66B contemplates that the power to hear and decide special exceptions will be reposed in a board of zoning appeals, and the City of Annapolis has created such a board, conditional use applications in the city are decided by the city council.

5. The director of planning and zoning had refused to approve the issuance of a building permit, for reasons not apparent in this record.

sought an amendment to the conditional use to permit active use of a portion of a basement which had theretofore been approved only for housing of mechanical equipment. The mayor and aldermen approved the active use of 15,480 square feet of the basement, on condition that AG provide 51 new off-street parking spaces and comply with the parking requirements set forth in Resolution 1–81. One week later, the mayor and aldermen filed a modified resolution, declaring that the new conditions and those remaining from Resolution 1–81 were interdependent and, if any condition of either resolution were declared invalid or modified by any court, the entire conditional use would stand rescinded. AG appealed, contending that the requirement of creating *new* parking spaces was arbitrary, capricious, and impossible to fulfill, and challenging the attempt of the modified resolution to insulate the actions of the mayor and aldermen from judicial review.[6]

The mayor and aldermen, in their capacity as the municipal corporation, were granted leave to intervene, and filed a demurrer and answer. From a memorandum of law filed by AG, we learn that it did not argue that the requirement of providing 51 additional parking spaces was arbitrary. Indeed, such an argument would likely have been futile, because the requirement followed § 22–122(21) of the city zoning code, which required one off-street parking space for each 300 square feet of gross floor area of business and professional office buildings. Rather, AG argued that the requirement of providing 51 *new* spaces within 500 feet of the building was unreasonable and virtually impossible to perform, due to the lack of land in that area which might be purchased and converted to off-street parking. AG argued that it had produced testimony demonstrating the reasonableness and feasibility of developing 51 additional but existing off-street parking spaces. It pointed out that its tenant, the Department of Economic and Community Development, a state agency, required the additional active space in the basement, and that the State could probably be persuaded to release 51 of the 300 spaces it controlled in the county-owned parking garage directly across the street from AG's building. AG claimed the evidence also showed that the average occupancy of the parking garage was 80 percent of capacity, and therefore the allocation of 51 spaces for its building would not adversely impact the public parking in the area. In response, the city pointed to testimony that demonstrated a critical need for off-street parking in the immediate area of AG's building. The city argued that the reasonableness of imposing the condition of 51 new spaces was at least fairly debatable.

Shortly before the appeal was to be heard in the circuit court, AG and the city reached an agreement that was designed to avoid further court proceedings. The parties cannot now agree concerning the precise terms of that agreement. Both parties concur that they agreed to seek a continuance of the court hearing, and that they agreed AG would file a new application for a conditional use. They also agree that they discussed the feasibility of substituting the following conditions for the requirement of 51 new spaces:

1. AG would procure a release from the State of 25 spaces of the State's 300 space allocation in the county parking garage across the street from the building.
2. AG would pay $75,000 to the city, to be credited to the off-street parking capital improvement budget as a contribution toward eventual parking improvements in the area.

AG contends that the city flatly agreed to approve the application on those conditions, and that the requirement for the filing of a new application was intended to be a mere matter of form. AG finds some succor for this argument in the language employed by the mayor in his memorandum to the aldermen proposing the settlement:

6. The *in terrorem* provision of the modified resolution was subsequently declared invalid by the Circuit Court for Anne Arundel County, and no appeal has been taken from that determination.

> I recommend immediate acceptance of this offer. If accepted, developer will expeditiously apply for a formal amendment of its conditional use to reflect the settlement. In addition, the trial would be postponed until the conditional use is approved at which time developer would dismiss the case, paying the costs.

The city, on the other hand, contends that it agreed only to a postponement of the circuit court hearing to allow AG to attempt to secure an amended conditional use upon the conditions discussed by the parties. It says the mayor and aldermen, acting solely in their capacity as the municipal corporation, thereby signified that they felt the proposed conditions were fair and would likely be approved, but that the mayor and aldermen did not, and in fact could not, enter into a binding agreement that they, in their capacity as the zoning authority, would approve the conditional use on those terms.

The amended conditional use was not granted on the terms contemplated by the parties in their agreement. In fact, when AG presented its revised application to the Planning and Zoning Commission (a body separate from the mayor and aldermen), that commission refused to make any recommendation. Acting on the advice of its staff, the commission held that before the application could be approved the property would have to be rezoned, and the zoning ordinance would have to be amended to permit payment into the off-street parking fund as an alternative to providing spaces otherwise required. The commission said the proposed conditional use was illegal, and therefore it had no jurisdiction to accept it or to act on it.

AG returned to court, and filed in the pending appeal a "Motion to Enforce Settlement Agreement." Judge James C. Cawood, Jr., after first finding that the parties had entered into a settlement agreement, deferred action on the motion to enforce that agreement. He held that the Planning and Zoning Commission could not refuse to act on the application, and that AG should be given a reasonable time to secure a court order compelling the commission to proceed. He reasoned that if the mayor and aldermen should grant the amended conditional use on the terms discussed by the parties, the motion to enforce the agreement would become moot.

The gears of the city's conditional use process were again engaged. The commission made its recommendation to the city council (comprised of the mayor and aldermen), and that body held a public hearing. The city council then denied the new application, thus leaving in place the earlier requirement of providing 51 new off-street parking spaces. Concerning the earlier agreement, the council acknowledged that the mayor and aldermen had reached a "preliminary understanding" with AG, but said that the entire agreement was subject to the zoning process, and that the council was therefore free to exercise its independent judgment on the application. Additionally, the council found: that the proposed amendment did not conform to existing zoning regulations because 51 spaces were required, and those spaces were required to be on-site; that the city code did not permit monetary remuneration in lieu of required off-street parking; that the building was constructed on land which remained in the residential zoning classification and it would be inappropriate to enlarge an unlawful use; that the proposed amendment would be detrimental to the health, safety, and welfare of the public because the area was "woefully lacking" in public parking facilities and any reduction of the 51 new spaces originally required would exacerbate a parking situation that was already over capacity; and, that allocating 25 spaces in the county parking garage to the use of the tenants of AG's building would likely send 25 all-day parkers who then used the garage into the streets, thereby aggravating a difficult parking and traffic congestion problem that had only grown worse since the original requirement of 51 new spaces had been imposed two years before.

AG filed an appeal from the latest denial, and the circuit court consolidated that appeal with the earlier appeal involving Resolution 1–81. In the meantime, a third appeal, involving the action of the city board

of appeals in denying a temporary use and occupancy permit to AG, had reached the circuit court, and was consolidated with the other cases for hearing.

Judge Cawood heard the consolidated appeals, including the motion to enforce the settlement agreement. No request was made to the court for leave to introduce testimony bearing on the terms of the agreement, nor was any testimony taken. Judge Cawood held that the city was estopped from using the zoning of the property as a bar to the issuance of an occupancy permit. He also held that unless the existence of the settlement agreement compelled a contrary result, the action of the city council in 1) requiring 51 new parking spaces as a condition to the active use of the basement area, and 2) denying the amendment which would have substituted 25 existing spaces and a $75,000 payment for the 51 space requirement, would be affirmed. Turning to the agreement, Judge Cawood again assumed the existence of a binding settlement agreement, but found that AG had not performed its end of the bargain because it had not obtained from the State a release in perpetuity of the 25 spaces in the parking garage. The net result was that AG was found to be entitled to continue the use and occupancy of the building in accordance with the conditional use granted by Resolution 1–81, but was denied its request to conduct any active use in the basement area of the building.

AG appealed to the Court of Special Appeals. Although it appealed generally from the dispositions made in the three consolidated cases, AG limited the scope of its appeal by presenting to the intermediate appellate court only the question of whether the circuit court erred in refusing to enforce the settlement agreement. The Court of Special Appeals, in an unreported opinion, affirmed the judgment of the trial court. We granted AG's petition for certiorari, and we now affirm.

As we have indicated, there is a serious disagreement between the parties with respect to the terms of their settlement agreement. Clearly, there was an agreement of some kind, and the objective of the agreement was to settle the controversy. The parties made no attempt to reduce their agreement to writing, and no one has testified concerning what was said. Both sides have relied upon a memorandum sent by the mayor to the eight aldermen, setting forth his understanding of the proposed agreement and requesting their concurrence. We think the memorandum is ambiguous with respect to the terms that are in dispute. Resolution of the ambiguity is not required, however, because the result is the same with either of the two possible constructions.

[1] If, as AG contends, the agreement was intended to require the city council to grant an amended conditional use on the conditions specified, the agreement was invalid. Without reaching the contentions of the city that 1) the mayor and aldermen acting in their capacity as the municipal corporation could not bind the mayor and aldermen acting in their capacity as the designated zoning authority, and 2) the action was in violation of the state "sunshine" law requiring open meetings,[7] we hold that the mayor and aldermen could not by agreement lawfully bind themselves to a future zoning or conditional use decision. We do so on the familiar premise that a municipality may not contract away the exercise of its zoning powers. *Baylis v. City of Baltimore*, 219 Md. 164, 170, 148 A.2d 429 (1959); 10 McQuillin, *Municipal Corporations*, § 29.07 (3d ed. 1981); 2 Anderson, *American Law of Zoning 3d*, § 9.21 (1986); 4 Yokley, *Zoning Law and Practice*, § 25–11 (4th ed. 1979).

AG recognizes the existence of this general principle, but argues that it applies only to cases involving contract or conditional *zoning*, and has no application in cases involving conditional uses. It is true that the principle most frequently has been cited in cases involving the contractual imposition of conditions or restrictions where zoning reclassification has been sought and

conditional zoning was not permitted. This Court has uniformly condemned the practice of conditional or contract zoning in the absence of statutory authority for the imposition of conditions. *See, e.g., Mont. Co. v. Nat'l Capital Realty*, 267 Md. 364, 373–75, 297 A.2d 675 (1972) (reliance by zoning authority upon agreement to file covenants imposing limitations upon use invalid as conditional zoning); *Rose v. Paape*, 221 Md. 369, 375–78, 157 A.2d 618 (1960) (municipality cannot attach conditions to property zoned or rezoned if those conditions are not uniform throughout the zoning district); *Baylis v. City of Baltimore, supra*, 219 Md. at 170, 148 A.2d 429 (rezoning based on agreements with owners are invalid); *Wakefield v. Kraft*, 202 Md. 136, 149–50, 96 A.2d 27 (1953) (conditional rezoning not permitted). *And cf. City of Baltimore v. Crane*, 277 Md. 198, 205–06, 352 A.2d 786 (1976) (ordinance granting additional density upon dedication of land not contract or conditional zoning where offered to all similarly situated property owners); *Funger v. Mayor of Somerset*, 249 Md. 311, 323–29, 239 A.2d 748 (1968) (agreement by town to make favorable recommendation to county zoning authority does not violate the general rule because the zoning authority was not a party to the agreement); *Greenbelt v. Bresler*, 248 Md. 210, 215–17, 236 A.2d 1 (1967) (same); *Town of Somerset v. Montgomery County*, 229 Md. 42, 50–52, 181 A.2d 671 (1962) (general rule inapplicable because zoning authority clearly did not impose conditions or rely upon representation of applicant concerning site development).

These cases rest, in part, on the rationale that permitting conditional zoning by contract destroys the uniformity that is required in each zoning district. As AG points out, this rationale does not apply when the zoning code specifically contemplates the imposition of conditions, as in the case of special exceptions and conditional uses. We conclude, however, that because one of the several reasons for the general prohibition against contract or conditional zoning does not apply in conditional use cases, that does not, *a fortiori*, mean that an entirely separate reason—the prohibition against contracting away the exercise of zoning power—is similarly inapplicable. If that were true, where conditional zoning is specifically permitted by statute[8] the zoning authority could obligate itself by advance contract to provide zoning and thereby render meaningless the prescribed zoning procedures. We hold that the sound policy which prohibits a municipality from contracting away its zoning power is as applicable to special exception and conditional use cases as it is to those involving zoning reclassifications. These closely related functions, often grouped generically under the broad topic of zoning, involve the exercise of the power of land use regulation that was delegated to the city by Article 66B of the Maryland Code. Just as the zoning authority is required to follow procedures mandated by statute, *West Mont. Ass'n v. MNCP & P Com'n*, 309 Md. 183, 186, 522 A.2d 1328 (1987), and to exercise its unconstrained independent judgment in deciding matters of reclassification, so too must the appropriate authority, whether the zoning authority or a duly authorized board of appeals, follow required procedures and exercise independent judgment in deciding requests for special exceptions, conditional uses, or variances. The carefully structured provisions for public notice, public hearings, and, in many cases, required consideration of staff or planning commission recommendations, would be

8. Conditional zoning, once roundly condemned, appears to be in the ascendency. In Maryland, the concept has evolved indirectly through the use of various zoning devices such as planned developments, and has found at least limited favor with the state legislature. *See* Article 66B, § 4.01(b) permitting a county or municipal corporation to impose certain conditions at the time of zoning or rezoning land, under certain

(1987); and *Bd. of Co. Comm'rs v. H. Manny Holtz, Inc.*, 65 Md.App. 574, 579–86, 501 A.2d 489 (1985) (holding that § 4.01(b) of Article 66B authorizes the imposition of conditions applicable to structural and architectural character of the land and improvements thereon, and does not authorize conditional use rezoning). We need not, and do not, offer an opinion concerning the intermediate appellate court's interpreta-

stripped of all meaning and purpose if the decision-making body had previously bound itself to reach a specific result. This principle is not limited to agreements of questionable legality, or to those made in smoke-filled rooms; it applies as well to those made openly, in good faith, and containing terms and conditions that would otherwise be appropriate.

The potential for harm that would be present in the absence of the rule is well illustrated by the facts of this case. AG and the mayor and aldermen undoubtedly acted with the best of intentions in attempting to agree upon conditions that they believed would not only accommodate the needs of the public, but also could be reasonably met by the developer. However, when subjected to the illumination of planning commission recommendations, citizen input, current information, advice of the city attorney, and careful reflection, the conditions once thought appropriate were seen by the zoning authority to be woefully inadequate.

We need not reach the question of whether the conditions agreed upon in this case were themselves legally impermissible. The prohibition against contracting away the exercise of the zoning power applies whether the conditions were valid or invalid. Even if the mayor and aldermen agreed to be bound to the conditions discussed, they had no authority to do so, and the agreement cannot be enforced.

[2] AG further suggests that even if the agreement is invalid, we should apply the principle of equitable estoppel to prevent the city from relying upon that invalidity. The short answer to that contention is that a municipality is not estopped to assert its own illegal action. *Permanent Fin. Corp. v. Montgomery Cty.*, 308 Md. 239, 247–50, 518 A.2d 123 (1986); *Salisbury Beauty Schools v. St. Bd. of Cosmetologists*, 268 Md. 32, 63–65, 300 A.2d 367 (1973); *Berwyn Heights v. Rogers*, 228 Md. 271, 279–80, 179 A.2d 712 (1962).

We turn to the alternative possibility—that the agreement between the parties was simply to postpone the trial of the zoning appeal in order to permit AG to attempt to obtain an amended conditional use upon conditions that at first blush appeared to be reasonable to the mayor and aldermen. If indeed that was the agreement of the parties, we find no vice in it. Settlements of controversies are favored. *General Motors Corp. v. Lahocki*, 286 Md. 714, 726, 410 A.2d 1039 (1980); *Chertkof v. Harry C. Weiskittel Co.*, 251 Md. 544, 550, 248 A.2d 373 (1968), *cert. denied*, 394 U.S. 974, 89 S.Ct. 1467, 22 L.Ed.2d 754 (1969). It is not uncommon for the parties in litigation, particularly after each has had an opportunity to carefully review the relevant facts and law, to discover that there may be a common meeting ground between them. Under certain circumstances, a municipality may agree to compromise a contested matter.[9] The city in this case clearly had the authority to enter into an agreement to request a postponement of the judicial hearing and to entertain a new or amended application for conditional use, provided it did not surrender or impair the right and obligation of the city council to independently and impartially consider the application in accordance with procedures established by law.

If we accept the city's construction of the agreement, which is the construction favored by law because it results in a valid agreement, *Garfinkel v. Schwartzman*, 253 Md. 710, 720, 254 A.2d 667 (1969), the outcome of this case does not change. The agreement was fully performed by both sides; nothing remained to be enforced. AG was entitled to pursue a new application for conditional use, and it did so. When the city council denied the application, AG was entitled to pursue its original appeal, and, if it wished, appeal the rejection of its latest application. It did both, and the Circuit Court for Anne Arundel County affirmed the action of the city council in each case. On appeal to the Court of Special Appeals, and before us, AG did not argue that the actions of the city council were arbitrary, capricious, or without adequate support in the record. Rather, it rested its right to relief upon the proposition that the city council had obligated itself to grant the amended conditional use upon the conditions set forth in the agreement, and upon the notion that it was entitled to judicial enforcement of that obligation. For the reasons previously stated, that contention cannot be sustained.

JUDGMENT AFFIRMED, WITH COSTS.

9. See the cases collected under the annotation, "Power of city, town, or county or their officials to compromise claim," 15 A.L.R.2d 1359.

314 Md. 689

Anthony J. UNITAS, Personal Representative of the Estate of Raymond V. Rangle

v.

Janet M. TEMPLE.

No. 47, Sept. Term, 1988.

Court of Appeals of Maryland.

Feb. 9, 1989.

Woman who had personal and professional relationship with fiance sought to enforce oral contract after fiance's death, in which he had allegedly agreed to provide financially for her. The Circuit Court, Baltimore City, Martin B. Greenfeld, enforced oral agreement, and appeal was taken. The Court of Special Appeals, 74 Md.App. 506, 538 A.2d 1201, affirmed. On certiorari review, the Court of Appeals, Rodowsky, J., held that woman's renewal of professional and personal relationship with fiance did not constitute part performance such as would warrant enforcement of alleged oral contract.

Reversed and remanded.

1. Frauds, Statute of ⚷129(1)

Doctrine of part performance is peculiar to chancery and is not regarded at law to take case out of statute of frauds.

2. Frauds, Statute of ⚷129(1)

Unless facts relied upon by party seeking to enforce alleged oral contract present case for equitable relief, party has no basis to argue part performance, and no remedy on oral contract.

3. Frauds, Statute of ⚷129(12)

Act constitutes part performance, such as would warrant enforcement of oral agreement to transfer realty, if court can, by reason of act itself, without knowing whether there was agreement or not, find parties unequivocally in position different from that which according to their legal rights, they would be in if there were no contract.

4. Frauds, Statute of ⚷129(12)

Woman's renewal of professional and personal relationship with fiance did not constitute part performance such as would warrant enforcement of alleged oral contract under which fiance was to provide for woman in his will, in that there was nothing in woman's acts themselves which indicated that they were only referable to fiance's alleged promise; woman's acts were objectively explainable without reference to alleged agreement.

James K. Archibald (Edmund P. Dandridge, Jr., Venable, Baetjer and Howard, Baltimore), on brief, for petitioner.

M. Albert Figinski (Franklin Goldstein, David R. Sonnenberg, Julie C. Janofsky, Melnicove, Kaufman, Weiner, Smouse & Garbis, P.A., Baltimore), on brief, for respondent.

Argued before ELDRIDGE, COLE, RODOWSKY, McAULIFFE, ADKINS, BLACKWELL, JJ., and CHARLES E. ORTH, Jr., Associate Judge of the Court of Appeals of Maryland (retired), Specially Assigned.

in the briefs here submitted are noted and aligned in their places for or against the respectively espoused doctrines. Taliaferro v. Travelers' Protective Ass'n, 80 F. 368, 25 C.C.A. 494, 49 U.S.App. 275, is cited as the leading case in the one school of thought, while Lovelace v. Travelers' Protective Ass'n, 126 Mo. 104, 105, 28 S.W. 877, 30 L.R.A. 209, heads the opposition.

[1] In our jurisdiction, the decision was made and the die cast by Korfin v. Continental Casualty Co., supra. In the case *sub judice,* therefore, the query is whether, under the existing circumstances, the husband should have foreseen that his conduct would probably result in his death.

In denying the appellant's motion, the court below observed:

"Now, the question in this case is whether or not the deceased should have anticipated the result of his attack upon his wife. And our latest decision says,

"'It is sufficient to render the means accidental if the act which precedes the injury was something unforeseen, unexpected, unusual, although the act be voluntary and intentional.'

"Now, in this case we do not know that the husband actually intended to shoot his wife, because there is a question as to whether or not the gun was loaded, or whether or not he knew it was loaded. There is also the further fact that this deceased weighed 207 pounds, a man whose daily work was that of a mechanic, which developed his muscles, he was a man apparently in good health, and it would appear that he was very much stronger than his wife.

"There is a question raised by these facts as to whether or not the deceased could have foreseen the result of his act."

[2] The rule is settled that upon motions for a dismissal, the equivalent of motions for a nonsuit or directed verdict under the former practice, the court cannot weigh the evidence but must take as true all evidence which supports the view of the party against whom the motion was made and must give him the benefit of all legitimate inferences which are to be drawn therefrom in his favor. Visaggi v. Frank's Bar & Grill, Inc., 4 N.J. 93, 71 A.2d 638 (1950). In Bachman Choc. Mfg. Co. v. Lehigh Wrhse. & T. Co., 1 N.J. 239, 62 A.2d 806, 808 (1949), it was said: "It is well established that a case should be submitted to a jury unless there are no disputed facts or disputed inferences to be drawn from undisputed facts."

Similar sordid and turbulent outbursts had admittedly occurred frequently before and were an integral part of the final culmination. The circumstances as here developed, in our opinion, did not as a matter of law factually forecast death as a natural and probable consequence, as the record bespeaks the frequency of parallel and almost identical disturbances over a long period of time when death was not adumbrated nor did it occur. Threats to kill were made so often they became commonplace and no attention was paid to them. "He always did threaten to kill me anyhow."

On the fatal occasion there was a variation to the established long-term pattern —the use of a rifle which the wife "assumed did not work" and "thought was out of order." The husband had it "before we were married" and "allowed the children to play with it." There is no proof he knew it was loaded.

There was also a deviation for the first time when the wife attempted to fight back and do something about the abuse and threats heaped upon her. "I just struggled with him trying to get the gun away from him. * * * I guess he didn't expect that because I was so afraid of him I always took everything. I never tried to fight him off."

We cannot, under the circumstances narrated here, decide as a matter of law, even with the intoxication and his threats, that the husband intended to kill his wife because a quarrel ensued or that the natural or probable consequence was that the wife, who had submitted docilely to the same utterances and abuses over the years, would, when she was again threatened and assaulted by her drunken husband, unexpectedly turn upon him and struggle for

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possession of the gun, resulting in his being shot to death.

[3] Although there is no conflicting testimony, nevertheless disputed inferences can be drawn from the undisputed facts and reasonable men might well differ as to the conclusion to be reached. Under the circumstances here present, we see no error in the submission of the case to the jury, which was the course pursued by the trial judge below.

The judgment is affirmed.

For affirmance: Chief Justice VANDERBILT, and Justices WACHENFELD, BURLING and ACKERSON—4.

For reversal: Justice HEHER—1.

6 N.J. 530

BECKMANN et al. v. TEANECK TP. et al.

No. A–78.

Supreme Court of New Jersey.

Argued Jan. 29, 1951, Feb. 5, 1951.

Decided March 19, 1951.

Suit by George H. Beckmann and others against the Township of Teaneck and others to compel the township and its officers to alter zoning ordinances and to enjoin them from interfering with the plaintiffs' use of certain premises. From a judgment of the Superior Court, Law Division, Bergen County, in favor of the plaintiffs, the defendants appealed to the Superior Court, Appellate Division, and the case was certified to the Supreme Court. The Supreme Court, Case, J., held that where contract with township had permitted construction of business building 150 feet from highway, a driveway for purpose of ingress and egress over intervening residence area was permissible, but that erection of advertising sign in that area would be in violation of zoning ordinance.

Judgment modified and, as so modified, affirmed.

1. Municipal corporations ⚷631(2)

Where contract with township permitted erection of business building 150 feet from highway, but intervening area was zoned for residential uses only, a large sign erected in the intervening area to advertise nature of business in building constituted a business use in violation of zoning ordinance.

2. Municipal corporations ⚷631(2)

Where contract with township permitted erection of business building 150 feet from highway, but intervening area was zoned for residential uses only, a driveway to be used as means of ingress and egress was within contemplation of permission to erect building and did not constitute a violation of zoning ordinance.

3. Appeal and error ⚷173(10)

Where theory of laches was not pleaded, was not among issues stated in pretrial order and did not appear to have been raised at trial, reviewing court could not consider that theory of case.

Warren Dixon, Jr., Hackensack, argued the cause for plaintiffs-respondents.

Dominick F. Pachella, Hackensack, argued the cause for defendants-appellants (John J. Deeney, Teaneck, attorney).

The opinion of the court was delivered by

CASE, J.

The Township of Teaneck caused the several plaintiffs to be summoned before the Municipal Court of the township on complaints charging them with violations of the local zoning ordinance in that, within a residence zone, they maintained a large advertising sign and also a driveway for business purposes. Plaintiffs thereupon filed their complaint in the Superior Court, Law Division, Bergen County, charging that the township, in prosecuting its complaints, had breached agreements earlier made with the Estate of William Walter Phelps, a corporation, and with Garden State Developers, Inc., a predecessor of the corporate plaintiff George H. Beckmann, Inc., and, upon the basis of the alleged breach, plaintiffs prayed that the township and its officers be directed to adopt an ordinance authorizing the matters complained of or take appropriate action

to grant variances or exceptions with respect thereto, and that they be enjoined from interfering with the plaintiffs, their successors or assigns, in the use of the premises. The court, having by consent heard the matter without a jury, made a determination of the facts and rendered a final judgment which (1) restrained the township and its officers from prosecuting the summonses and the complaints issued thereon, (2) directed that the members of the township council, "in the exercise of their discretion rezone or consent to a variance, or grant an exception, or consent to a non-conforming use, or take other effective action to permit the use of the site on which plaintiff's office building is erected * * * so as to be lawfully usable for the transaction of real estate, mortgage, insurance and building contractors' business", and (3) that the township and its officers be restrained from interfering with the use of plaintiff's property because of an alleged "paper" street known as Hancock Avenue. The appeal by the township and its associated defendants to the Superior Court, Appellate Division, was certified to us on our own motion.

The Township of Teaneck has consistently endeavored to prevent the invasion of business on either side of State Highway Route 4 running from George Washington Bridge westerly through the township. The corporate plaintiff lawfully constructed, maintains and uses a one and one-half story structure for specified business purposes at a distance of at least 150 feet southerly from the center line of the highway. The territory between the building and the highway is zoned for residences and against business. The controversy, stated in its simplest terms, is whether the corporation and the associated plaintiffs may (1) erect and maintain adjacent to the highway a large business sign announcing the presence of the building and the business conducted therein and (2) use for entrance to and exit from the building a driveway which the plaintiffs have constructed between the highway and the building over their lands zoned against business use. The arguments present facts and contentions which we think are in large part extrinsic to, or at least unnecessary and confusing in the determination of, the issues, and we shall endeavor to confine the discussion to what we regard as the controlling elements.

The land was originally a part of a tract owned by the Estate of William Walter Phelps, deceased. On April 15, 1947, following authorizing resolutions, the township entered into a contract with the estate and another contract with Garden State Developers, Inc., the prospective purchaser and developer of the tract with which we are concerned. (Cf. Fraser v. Teaneck Township, 137 N.J.L. 119, 58 A.2d 610 (Sup.Ct.1948), affirmed 1 N.J. 503, 64 A.2d 345 (1949), which, however, did not consider or pass upon the issues here presented.) Those contracts contained the following clause bearing upon the proposal which was later realized by the construction of plaintiffs' building: "The Township will, by rezoning or consent to a variance, or grant of an exception, or consent to a non-conforming use, or by other effective action, permit the erection of one office building on the area lying on the southerly side of State Highway Route No. 4 and easterly of Decatur Avenue if projected southerly, which is marked on the attached map as 'Business—Proposed Office Site,' to be used for the transaction of real estate, mortgage, insurance, and building contractors' business provided however that no part of any such building shall be closer than 150 feet of the center line of said State Highway Route No. 4. It is understood and agreed that the building shall not be used for any purposes except as an office for the transaction of real estate, mortgage, insurance and building contractors' business, and that no construction material shall be stored on the site outside the main walls of the building."

Neither of the agreements had provision regarding the erection of a sign or the construction or use of a driveway. The building, when constructed, was so placed that the land upon which it stood was in an area already zoned with a classification that permitted the lawful construction and use of the building for its business purposes. The highway ran approximately 150 feet to the north of the building, and the north line of the building was coterminous with the north line of the area within which the business use was permitted. The area between the north line of the building and the highway is owned by plaintiffs and was then and is now zoned for residential uses and against business uses. There, immediately adjacent to the highway, is where the sign was erected. It is a structure 8 feet high and 16 feet wide. It proclaims the neighboring presence of plaintiffs' business structure and the character of business conducted therein. It is an announcement of, and in effect an invitation to do, business. It is clearly and exclusively a business structure put to a business use and is a violation of the provisions of the zoning ordinance. Not only so, it is not within the purview of the contract provisions and is contrary to the spirit thereof. To what point was the "business site" specifically kept at a distance of 150 feet if by signs and advertising features it was to be projected immediately along the highway? We find nothing in the agreement which calls upon the municipality to do more than to permit the construction of the building which is now constructed and to permit the building, when constructed, to be used for the operation of the business that is now being conducted there, and we find nothing in the agreement inconsistent with the proposition that the area between the building and the highway shall not be used for business purposes. No rezoning or consent to a variance was necessary to legalize the construction of the building and the use of the structure for the designated business purposes. After the agreement was entered into, the corporate plaintiff applied to the building inspector of the township and, on June 11, 1947, obtained a permit for the construction. After the construction was completed a certificate of occupancy was issued and the appropriate use followed and is continued. But neither the permit to construct the building, nor the certificate of occupancy after construction, may be warped into a consent that the township purpose to keep the lands along the highway free of business structures should be frustrated. On or subsequent to June 17, 1947, an ordinance was adopted which, as stated in respondents' brief, rezoned "the entire tract in accordance with the agreements". We find it difficult to deduce from the exhibits just what changes were effected from the earlier ordinance in order to accomplish that result, but there appears to be no dispute over the two essential propositions that the site of the business office is so zoned as to permit that use, and that the land from there north to the highway is zoned against business and for residences. The only argument for the sign is that without it the traveling public will not be adequately informed of the business conducted in the building 150 feet away; but such an argument, generally applied, would quite undo the whole purpose in suppressing business and its restless distractions in beautiful rural areas.

[1] The trial court gave an effect to the agreement which we do not give and assumed an authority on the part of the municipal corporation to contract for the exercise of legislative powers and of the court to control the municipality in the performance of its legislative functions which we do not concede. Cf. McQuillin, Municipal Corporations, 2nd Ed. (Rev.) Vol. 3, sec. 1271, p. 1112; 63 C.J.S. Municipal Corporations, § 979(c), page 534; Hoboken Local No. 2, New Jersey State Patrolmen's Benevolent Ass'n v. City of Hoboken, 44 A.2d 329, 23 N.J.Misc. 334, 340 (Sup.Ct.1945), affirmed on the opinion below, 134 N.J.L. 616, 48 A.2d 917 (E. & A. 1946); Potter v. Borough of Metuchen, 108 N.J.L. 447, 155 A. 369 (Sup.Ct.1931). But whether the matter of the sign be approached by way of, or without, the agreement, the effect is the same; the claim of a right to maintain it in the area concededly and lawfully zoned against business is without support. It is a business use, is a violation of the ordinance and is not provided for by the agreement.

[2] The driveway presents a different question. Certainly, for whatever value foreknowledge may have, the agreements anticipated the erection of a business struc-

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ture and the conduct of designated businesses therein and must have anticipated that there would be a practical means of ingress and egress; and the amending ordinance was adopted in the light of the conditions then shaped for realization. The driveway was constructed with permission from the State Highway Department, the public authority under whose administration the highway is and the propriety of the driveway from an operational standpoint must therefore be conceded. That permission was prefaced by a letter from the township manager advising that the township was agreeable to the location of the driveway. A driveway in itself is neutral. It is neither business nor otherwise. It takes color from the uses permitted by the zoning ordinance of the lands in the area. The land between the building and the state highway was classified by the zoning ordinance as a B Zone, which permitted the erection of two family houses with the exception of a small portion immediately adjacent to the highway which was zoned as a Class A residence zone. Thus it would have been consistent with the ordinance for plaintiff to develop the intervening tract with houses and in connection therewith to build such a driveway. It seems clear therefore that the existence of a driveway in that location is not inevitably to be condemned as a violation of the ordinance. We reach the conclusion that under the circumstances of the case and particularly in view of the events immediately preceding, concomitant with and directly following the consideration and adoption of the ordinance, and so connected therewith as to be chapters in the same panorama of municipal incidents, the reasonable and consistent interpretation of the ordinance and its several parts negates the charge that the construction and use of the driveway, strictly as a means of ingress and egress, without sign or advertising matter, are a violation.

It is said on behalf of the township that the driveway as constructed, in leading to the state highway from the plaintiffs' lands, passes over an intervening dedicated street called Hancock Avenue. Hancock Avenue has no real existence; it is said to be a "paper" street, that is, "laid out on the map". The proofs are very hazy to that end. Our study of them leads to the conclusion that what was once indicated on the maps in suggestion of a street has, in this vicinity, been obliterated by the lines of the state highway and the ramp leading thereto and therefrom.

Our answer to the posed questions is that the erection and maintenance of the sign violate, and the construction and use of the driveway merely as a means of ingress and egress do not violate, the zoning ordinance.

[3] Appellants now charge respondents with *laches*; but *laches* was not pleaded, was not among the issues stated in the pretrial order and does not appear to have been raised at the trial. The court will not now hear the appellants on a new and different theory or issue than that on which the cause was tried. State ex rel. Wm. Eckelmann, Inc., v. Jones, 4 N.J. 207, 214, 72 A.2d 322 (1950). Estoppel by conduct against the township was stated by the pretrial order as an issue for trial; but we find negatively as to it.

So much of Paragraph (1) of the judgment under review as restrains and enjoins the prosecution of the existing summonses and complaints charging a violation by reason of the driveway is affirmed; and the remaining portions of Paragraph (1) and all of Paragraphs (2) and (3) are reversed. We are in accord with the finding that there is nothing in the alleged existence of Hancock Avenue that is pertinent to present issues and have so indicated; but we discover no necessity for an injunction to enforce that finding.

The result is that the judgment below is to be modified to conform to our findings, and, as so modified, affirmed. Costs are not allowed.

For modification: Chief Justice VANDERBILT, and Justices CASE, HEHER, OLIPHANT, WACHENFELD, BURLING and ACKERSON—7.

Opposed: None.

In reply to the foregoing letter of June 27th, the defendant wrote as follows:

"Seattle, 7-2-08.

"Chas. S. Brent & Bro., Paris, Kentucky—Gentlemen: Answering your favor of the 27th, we wish to correct your understanding of our order. This called for minimum car of 15 tons and not for 325 bags. We would like to have shipment between August 15th and September 15th providing new crop is harvested by that time, but notify us and send sample before shipping so that we will be ready to take care of the seed."

Subsequent correspondence occurred between the parties in relation to the dispute that arose between them, but the contract is to be found in the correspondence already set forth, commencing with the plaintiff's offer to sell the defendant the seed at "$1.40 per bu., f. o. b. cars" Paris, Ky., with a guaranty that the seed would "test 21 pounds to the measured bushel." What is the meaning of the word "test" as here used? There is nothing in the letter expressly indicating its meaning. The defendant seems to have understood it as meaning "weight," for in its written requisition or order of June 22d, confirming its telegram of the same date, it ordered one minimum car load of the seed offered "weighing 21 lbs. to the bushel at $1.40 per bushel, f. o. b. cars Paris, Ky. Per your quotation June 17th." The view of the court below was that the defendant was bound to "treat fourteen pounds as a bushel," because of the plaintiff's letter of June 27th acknowledging receipt of the defendant's requisition or order, and the latter's failure to make any objection to the description of the thing sold therein contained, while calling attention to the fact that the order called for one "minimum car of 15 tons and not for 325 bags."

The letter of the plaintiff to the defendant of June 27th upon the point in question is as follows:

"Yours of the 22d (yours No. 7,272) confirming purchase of Blue Grass Seed from us duly to hand and seems to be correct. 325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at $1.40 per bu. (14#) f. o. b. cars here" Paris, Ky.

The plaintiff knew by the requisition which he received that the defendant understood the word "test," as applied to the seed in the plaintiff's original offer of it, to mean "weight," for the order was for one minimum car of seed "weighing 21 lbs. to the bushel at $1.40 per bushel." There is certainly no ambiguity about that language. The court below said in its opinion denying the defendant's motion for a new trial that "there can be no question but that the plaintiff at all times understood the contract to call for 14 pounds to the bushel."

We are unable to discover any ground for that statement. If the plaintiff did not understand the defendant's order, or did not think it therein correctly interpreted the word "test" in his original offer of the seed for sale, ought he not to have frankly said so? Instead, in his letter of June 27th acknowledging receipt of the defendant's order, he said that it "seems to be correct," and proceeded to add in his letter: "325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at $1.40 per bu. (14#) f. o. b. cars."

This is the first time 14 pounds appeared in the correspondence between the parties. What did it mean? On the trial it was shown that the defendant had for a number of years issued a seed catalogue in which it listed, among other articles, Kentucky Blue Grass Seed as containing 14 pounds to the bushel; but there was evidence on the part of the defendant tending to show that this was inserted only for the purpose of informing farmers and others using such seed that 14 pounds in weight should be sown where the directions called for the sowing of a bushel. It is manifest that such considerations were for the jury if the contract was ambiguous.

When the plaintiff first offered the defendant the seed, he said nothing about 14 pounds, but that it would "test" 21 pounds to the bushel. When the defendant gave its order in pursuance of that offer, it ordered one minimum car load "weighing 21 lbs. to the bushel, at $1.40 per bushel," which interpretation by the defendant of the meaning of the word "test," as used in the offer, the plaintiff said in his letter of June 27th "seems to be correct," and made no objection unless it can be found in the next succeeding terms, to wit: "325 bags Fancy Cleaned True Kentucky Blue Grass Seed, testing 21# to the measured bushel, at $1.40 per bu. (14#) f. o. b. cars."

The figures and symbol in parentheses (meaning 14 pounds) so inserted by the plaintiff, taken in connection with the preceding correspondence between the parties, and for the first time appearing therein, are, in our opinion, ambiguous, and their meaning, taken in connection with the balance of the correspondence, should have been left to the determination of the jury, in view of all the facts and circumstances of the case, under appropriate instructions from the court.

The judgment is reversed, and the cause remanded to the court below for a new trial.

BOISE CITY, IDAHO, v. BOISE ARTESIAN HOT & COLD WATER CO., Limited.

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,875.

1. FRANCHISES (§ 2*)—SPECIAL PRIVILEGES—GRANT.
   Franchises and special privileges must be construed most strongly against the grantee and in favor of the government.
   [Ed. Note.—For other cases, see Franchises, Cent. Dig. § 2; Dec. Dig. § 2.*]

2. MUNICIPAL CORPORATIONS (§ 58*)—DELEGATION OF POWER—CONSTRUCTION.
   Legislative grants of power to municipal corporations must be strictly construed to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof.
   [Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. §§ 145-147; Dec. Dig. § 58.*]

3. MUNICIPAL CORPORATIONS (§ 682*)—CHARTER—FRANCHISE—GRANT—EXTENT.
   Where the charter of a city authorized it to grant the use of its streets for the laying of water mains to supply its inhabitants, the city was only authorized to grant such use for a reasonable time and could not grant a perpetual franchise under the rule that a municipal corporation may not irrevocably surrender any part of its power to control its pub-

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

lic streets by contract or otherwise without the express consent of the Legislature.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1469; Dec. Dig. § 682.*]

4. MUNICIPAL CORPORATIONS (§ 682*)—WATERWORKS COMPANY—FRANCHISE—CONSTRUCTION—TERM—LICENSE FEE—STATUTES.

Rev. St. Idaho 1887, § 2710, provides that no corporation formed to supply a city with water may do so unless previously authorized by ordinance or unless done in conformity with a contract between the corporation and the city or town, and that such contract shall not deprive the city or town of the right to regulate rates, nor shall any exclusive right be granted or contract or grant made for a term exceeding 50 years. *Held* that, where a city granted a franchise to defendant's predecessors to use the streets for the construction of a water system without specifying any term for the continuance of the grant, it was not a grant for 50 years, but a mere license revocable by the city at will, and hence did not deprive the city of the right thereafter to impose on defendant payment of a monthly license fee for the use of the streets.

[Ed. Note.—For other cases, see Municipal Corporations, Cent. Dig. § 1470; Dec. Dig. § 682.*]

In Error to the Circuit Court of the Unit . States for the Central Division of the District of Idaho.

Action by Boise City, Idaho, against the Boise Artesian Hot & Cold Water Company, Limited. Judgment for defendant, and plaintiff brings error. Reversed, with directions.

The plaintiff in error was plaintiff in the court below, where it brought the action to recover from the defendant certain license fees imposed by one of its ordinances, enacted in 1906. The facts of the case are undisputed. They show, among other things, that the plaintiff in error is a municipal corporation operating under a special charter granted by the Legislature of the territory of Idaho during the year 1863, and subsequent amendments thereto; that on the 3d day of October, 1889, the city enacted an ordinance entitled "An ordinance granting Eastman Brothers the right to lay water pipes in Boise City," the only two sections of which ordinance are as follows:

"Section 1. H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks for the supplying of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes in, through, and along and across the streets and alleys of Boise City, under the surface thereof; but they shall at all times restore and leave all streets and alleys in, through, along, and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times promptly repair all damage done by them or their pipes, or by water escaping therefrom.

"Sec. 2. This ordinance shall take effect from and after its passage and approval." Approved October 3, 1889.

The Artesian Water & Land Improvement Company having become organized as a corporation under the laws of the state of Idaho for the purpose of supplying Boise City and its inhabitants with water for public and family use, the city, on the 10th day of July, 1890, enacted an ordinance entitled "An ordinance granting to the Artesian Water & Land Improvement Company the right to lay water pipes in Boise City," the three sections of which are as follows:

"Section 1. The privilege of laying down and maintaining water pipes in the streets and alleys now laid out or hereafter to be laid out and dedicated in Boise City, Idaho, is hereby granted to the Artesian Water & Land Improvement Company, its successors or assigns.

"Sec. 2. All water pipes placed in said streets and alleys shall be laid down in a workmanlike manner, and all excavations made for pipes shall be properly filled, and with all convenient speed.

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

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"Sec. 3. This ordinance shall take effect and be in force from and after its passage." Approved July 10, 1890.

Immediately after the enactment of the ordinance in their favor, Eastman Bros. proceeded to construct a system of waterworks, consisting of artesian wells and reservoirs, and laid mains and pipes under and along the streets and alleys of Boise City, and to supply the city and its inhabitants with pure mountain water, in accordance with that ordinance, expending in such construction over $20,000 to the time they sold their interest therein to an Idaho corporation called the Artesian Hot & Cold Water Company, Limited, hereinafter mentioned.

Immediately after the enactment of the ordinance in favor of the Artesian Water & Land Improvement Company, it proceeded to sink artesian wells, construct reservoirs, and lay pipes under and along the streets of the city and to supply the city and its inhabitants with pure, fresh water for municipal, domestic, and irrigation purposes, under and pursuant to the aforesaid ordinance in its favor, expending in the construction, extension, and improvement of its waterworks more than $50,000 up to the time of its sale thereof to the aforesaid Artesian Hot & Cold Water Company, Limited, as hereinafter mentioned.

The Artesian Hot & Cold Water Company, Limited, was organized under the laws of the state of Idaho, and was authorized by its articles of incorporation to supply the plaintiff in error and its inhabitants with water for municipal and domestic uses, and to purchase and acquire the waterworks, wells, reservoirs, pipe lines, properties, rights, and franchises of both the Eastman Bros., and the Artesian Water & Land Improvement Company, which purchase was effected on the 28th day of March, 1891.

The defendant in error is a corporation organized and existing under the laws of the state of West Virginia, with its principal place of business at Boise City, Ada county, Idaho. Its articles of incorporation authorize it to carry on "a waterworks system, and to sell and rent water to the inhabitants of the said Boise City and to take, purchase, acquire, hold, operate, and maintain rights and privileges of water companies, associations, or corporations, and to acquire, use, own, and operate all properties, franchises, rights, claims, privileges, and everything belonging to that certain corporation known as the Artesian Hot & Cold Water Company, Limited, and to be the successor in every respect of said corporation."

On the 28th day of August, 1901, the defendant in error acquired by purchase from the Artesian Hot & Cold Water Company, Limited, all of its rights in and to both of the water systems mentioned, and all of its said waters, as well as all of the rights and privileges granted by the aforesaid ordinances.

The record further shows: That between the 28th day of March, 1891, and the 28th day of August, 1901, the Artesian Hot & Cold Water Company, Limited, supplied the city and its inhabitants with pure, fresh water for municipal, domestic, and other useful purposes, and that during that period the population of the city increased from about 3,000 to about 6,000 people, the area of the city being enlarged by the laying out and platting of additions thereto, which were settled upon and occupied, and during which period the Artesian Hot & Cold Water Company, with the city's knowledge and consent, extended its pipe lines under the streets and alleys of the city from time to time, and supplied such additions with water to meet the demands upon it, and laid about 15 miles of additional pipe, constructed two wells and one reservoir for cold water, and erected a large steam pumping plant with a capacity of 3,000,000 gallons a day, aggregating in cost more than $192,000. That at all times since the 28th day of August, 1901, the defendant in error has supplied the city and its inhabitants "by virtue of said ordinance and laws, and with plaintiff's knowledge, acquiescence, and consent, pure fresh water for municipal, domestic, and other useful purposes, in accordance with said ordinances, and in full compliance therewith, and with said laws of Idaho. That since said last-named date the population of Boise City has increased from about 6,000 to over 25,000 inhabitants, and this defendant, with plaintiff's knowledge, acquiescence, and consent, has extended its cold water system to meet the growth of said city, and has laid over 30 miles of

additional mains under the streets and alleys of said city, constructed numerous wells and galleries, acquired by condemnation proceedings additional land for the development of an increased water supply, installed four electric pumps of an aggregate capacity of six and one-half million gallons of water per day, and has expended in the improvement and extension of said cold water system an additional sum of more than $140,000. That the defendant and its predecessors in interest in and to its waterworks system are now and ever since the 3d day of October, 1889, have been using the streets and alleys of said Boise City in the sale and delivery of water to the plaintiff, and residents and inhabitants of Boise City, through the water mains of said waterworks systems, and in the laying and repairing of said water pipes connected with said waterworks systems."

On the 7th day of June, 1906, the plaintiff in error enacted an ordinance, the first and fourth sections of which are as follows:

"Section 1. That the said Boise Artesian Hot & Cold Water Company, a private corporation organized and existing under and by virtue of the laws of the state of West Virginia, the successors in interest of the said H. B. Eastman and B. M. Eastman in and to said waterworks now being operated under said license granted by said ordinance of October 3d, 1889, in said Boise City, are hereby required to hereafter pay to said Boise City on the first day of each and every month, a monthly license fee of $300.00, for the privilege granted by said ordinance of October 3d, 1889, to lay and repair water pipes in the streets and alleys of said city through which water is being furnished to the inhabitants of said Boise City by said company. * * *

"Sec. 4. That nothing in this ordinance shall be construed or understood as granting any privilege or authority for any other term than that provided for in the aforesaid ordinance of October 3d, 1889."

The action was brought to recover the aggregate amount of three years' license fees so imposed, and which the defendant refused to pay after demand made.

The court below held that the ordinance of July 10, 1890, to the Artesian Water & Land Improvement Company, its successors and assigns, having been accepted and acted upon by the grantee and its successors, created a franchise for 50 years, and that the imposition of the license tax provided for by the ordinance of June 7, 1906, was an impairment of such franchise and therefore void. Judgment followed accordingly, and the city brought this writ of error.

Frank B. Kinyon and Cavanah & Blake, for plaintiff in error.

Richard H. Johnson, for defendant in error.

Before ROSS and MORROW, Circuit Judges, and HANFORD, District Judge.

ROSS, Circuit Judge (after stating the facts as above). It will be seen from the foregoing statement that the trial court held in effect that the ordinance of July 10, 1890, granted to the Artesian Water & Land Improvement Company, one of the predecessors in interest of the defendant in error, a franchise to use the streets and alleys of the city for the purpose of supplying it and its inhabitants with water for the period of 50 years. If that be so, then manifestly the attempted imposition by the ordinance of June 7, 1906, of the license fees in question was of no effect. The court below held that the fact that the plaintiff in error was incorporated and exists under a special charter does not render inapplicable to it the provisions of section 2710 of the Revised Statutes of Idaho of 1887, and that the provisions of that section should be read into the ordinance of July 10, 1890, as a part thereof, and thereby fixed the life of the franchise or privilege granted by that ordinance at 50 years.

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Section 2710 of the state statutes so referred to reads as follows:

"No corporation formed to supply any city or town with water must do so unless previously authorized by an ordinance of the authorities thereof, or unless it is done in conformity with a contract entered into between the city or town and the corporation. Contracts so made are valid and binding in law, but do not take from the city or town the right to regulate the rates for water, nor must any exclusive right be granted. No contract or grant must be made for a term exceeding fifty years."

We are unable to give to this statute the effect attributed to it by the court below. Its terms and purposes, we think, seem quite plain. Every corporation formed to supply any city or town of the state with water is thereby prohibited from doing so unless previously authorized by an ordinance of the authorities thereof, or unless done in conformity with a contract entered into between such city or town and the corporation. Such contracts are authorized by the statute, subject to the express provision that they shall not take from the city or town the right to regulate the rates for water, nor, further expressly declares the statute, shall any exclusive right be granted, nor shall any such contract or grant be made for a term exceeding 50 years.

This is very far from saying that no such contract or grant shall be made for a shorter period than 50 years. It fixes a maximum beyond which no contract or grant is permitted to extend, but leaves the matter of time, within that limit, to be fixed by contract or by grant of the municipality.

In the case of Water Co. v. Knoxville, 200 U. S. 22, 33, 26 Sup. Ct. 224, 227 (50 L. Ed. 353), the Supreme Court said:

"'Grants of franchises and special privileges are always to be construed most strongly against the donee, and in favor of the public.' Such were the words of this court in Turnpike Co. v. Illinois, 96 U. S. 63, 68 [24 L. Ed. 651]. The universal rule in doubtful cases—this court said in Oregon Railway Co. v. Oregonian Ry. Co., 130 U. S. 1, 26 [9 Sup. Ct. 409, 32 L. Ed. 837]—is that 'the construction shall be against the grantee and in favor of the government.' As late as Coosaw Mining Co. v. South Carolina, 144 U. S. 550, 562 [12 Sup. Ct. 689, 36 L. Ed. 537], this court said: 'The doctrine is firmly established that only that which is granted in clear and explicit terms passes by a grant of property, franchises, or privileges in which the government or the public has an interest. Statutory grants of that character are to be construed strictly in favor of the public, and whatever is not unequivocally granted is withheld; nothing passes by mere implication. This principle, it has been said, is a wise one, as it serves to defeat any purpose concealed by the skillful use of terms to accomplish something not apparent on the face of the act, and thus sanctions only open dealing with legislative bodies.' Slidell v. Grandjean, 111 U. S. 412, 438 [4 Sup. Ct. 475, 28 L. Ed. 321]. We have never departed from or modified these principles, but have reaffirmed them in many cases. It is true that the cases to which we have referred involved in the main the construction of legislative enactments. But the principles they announce apply with full force to ordinances and contracts by municipal corporations in respect of matters that concern the public. The authorities are all agreed that a municipal corporation, when exerting its functions for the general good, is not to be shorn of its powers by mere implication. If by contract or otherwise it may, in particular circumstances, restrict the exercise of its public powers, the intention to do so must be manifested by words so clear as not to admit of two different or inconsistent meanings."

Turning to the ordinance of July 10, 1890, it is seen that it only granted to the Artesian Water & Land Improvement Company, one of the predecessors in interest of the defendant in error, the privilege

of laying down and maintaining water pipes in the streets and alleys then laid out in Boise City or thereafter to be laid out and dedicated, with provisions for the proper performance of the work with reasonable diligence. In effect the provisions of that ordinance were precisely similar to those of the previous ordinance of October 3, 1889, granting to the Eastman Bros., also predecessors in interest of the defendant in error, similar rights, which were held by this court in the case of Boise City Artesian Hot & Cold Water Co. v. Boise City, 123 Fed. 232, 59 C. C. A. 236, to have conferred on the Eastmans a license merely, revocable at the pleasure of the city; we there saying:

"The ordinance of October, 1889, granted permission to the Eastmans and to their successors in interest to lay and repair their pipes in the streets of the city, and to furnish water to the inhabitants thereof. No term was fixed for the duration of the privilege, and no contract was in terms made between the city and the grantees of the privilege. It is plain that the ordinance was either the grant of a license revocable at the will of the grantor, or, by its acceptance on the part of the grantee, it became an irrevocable and perpetual contract. No middle ground is tenable between these two constructions. In the Constitutions of nearly all the states it is provided that no exclusive or perpetual franchises shall be granted, and, irrespective of such constitutional limitation, it is clear, both upon reason and authority, that no municipal corporation, in the absence of express legislative authority, has power to grant a perpetual franchise for the use of its streets. The city of Boise was incorporated by the territorial Legislature of Idaho on January 11, 1866. It was given power 'to provide the city with good and wholesome water,' and to erect or construct 'such waterworks and reservoirs within the established limits of the city as may be necessary or convenient therefor.' There can be no doubt that under this provision of its charter the city had the power to grant the use of its streets for a fixed reasonable period of time, either to an individual or to a corporation, for the purpose of furnishing a water supply to the inhabitants. It had no authority, however, to make a perpetual contract. A municipal corporation intrusted with the power of control over its public streets cannot, by contract or otherwise, irrevocably surrender any part of such power without the explicit consent of the Legislature. Cooley's Constitutional Limitations (2d Ed.) 205, 210; Dillon on Municipal Corporations, §§ 715, 716; Barnett v. Denison, 145 U. S. 135, 139, 12 Sup. Ct. 819, 36 L. Ed. 652. And legislative grants of powers to municipal corporations are to be so strictly construed as to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof. Charles River Bridge Co. v. Warren Bridge, 11 Pet. 426, 9 L. Ed. 773, 938; Syracuse Water Co. v. City of Syracuse, 116 N. Y. 167, 22 N. E. 381, 5 L. R. A. 546; Long Island Water Supply Co. v. Brooklyn, 166 U. S. 685, 696, 17 Sup. Ct. 718, 41 L. Ed. 1165; Stein v. Bienville Water Supply Co., 141 U. S. 67, 11 Sup. Ct. 892, 35 L. Ed. 622. From these principles and authorities it follows that the Eastmans were given no exclusive or perpetual right, and that the ordinance operated to grant them a license only, and left the city free at any time to revoke the privilege granted, or to put in its own waterworks, or to grant a franchise to another company. The most that the licensees could claim under it was that it legalized their use of the streets for supplying water, and gave them permission to occupy the same until such time as the city might see fit to terminate the privilege."

If a revocable license only, it does not seem to be questioned that the city might either terminate the license, or impose a license fee as a condition of its continued enjoyment.

It results from what has been said that the judgment must be and is reversed, with directions for further proceedings in accordance with the views here expressed.

HANLEY v. UNITED STATES. †

(Circuit Court of Appeals, Ninth Circuit. February 6, 1911.)

No. 1,814.

1. PUBLIC LANDS (§ 19*)—UNLAWFUL INCLOSURE—PROSECUTION.

Whether defendant, who was general manager of a large stock ranch owned by a corporation, on which there was a fence which, together with natural barriers, inclosed a large quantity of government land, was personally chargeable with the offense of maintaining such inclosure in violation of Act Feb. 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), *held*, under the evidence, a question for the jury.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

2. PUBLIC LANDS (§ 19*)—PROSECUTION FOR UNLAWFUL INCLOSURE—INSTRUCTIONS.

The charge of the court in a prosecution for maintaining an unlawful inclosure of public lands in relation to evidence of the intention and purpose with which the fences complained of were built and maintained considered, and *held* without error.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

3. PUBLIC LANDS (§ 19*)—PROSECUTION FOR UNLAWFUL INCLOSURE—INSTRUCTIONS.

Act Feb. 25, 1885, c. 149, § 1, 23 Stat. 321 (U. S. Comp. St. 1901, p. 1524), prohibits the construction or maintenance of any inclosure of public land by one having no claim or color of title thereto. Section 4 provides that any person violating the act "whether as owner, part owner, agent, or who shall aid, abet, counsel, advise or assist in any violation thereof," shall be deemed guilty of a misdemeanor. *Held* that, under an indictment charging only the maintenance of such an inclosure, the defendant could not be convicted of having aided, abetted, counseled, advised, or assisted in its maintenance.

[Ed. Note.—For other cases, see Public Lands, Dec. Dig. § 19.*]

In Error to the District Court of the United States for the District of Oregon.

William Hanley was convicted of a criminal offense, and brings error. Reversed.

C. E. S. Wood and John M. Gearin, for plaintiff in error.

John McCourt, U. S. Atty.

Before GILBERT and ROSS, Circuit Judges, and HANFORD, District Judge.

ROSS, Circuit Judge. The plaintiff in error was defendant in the court below to an indictment containing two counts, the first of which charged him with unlawfully maintaining and controlling certain fences, which, together with natural barriers and cross-fences, inclosed a large body of public land of the United States situated in Harney county, state of Oregon, and the second of which counts charged him with unlawfully preventing and obstructing persons from peaceably entering upon or establishing a settlement or residence on the tracts of public land within the inclosure, and preventing and obstructing their passage over and through the public lands so inclosed by means of the fences described in the first count, contrary to the provisions of Act

*For other cases see same topic & § NUMBER in Dec. & Am. Digs. 1907 to date, & Rep'r Indexes

† Rehearing denied March 10, 1911.

N.J. 127, 132–33, 405 *A.*2d 381 (1979) (citing 40:55D–4). Second, the legislative history of "interested party" indicates that a potential plaintiff must show merely that he has been denied the reciprocal benefits of a common zoning plan.

[14] The current definition of "interested party" first appeared in *N.J.S.A.* 40:55–47.1 of the prior municipal land use statute. The Legislature intended that section to give individuals the same right to an injunction afforded municipalities under *N.J. S.A.* 40:55–47. See Assembly Bill 536 of 1969; *see, also, Alpine Borough v. Brewster,* 7 *N.J.* 42, 80 *A.*2d 297 (1951). Accordingly, an interested party, at most, must show the equivalent of what was traditionally described as "special damages," that is, damages "distinct from [those] suffered . . . in common with the community at large." *Morris v. Haledon,* 24 *N.J.Super.* 171, 179–80, 93 *A.*2d 781 (App.Div.1952). *See, also,* Governor's Message re Assembly Bill 536, Dec. 1, 1969; *Alpine Borough v. Brewster, supra* 7 *N.J.* at 52, 80 *A.*2d 297; *Stokes v. Jenkins,* 107 *N.J.Eq.* 318, 321, 152 *A.* 383 (Ch.1930).

[15] Plaintiffs have clearly suffered special damages. Their proximity to the windmill denies them the equal benefit of enjoyment of their property, and causes them injury greater than that suffered by the general public. *See Stokes v. Jenkins, supra* at 322, 152 *A.* 383. Accordingly, plaintiffs are "interested parties" within the meaning of *N.J.S.A.* 40:55D–4 and are entitled to an injunction under *N.J.S.A.* 40:55D–18.

[16] Defendants nevertheless contend that the windmill ordinance is arbitrary and unreasonable. That position is unpersuasive. Defendants argue that the ordinance violates equal protection guarantees by arbitrarily singling out windmills for noise control, and due process because it unreasonably limits windmill noise to 50 dBA while other ambient sounds often rise above that level. The ordinance, however, is a zoning regulation and was promulgated under the police power. Since it is "social" legislation it need be justified only by a showing that, in any state of facts, it reasonably advances a legitimate state purpose. *Dandridge v. Williams,* 397 *U.S.* 471, 485, 90 *S.Ct.* 1153, 1161, 25 *L.Ed.*2d 491 (1970). This same minimal standard satisfies the principle of substantive due process. *See Nebbia v. New York,* 291 *U.S.* 502, 54 *S.Ct.* 505, 78 *L.Ed.* 940 (1934); *Hutton Park Gardens v. West Orange,* 68 *N.J.* 543, 560–61, 350 *A.*2d 1 (1975). Thus, a showing that the ordinance reasonably advances a legitimate state purpose would defeat both claims.

Pursuant to a police power statute, the Brigantine ordinance legitimately protects public health and welfare by proscribing excessive noise. Limiting noise from windmills indisputably advances that legitimate purpose and does so in a reasonable way. The claim that "other ambient sounds" may exist above 50 dBA ignores the distinction between noise (unwanted sound) and natural ambient sounds. It is not unreasonable for Brigantine to classify a windmill's sound "noise" and thus limit it. Nor is it unreasonable for the city to attack the noise problem "one step at a time," beginning with windmills, "addressing itself to the phase of the problem which seems most acute to the legislative mind." *Williamson v. Lee Optical Co.,* 348 *U.S.* 483, 489, 75 *S.Ct.* 461, 465, 99 *L.Ed.* 563 (1955). Defendant's constitutional claims are thus without merit. It must also be remembered that this ordinance is entitled to a presumption of validity. That presumption "may be overcome by a clear showing that the local ordinance is arbitrary or unreasonable." *Quick Chek Food Stores v. Springfield Tp.,* 83 *N.J.* 438, 447, 416 *A.*2d 840 (1980). There has been no such showing here.

In conclusion, it is the view of this court that, for a variety of reasons, defendants' windmill constitutes an actionable nuisance. Under the same analysis plaintiffs' heat pump does not. An alternative basis for granting injunctive relief is defendants' violation of the municipal zoning ordinance. An order should be entered accordingly.

Peter CARLINO and Elizabeth Carlino, His Wife, Appellants,

v.

WHITPAIN INVESTORS, Whitpain Township, Whitpain Township Board of Supervisors and Pennsylvania Department of Transportation, Appellees.

Supreme Court of Pennsylvania.

Argued Oct. 19, 1982.

Decided Dec. 23, 1982.

In an equity action, landowner sought preliminary injunctive relief with respect to an access road. Complaint was dismissed by the Commonwealth Court, 52 Pa. Cmwlth. 145, 415 A.2d 461, on preliminary objections, and the landowners appealed. The Supreme Court, Eastern District, Flaherty, J., held that: (1) landowners lacked standing to complain of endangering of the public health, safety and welfare; (2) allegations asserting nonexistent right to maintain existing traffic conditions on avenue failed to state cause of action; (3) if defending developer's predecessor in title procured rezoning of subject land in exchange for covenanted use restrictions applicable to that land, such restrictions would be unenforceable; and (4) any amendment of complaint would be futile.

Affirmed.

Larsen, J., dissented and filed opinion in which McDermott, J., joined.

1. Action ⇐13

Rule respecting standing is not intended to bar from relief persons injured by breach of public duty merely because many others have incurred similar injuries as consequences of that breach, but rather, the concern is to distinguish those who have suffered some individual injury from those asserting only common right of entire public that the law be obeyed.

2. Highways ⇐85

Although complaint alleging that Commonwealth Department of Transportation should not have issued driveway permit authorizing construction of access road without adequate preliminary studies and that deficiencies existed in the access road which would endanger public health, safety and welfare contained broad assertion that deficiencies would have unique impact on plaintiff, there was failure to specify any individual injury attributable to deficiencies in roadway itself and in preparatory studies, and thus plaintiffs lacked standing to raise such objection to DOT's action.

3. Highways ⇐85

Allegations that grant of driveway permit by Commonwealth Department of Transportation would result in inconvenience and annoyance because of presence of access road immediately adjacent to plaintiff's property, thereby impairing value of the property in manner not compensable in damages, were an assertion of nonexistent right to maintain existing traffic conditions on avenue and therefore failed to state cause of action.

4. Contracts ⇐108(1)

Individuals cannot, by contract, abridge police powers which protect general welfare and public interest but, rather, the otherwise valid contractual rights of individuals must give way to general welfare.

5. Zoning and Planning ⇐3, 160

Police power of municipalities cannot be subjected to agreements which restrict or condition zoning district classifications as to particular properties, and agreement and concomitant presentations or stipulations which induce changes in zoning district classifications do not limit effect of those changes once enacted.

6. Pleading ⇐233
Pretrial Procedure ⇐695

Right to amend pleadings should not be withheld where there is some reasonable

possibility that amendment can be accomplished successfully, but where allowance of amendment would be futile exercise, complaint may properly be dismissed without allowance for amendment.

Edward J. Hughes, Norristown, for appellants.

Howard Gershman, Blue Bell, for Whitpain Tp. and Bd. of Sup'rs.

J. Peirce Anderson, Norristown, John M. Hrubovcak, Asst. Atty. Gen. for Dept. of Transp.

Before O'BRIEN, C.J., and ROBERTS, NIX, LARSEN, FLAHERTY, McDERMOTT and HUTCHINSON, JJ.

OPINION OF THE COURT

FLAHERTY, Justice.

This equity action was commenced in the Court of Common Pleas of Montgomery County by the appellants, Peter Carlino and Elizabeth Carlino, seeking a preliminary injunction against the appellees, Whitpain Investors (hereinafter Developer), Whitpain Township (hereinafter Township), and Pennsylvania Department of Transportation (hereinafter PennDOT). Upon motion of PennDOT, the action was transferred to Commonwealth Court, and, sustaining appellees' preliminary objections, Commonwealth Court dismissed the complaint.[1] The instant appeal ensued.

Since review is sought of the sustainment of preliminary objections in the nature of demurrers, the well pleaded factual allegations set forth in the complaint are to be regarded as true for purposes of review. *Papieves v. Kelly,* 437 Pa. 373, 263 A.2d 118 (1970). The facts as alleged by appellants' complaint establish the following. Developer is constructing an apartment complex in the Township on a 47 acre tract of land situated between three roads, one of which, Stenton Avenue, is a state highway. Appellants' residence lies directly across Stenton Avenue from the construction site. Developer's predecessor in title sought to have the 47 acre tract rezoned from an R-1 (single-family) classification to an R-3 (multi-family) classification to permit construction of residential rental units. At the hearing on rezoning of the tract, the then owner stipulated that a 300 foot buffer would be provided from the right-of-way line of Stenton Avenue, and further specified that no access road from the apartment complex to Stenton Avenue would be built. In 1973, the requested zoning change was adopted by the Township. In 1979, however, construction of an access road from the apartment complex to Stenton Avenue commenced, and appellants became aware that the land development plan finally approved by the Township had, at the insistence of the Township, included a provision for access to Stenton Avenue, and that in 1978, a driveway permit authorizing construction of the access road to Stenton Avenue had been issued by PennDOT.

[1, 2] Alleging that the driveway permit issued by PennDOT to Developer was granted without adequate preliminary studies, and asserting the existence of deficiencies in the access road that endanger the public health, safety, and welfare, appellants seek an injunction requiring revocation of the permit. Established principles governing standing to raise issues in the public interest, however, bar appellants' assertion of these claims. In *Wm. Penn Parking Garage, Inc. v. City of Pittsburgh,* 464 Pa. 168, 192, 346 A.2d 269, 280–281 (1975), our cases dealing with standing were summarized as follows:

> The core concept, of course, is that a person who is not adversely affected in any way by the matter he seeks to challenge is not "aggrieved" thereby and has no standing to obtain a judicial resolution of his challenge. In particular, it is not sufficient for the person claiming to be "aggrieved" to assert the common interest of all citizens in procuring obedience to the law.

1. Carlino v. Whitpain Investors, 53 Pa. Commw.Ct. 145, 415 A.2d 461 (1980).

(footnotes omitted). This rule respecting standing is not intended to bar from relief persons injured by breach of a public duty merely because many others have incurred similar injuries as a consequence of that breach; rather, the "concern is to distinguish those who have suffered some *individual injury* from those asserting only the common right of the entire public that the law be obeyed." *Id.* at 203, 346 A.2d at 287 (emphasis added). Since the instant complaint, although containing a broad assertion that deficiencies in the access road will "have a unique impact" on appellants, fails to specify any *individual injury* attributable to deficiencies in the roadway itself and in preparatory studies, appellants must be regarded as lacking standing to raise such objections to PennDOT's action.

[3] Appellants further challenge PennDOT's grant of the driveway permit on grounds that presence of the access road immediately adjacent to their property will cause inconvenience and annoyance, thereby impairing the value of their property in a manner not compensable in damages. We regard this assertion as inadequate to state a cause of action. In *Wolf v. Department of Highways,* 422 Pa. 34, 220 A.2d 868 (1966), an eminent domain case, an owner of business property abutting a state highway alleged that highway improvements had diminished the property's value by necessitating a circuitous route of ingress, thereby reducing the number of business customers willing to enter the premises. Denying the owner's claim for damages insofar as property value diminution occasioned by such a diversion of traffic, this Court held that owners of properties abutting state roads have no cognizable legal interest in preserving a particular flow of traffic on those roads. Thus, in *Wolf,* 422 Pa. at 47, 220 A.2d at 875, quoting *State of Missouri ex rel. State Highway Comm. v. Meier,* 388 S.W.2d 855, 857 (Mo.1965), the rights of an abutting owner were stated as follows:

> "Respondent, as an abutting property owner on a public highway, does not now have and has never had any other property interest in the public highway other than a reasonable right of ingress and egress, as stated. Respondent has never had a property right in the traffic, great or *small,* on the highway, nor a right to recover damages for a decrease in value of her premises by reason of the diversion of traffic away from her property, nor *has she had a property right to have the same amount of traffic pass her property as before* or to have it move in the same direction."

(emphasis added). Since appellants' contention that the access road in question will cause inconvenience and annoyance is, in essence, an assertion of right to maintain the existing traffic conditions on Stenton Avenue, and since the existence of such a right has been negated by our holding in *Wolf,* appellants' claim against PennDOT fails to state a cause of action.

With respect to Township and Developer, appellants seek an injunction requiring the former to refrain from conditioning Developer's construction permit upon provision of the access road in question, and requiring the latter to eliminate that road and restore the 300 foot buffer zone along Stenton Avenue. The complaint alleges that Developer's predecessor in title, pursuant an agreement with the Township, stipulated as to plans to preserve the buffer area and forego an access road to Stenton Avenue, thereby rendering the 1973 rezoning contractually conditioned upon there being no access route traversing the buffer zone.

[4, 5] The concept of contractually conditioned zoning advanced by appellants lacks precedent in this Commonwealth,[2] and authorities elsewhere differ with respect to whether to accord the concept validity. See generally *Nicholson v. Tourtellotte,* 110 R.I.

2. In *Gladwyne Colony, Inc. v. Lower Merion Township,* 409 Pa. 441, 187 A.2d 549 (1963), it was alleged that a landowner gave consideration (parkland) to a municipality in exchange for enactment of a rezoning ordinance. The case did not involve contractually conditioned rezoning, however, since no special land use limitations or conditions were accepted by the property owner in order to secure the rezoning.

411, 293 A.2d 909 (1972); *State ex rel. Zupancic v. Schimenz,* 46 Wis.2d 22, 174 N.W.2d 533 (1970); 70 ALR 3d 125. The proposition has long been recognized in this Commonwealth that individuals cannot, by contract, abridge police powers which protect the general welfare and public interest. As stated in *Leiper v. Baltimore & Philadelphia Railroad Co.,* 262 Pa. 328, 332, 105 A. 551, 553 (1918), "Where the rights of individuals under a contract which would otherwise be perfectly valid are in conflict with the 'general well-being of the State,' the rights of the individuals must give way to the general welfare." See also, *Municipal Authority of Blythe v. Pennsylvania Public Utility Commission,* 199 Pa.Super. 334, 185 A.2d 628 (1962). The police power of municipalities cannot be subjected to agreements which restrict or condition zoning district classifications as to particular properties. We are in accord with the position adopted by the Supreme Court of New Jersey, in *Houston Petroleum Co. v. Automotive Products Credit Association, Inc.,* 9 N.J. 122, 87 A.2d 319, 322 (1952), wherein the Court stated: "Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations." In *Houston,* covenants and restrictions agreed to by a landowner as a means of effecting a zoning change were held invalid on grounds that the purported contract thereby made, was, with regard to the municipality, ultra vires and contrary to public policy. In so holding, the Court relied upon its decision in *V.F. Zahodiakin Engineering Corp. v. Zoning Board of Adjustment,* 8 N.J. 386, 394–395, 86 A.2d 127, 131 (1952), setting forth the following principle, with which we agree, governing exercise of municipal zoning power:

> Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts. The use restriction must needs have general application. The power may not be exerted to serve private interests merely, nor may the principle be subverted to that end.

Accordingly, we reject the view that agreements, and concomitant representations or stipulations, which induce changes in zoning district classifications limit the effect of those changes once enacted. Thus, if it were proven, as alleged in the complaint, that Developer's predecessor in title procured rezoning of the subject land in exchange for covenanted use restrictions applicable to that land, such restrictions would be unenforceable; hence, proceedings to enforce the restrictions were properly dismissed by the court below.[3]

[6] Finally, appellants contend that the court below abused its discretion by dismissing their complaint, while sustaining preliminary objections, without granting leave to amend the pleadings in an effort to avoid dismissal. As stated in *Otto v. American Mutual Insurance Co.,* 482 Pa. 202, 205, 393 A.2d 450, 451 (1978), "The right to amend should not be withheld where therc is some reasonable possibility that amendment can be accomplished successfully." Where allowance of an amendment would, however, be a futile exercise, the complaint may properly be dismissed without allowance for amendment. *Nationwide Mutual Insurance Co. v. Barbera,* 443 Pa. 93, 277 A.2d 821 (1971). Appellants submit only that, if granted the opportunity to amend their complaint, they "would plead ... a sufficient interest to confer standing ... and would assert third party beneficiary rights ... arising out of the stipulation and agreement between the Township and the Developer and the conditional rezoning of the tract." Since the principle of contractually conditioned rezoning lacks viability, and in view of appellants' failure to allege what new interest would be asserted as a basis for standing, there appears no reasonable possibility that amendment could successfully be accomplished. Accordingly, an opportunity to amend the complaint was properly denied.

Order affirmed.

3. Since rezoning of the subject tract is held not to be validly conditioned upon there being no access road to Stenton Avenue, there is no need to address PennDOT's claim that municipalities lack authority to deny access to state highways.

LARSEN, J., files a dissenting opinion in which McDERMOTT, J., joins.

LARSEN, Justice dissenting.

I dissent to the majority's conclusion that the appellants have no enforceable rights against the township and developer. The Carlinos apparently were prepared to oppose the application for rezoning and, if necessary, challenge by appeal any approval of a new zoning classification. However, the appellants were misled to inaction by conduct of the township and the developer's predecessor when the property was rezoned. The potential flames of opposition were doused quickly and efficiently by the soothing nectar of promises, stipulations and representations publicly and officially made by township officials and the then owner of the premises. There is nothing before us to suggest that the Carlinos were other than completely assured that the threats to the public health and safety, which they perceived, were effectively minimized by the establishment of a 300 feet buffer zone and the committment that no access road to Stenton Avenue would be built. The appellants' good faith beliefs in this regard were derived directly from the pacifying actions of the township and the former property owner. The Carlinos, who were cajoled into giving up valuable and legally protected rights, should not be left without a remedy when they discover that they were deceived.

Under these circumstances, it may be said that the rezoning application with accompanying plan and representations were detrimentaly misleading as to the Carlinos. In such instances, our courts have said that negligent or wrongful official conduct which misleads an aggrieved party to his detriment can be equated to fraud. *See: Appeal of Girolamo,* 49 Pa.Commw. 159, 410 A.2d 940 (1980); *See also: Visual-Educt tion Devices, Inc. v. Springettsbury Town ship,* 54 Pa.Commw. 529, 422 A.2d 235 (1980). Although the facts and specific issues in *Girolamo* and *Springettsbury* are dissimilar to those in the present case, the judicial disapproval of deceit and misleading conduct as a viable principle is applicable to the Carlinos' situation.

Accordingly, I would hold that the appellants' right to be heard, a right which they were wrongfully induced to forego in 1973, should be recognized under the facts in this case and would, therefore, reverse.

McDERMOTT, J., joins in this dissenting opinion.

Wen Y. CHUNG, as Trustee U/A/D June 5, 1986, Appellant,

v.

SARASOTA COUNTY, a Political Subdivision of the State of Florida, and The Board of County Commissioners of Sarasota County, Florida, and its Commissioners, Wayne L. Derr, Charley Richards, Robert L. Anderson, David R. Mills, and Eugene A. Matthews, in their official capacities, Appellees,

and

Elling O. Eide and Holiday Harbor Homeowners Association, Inc., Intervenors/Appellees.

Nos. 95–04581, 95–04911.

District Court of Appeal of Florida, Second District.

Dec. 27, 1996.

Trustee brought action against county to challenge county's denial of his rezoning petition. The Circuit Court, Sarasota County, Peter A. Dubensky, J., vacated stipulated final judgment which had obligated county to rezone trustee's property subject to numerous stipulations and conditions. Trustee appealed. The District Court of Appeal, Blue, J., held that county's purported settlement agreement with trustee constituted invalid contract zoning.

Affirmed.

1. Zoning and Planning ⚷160

County's purported settlement agreement in zoning litigation, under which county agreed to rezone disputed property subject to numerous stipulations and conditions, constituted invalid contract zoning, though county commission had approved settlement at its regular meetings, as settlement bypassed more stringent notice and hearing requirements for rezoning. U.S.C.A. Const.Amend. 14; West's F.S.A. § 163.3215(7).

2. Zoning and Planning ⚷160

"Contract zoning" refers to agreement between property owner and local government where owner agrees to certain conditions in return for government's rezoning or enforceable promise to rezone.

See publication Words and Phrases for other judicial constructions and definitions.

3. Zoning and Planning ⚷160, 762

Contracts have no place in zoning plan and contract between municipality and property owner should not enter into enactment or enforcement of zoning regulations; purported contract so made is ultra vires and all proceedings to effectuate it are coram non judice and utterly void.

Stephen D. Rees and Julie Ginsburg Eller of Icard, Merrill, Cullis, Timm, Furen & Ginsburg, P.A., Sarasota, for Appellant.

Elizabeth M. Woodford, Assistant County Attorney, Sarasota, for Appellee Sarasota County and its Commissioners.

Donald E. Hemke of Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Tampa, for Appellee/Intervenor Eide.

Daniel J. Lobeck of The Law Offices of Lobeck & Hanson, P.A., Sarasota, for Appellee/Intervenor Holiday Harbor.

BLUE, Judge.

In these consolidated cases, Wen Y. Chung, as trustee, appeals two orders by the circuit court. The first order allowed the Holiday Harbor Homeowners Association to intervene. Because Holiday Harbor's substantial interests were affected and because it moved to intervene while a rehearing was pending, we affirm this order without further discussion. *See, e.g., Wilson v. Clark,* 414 So.2d 526, 530 (Fla. 1st DCA 1982) ("Finality of a determination does not ... occur until time expires to file a rehearing petition and disposition thereof if filed...."); *Friedland v. City of Hollywood,* 130 So.2d 306 (Fla. 2d DCA 1961) (holding that adjacent property owners had standing to challenge rezoning). The second order on appeal vacated a stipulated final judgment entered in a zoning dispute between Chung and Sarasota County. Based on the following analysis, we have concluded that Sarasota County's purported settlement agreement constituted improper contract zoning. Accordingly, we affirm the trial court order that vacated the final judgment.

Briefly stated, the facts are these. In 1990, Chung filed a petition with Sarasota County to rezone approximately eleven acres of land. After the rezoning petition was denied by the Sarasota County Commission, Chung filed legal actions in the circuit court. Subsequently, Chung and the County entered into a settlement agreement, which obligated the County to rezone Chung's property subject to numerous stipulations and conditions. Based on the settlement, the trial court entered a stipulated final judgment and retained jurisdiction over its enforcement. An adjacent property owner, Elling O. Eide, filed a motion to intervene that the trial court granted for the limited purpose of a rehearing. The Holiday Harbor Homeowners Association also intervened. After a hearing, the trial court vacated the stipulated final judgment and Chung appeals.

[1] Chung argues that the trial court erred in vacating the stipulated final judgment because counties have the authority to enter into contracts and to settle litigation. Eide and the Homeowners Association argue that the settlement agreement and final judgment were invalid as contract zoning and as violative of due process and various statutes and ordinances related to zoning. We accept the general rule that "[a] stipulation properly entered into and relating to a matter upon which it is appropriate to stipulate is binding upon the parties and upon the Court." *Gunn Plumbing, Inc. v. Dania Bank,* 252 So.2d 1, 4 (Fla.1971). For the following reasons, however, we have reached the conclusion that this zoning dispute was not a matter upon which it was appropriate to stipulate.

[2, 3] "Contract zoning" refers to an agreement between a property owner and a local government where the owner agrees to certain conditions in return for the government's rezoning or enforceable promise to rezone. James D. Lawlor, Annotation, *Validity, Construction, & Effect of Agreement to Rezone, or Amendment to Zoning Ordinance, Creating Special Restrictions or Conditions Not Applicable to Other Property Similarly Zoned,* 70 A.L.R.3d 125, 131 (1976).

> Contracts have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations.... [A] purported contract so made is ultra vires and all proceedings to effectuate it are *coram non judice* and utterly void.

E.C. Yokley, 4 *Zoning Law & Practice* § 25–11, at 321 (4th ed. 1979) (footnote omitted). In *P.C.B. Partnership v. City of Largo,* 549 So.2d 738 (Fla. 2d DCA 1989), this court held that a contract was ultra vires and unenforceable because it purported to restrict the City's decision-making authority on development issues. "The City does not have the authority to enter into such a contract, which effectively contracts away the exercise of its police powers." 549 So.2d at 740 (citations omitted).

One of the reasons contract zoning is generally rejected is because "[t]he legislative power to enact and amend zoning regulations requires due process, notice, and hearings." Terry Lewis et al., *Spot Zoning, Contract Zoning, & Conditional Zoning, in* 2 *Florida Environmental & Land Use Law* 9–1, 9–13 (James J. Brown, ed., 2d ed. 1994).

Assuming that the developer and municipality bargain for a rezoning ordinance

tory, contract zoning is nevertheless illegal when they enter into a bilateral agreement involving reciprocal obligations. By binding itself to enact the requested ordinance (or not to amend the existing ordinance), the municipality bypasses the hearing phase of the legislative process.

Roy P. Cookston & Burt Bruton, *Zoning Law*, 35 U.Miami L.Rev. 581, 589 n. 34 (1981). In *Hartnett v. Austin*, 93 So.2d 86 (Fla.1956), the Florida Supreme Court declared a zoning ordinance invalid because it was conditioned upon separate collateral agreements with the developer. The court also noted:

> If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse. The residential owner would never know when he was protected against commercial encroachment.... The adoption of an ordinance is the exercise of municipal legislative power. In the exercise of this governmental function a city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body.

93 So.2d at 89. We conclude that the County's settlement agreement here presents a case of improper contract zoning. Although the County Commission approved the settlement at its regular meetings, it bypassed the more stringent notice and hearing requirements for a rezoning. When it entered into the settlement agreement that obligated it to rezone Chung's property, the County contracted away the exercise of its police power, which constituted an ultra vires act.

Chung argues that the County must still follow the formal requirements to enact the zoning amendments and that this process will provide the necessary due process opportunities for notice and a hearing. We reject this argument because the hearings that follow would be a pro forma exercise since the County has already obligated itself to a decision. *See Zoning Board of Monroe County v. Hood*, 484 So.2d 1331 (Fla. 3d DCA 1986) (binding County to stipulated final judgment, where the County had agreed to approve a development plan and rezone the site; no reference to contract zoning but discussing potential collateral attacks on the stipulated judgment by non-parties). In *Molina v. Tradewinds Development Corp.*, 526 So.2d 695 (Fla. 4th DCA 1988), the Fourth District approved a settlement agreement similar to the one between Chung and Sarasota County and affirmed an order compelling the City to comply by rezoning in conformity with the agreement. Without discussing the issue of contract zoning, the court held that the orders did not abrogate or modify the City's obligation to follow applicable zoning laws, including requirements for public hearings. On this point, we disagree with the Fourth District because the County has already made its rezoning decision. Its obligation to follow applicable zoning laws, including requirements for public hearings, is an obligation that must be exercised prior to the decision-making, not afterwards.

We are concerned about impairing a local government's ability to settle litigation. On the other hand, we can envision developers filing an unacceptable plan for rezoning, appealing its denial, and then obtaining approval of a modified plan by settlement agreement before satisfying the public notice and hearing requirements. While we do not suggest that this happened in the present case, the fact remains that the County bound itself to enact the requested rezoning before the matter was noticed or scheduled for the required hearings. As a final note, we point out an interesting provision in chapter 163, Florida Statutes (1995). Aggrieved parties are entitled to bring suit to prevent local government action that would be inconsistent with the comprehensive plan. § 163.3215(1). "In any action under this section, no settlement shall be entered into by the local government unless the terms of the settlement have been the subject of a public hearing after notice as required by this part." § 163.3215(7). In the zoning and land use arena, we find reassuring this legislative recognition of the need to afford due process, notice and hearing before settlement terms are approved. By prohibiting contract zoning, the same due process rights have been protected in the local exercise of zoning power.

Accordingly, we affirm the trial court's order in this case, which vacated the stipulated final judgment between Chung and Sarasota County. Further, we certify the following question of great public importance:

> WHETHER A COUNTY OR LOCAL GOVERNMENT CAN ENTER INTO A SETTLEMENT AGREEMENT IN ZONING LITIGATION WITHOUT FIRST ADHERING TO THE DUE PROCESS AND STATUTORY/ORDINANCE REQUIREMENTS FOR ENACTING THE ZONING CHANGES CONTEMPLATED BY THE AGREEMENT?

SCHOONOVER, A.C.J., and FULMER, J., concur.

James D. GANYARD, Appellant,

v.

STATE of Florida, Appellee.

No. 95–1536.

District Court of Appeal of Florida, First District.

Dec. 30, 1996.

Rehearing Denied Feb. 7, 1997.

Defendant was convicted in the Circuit Court, Leon County, J. Lewis Hall, Jr., J., and he appealed. The District Court of Appeal, Allen, J., held that: (1) defendant has no right to be physically present whenever peremptory challenges might be exercised and has only the right to be present when peremptory challenges "are exercised," and (2) defendant was not prejudiced by his absence from bench conference when peremptory challenges were exercised by prosecutor, despite claim that he was prejudiced because his attorney might have exercised challenges at the conference.

Affirmed and question certified.

Lawrence, J., filed a specially concurring opinion.

Webster, J., dissented and filed an opinion in which Mickle, J., joined.

1. Criminal Law ⇐636(3)

It was error not to have defendant physically present at bench conference during which jury challenges were exercised where he never waived his presence or ratified the strikes made outside his presence. (Per Allen, J., with one Judge concurring and one Judge concurring specially.)

2. Criminal Law ⇐1166.14

Defendant was not prejudiced by his absence from bench conference when peremptory challenges were exercised by prosecutor because challenges were within the discretion of the prosecutor, despite claim that defendant was prejudiced because his attorney might have exercised challenges at the conference. (Per Allen, J., with one Judge concurring and one Judge concurring specially.)

3. Criminal Law ⇐636(3)

Defendant has no right to be physically present whenever peremptory challenges might be exercised; he has only the right to be present when peremptory challenges "are exercised." (Per Allen, J., with one Judge concurring and one Judge concurring specially.)

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A.

[8] The Association in Count I of their underlying Amended Complaint alleged that the County willfully violated the FLSA. In *United States Fidelity & Guaranty Co. v. Fireman's Fund Insurance Co.*, 896 F.2d 200, 203 (6th Cir.1990), the court interpreted a similar errors or omissions policy to not cover intentional acts. The Fireman's Fund policy did not specifically exclude intentional acts of the insured. The exclusions in that policy, like the exclusions here, were for dishonest, fraudulent, criminal or malicious acts. The court concluded that the only reasonable construction was that the insurance company "contracted to provide coverage for negligent—not intentional acts * * * *" *Id.* A willful violation of the FLSA does not constitute a "negligent act or omission." *Cf. City of Fort Pierre v. United Fire & Casualty Co.*, 463 N.W.2d 845, 848 (S.D. 1990) (holding negligent act, error or omissions policy did not cover city's intentional decision to ignore federal government permit requirements).

Also, the FLSA is a federal statute that prescribes criminal penalties for its violation. 29 U.S.C. § 216(a). Thus, a willful violation of the FLSA is a criminal act that is excluded under the policy.

B.

[9, 10] Count II of the Association's Amended Complaint alleged that the County breached its members' contract of employment and breached the County Rules and Regulations incorporated in the Collective Bargaining Agreement. Exclusionary provisions in insurance policies will be enforced if they are clear and do not violate public policy. *Jimenez v. Foundation Reserve Ins. Co.*, 107 N.M. 322, 324, 757 P.2d 792, 794 (1988). As previously noted, the exclusions applicable to the Comprehensive General Liability Insurance portion of the policy were also applicable to the errors or omissions section. The Comprehensive General Liability Insurance exclusions include *inter alia:*

This insurance does not apply:

(a) to liability assumed by the insured under any contract or agreement except a defined contract: but this exclusion does not apply to a warranty of fitness or quality of the named insured's product if a warranty that work performed by or on behalf of the named insured will be done in a workmanlike manner; ...

As defined in the policy, contract means "any written agreement, except one pertaining to aircraft, under which a named insured assumes the liability of others for bodily injury or property damage." In *Commercial Union Insurance Co. v. Basic American Medical, Inc.*, 703 F.Supp. 629, 632–33 (E.D.Mich.1989), the court interpreted the following exclusionary language in a general liability policy: "This insurance does not apply: a. to liability assumed by the insured under any contract or agreement except an incidental contract * * * *" The *Commercial Union* court found that "employment contracts do not constitute the type of liability assumed by defendants under a contract which would bring these contracts within the policy's coverage." *Id.* at 633. In its analysis of the issue, the court referred to the following discussion of contractual exclusions clauses in liability insurance policies contained in 12 George J. Couch, *Couch on Insurance* § 44A:35, at 55–57 (2d ed. 1981):

> "Such provisions * * * deny the coverage generally assumed by a liability policy in cases in which the insured in a contract with a third party agrees to save harmless or indemnify such third party." (citations omitted).
>
> The purpose of these contractual exclusion clauses is not to make the insurer underwrite its insureds' contracts, but to limit coverage to the insured's tort liability.

Commercial Union, 703 F.Supp. at 633. We agree with the court in *Commercial Union*, and interpret the similar, clear language here to exclude coverage for employment contracts. The Colonial Penn policy does not afford coverage for breach of contract or breach of the Collective Bargaining Agreement.

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C.

[11] Count III of the Association's Amended Complaint alleged that the County failed to negotiate changes in County Rules and failed to pay stand-by time, therefore breaching its contract of employment with members of the Association and willfully violating County Rule 312.2. In the alternative, it is alleged that the County negligently breached the Collective Bargaining Agreement. The County contends that acting upon the advice of its attorney and his interpretation of the FLSA, employees were not paid for on-call lunch periods. The County argues "that a misapprehension of what the law allows is sufficient to constitute an error under the policy." Thus, the County contends, the breach of contract occurred as a result of a "negligent act, error or omission," and the key to determining coverage is not the form of the pleading, but the nature of the insured's conduct. *See Touchette Corp. v. Merchants Mut. Ins. Co.*, 76 A.D.2d 7, 9, 429 N.Y.S.2d 952, 954 (1980).

Under some circumstances, breach of a contractual duty may give rise to an independent action in tort. *Preferred Mktg. v. Hawkeye Nat'l Life Ins. Co.*, 452 N.W.2d 389, 397 (Iowa 1990). "Only where a duty recognized by the law of torts exists between the plaintiff and defendant distinct from a duty imposed by the contract will a tort action lie for conduct in breach of the contract." *Id.; see Cottonwood Enters. v. McAlpin*, 111 N.M. 793, 795–96, 810 P.2d 812, 814–15 (1991) (holding tort of negligence must be based upon duty other that one imposed by contract); W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 92 (5th ed. 1984) (describing requirement for separate duty apart from contractual duty to give rise to tort action). There is no relationship between the County and its employees that gives rise to a legal duty to pay overtime which is independent of the Collective Bargaining Agreement. Even the violation of the FLSA evolves from the contract of employment. The FLSA provisions "are read into and become a part of every employment contract that is subject to the terms of the Act." *Roland Elec. Co. v. Black*, 163 F.2d 417, 426 (4th Cir.1947), *cert. denied*, 333 U.S. 854, 68 S.Ct. 729, 92 L.Ed. 1135 (1948).

The claims of the Association were properly viewed as existing only in contract, and the Colonial Penn policy excluded claims for breach of contract. The County made no showing that the essential facts of the complaint alleged any "negligent act, error or omission." *See Wylie*, 105 N.M. at 409, 733 P.2d at 857. Therefore, Colonial Penn had no duty to defend or indemnify under the policy.

The judgment of the district court is affirmed.

IT IS SO ORDERED.

MONTGOMERY and FROST, JJ., concur.

114 N.M. 699

Wayne DACY and Sandra Dacy, his wife, Petitioners–Appellants,

v.

VILLAGE OF RUIDOSO, Respondent–Appellee.

No. 20143.

Supreme Court of New Mexico.

Nov. 19, 1992.

Landowners sued village for breach of contract after village failed to rezone landowner's property. The District Court of Lincoln County, Sandra A. Grisham, J., found for village. Landowners appealed. The Supreme Court, Montgomery, J., held that: (1) contract zoning between landowners and village was unenforceable, and (2) landowners were not entitled to restitution.

Affirmed.

›ning and Planning ⇐160
'Contract zoning," properly used, de-
es agreement between municipality
another party in which municipality's
deration consists of either promise to
property in requested manner or actu-
t of zoning property in that manner.
See publication Words and Phrases
›r other judicial constructions and
efinitions.

›ning and Planning ⇐160
Contract zoning is illegal whenever it
s from promise by municipality to zone
erty in certain manner, such as in bilat-
contract to zone or in unilateral con-
in which municipality promises to re-
in return for some action or forbear-
by other party; in making such prom-
nunicipality preempts power of zoning
›rity to zone property according to
:ribed legislative procedures.

ıning and Planning ⇐160
Contract zoning in form of unilateral
act in which party makes promise in
n for municipality's act of rezoning is
as municipality makes no promise
:here is no enforceable contract until
:ipality acts to rezone property; be-
: municipality does not commit itself
y specified action before zoning hear-
t does not circumvent statutory proce-
, or compromise rights of affected per-

ning and Planning ⇐160
'illage's agreement to rezone land-
rs' property in return for landowners'
:yance of property needed for right-of-
was unenforceable unilateral contract
g as village's agreement was an at-
: to commit itself to specific zoning
ı without following required statutory
dures. NMSA 1978, § 3-21-6, subd.

ntracts ⇐136
)amages are unavailable as relief to
to illegal contract.

'unction ⇐57
ecific Performance ⇐55
leither specific performance nor in-
on will be granted to party to illegal
ıct.

7. Municipal Corporations ⇐249

Landowners who entered into unenforceable contract for zoning with village were not entitled to restitution; landowners would not suffer disproportionate forfeiture absent restitutionary relief, as it was questionable whether village had made promise to rezone, landowners failed to protect themselves against risk of decline in value of property and reasonableness of landowners' reliance on alleged promise to rezone was questionable.

Sam A. Westergren, Santa Fe, for petitioners-appellants.

David A. Thomsen, Ruidoso, for respondent-appellee.

OPINION

MONTGOMERY, Justice.

In this case we deal with an instance of so-called "contract zoning." The trial court found that the Village of Ruidoso ("the Village") had contracted with the appellants, Wayne and Sandra Dacy, to rezone a tract of land conveyed to them in exchange for another tract and held that the contract was void for illegality. In the Dacys' suit against the Village for damages for breach of contract, the court after a bench trial entered judgment for the Village. The Dacys appeal and we affirm, discussing the enforceability of a contract to zone property and the consequences of a ruling that the contract is unenforceable.

I. FACTS AND ISSUES

In 1983, the Village desired to acquire property owned by the Dacys for use as part of a highway right of way. Because the Village had neither the time nor the money to condemn the Dacys' property, it proposed a trade under which the Village would convey certain property, described as "Tract A-A," to the Dacys in exchange for the property it needed for the right of way. The Dacys agreed to this exchange, and in October 1983 the parties drafted a written agreement for the trade of these

lands. The parties executed the agreement in January 1984 by exchanging quitclaim deeds to their respective parcels.

The Village conveyed Tract A-A to the Dacys subject to the restrictive covenants contained in a document entitled "Restrictive Covenants of Gavilan Subdivision," which was incorporated by reference into both the agreement and the Village's deed.[1] Both the agreement and the deed, however, specifically excepted paragraphs A(2) and A(11) of the Gavilan subdivision restrictive covenants. These omitted paragraphs, had they been included, would have prohibited subdivision and multi-family use of Tract A-A and restricted removal of trees and earth.

After the parties exchanged their deeds, the Dacys applied to the Village for rezoning of Tract A-A. They requested a change in zoning from R-1 (residential single-family housing) to R-2 (multi-family housing) so that they could build condominiums on the property. After review of the application, the Planning and Zoning Commission, an advisory body to the Village Council, recommended rezoning Tract A-A as R-2. The Village Council then considered the matter in October 1984 and, declining to follow the Commission's recommendation, denied the Dacys' rezoning request.

In November 1984, the Dacys filed suit against the Village, seeking reversal of the Council's denial of their request and damages for breach of contract and misrepresentation. The Dacys based their breach of contract claim on an alleged promise by the Village in the 1983 agreement to rezone Tract A-A as R-2.

The court held a hearing in February 1986 and determined that, for reasons not material here, Tract A-A had no zoning classification. Accordingly, upon agreement of the parties, the court remanded the matter to the Planning and Zoning Commission to properly zone Tract A-A. The court deferred resolution of the breach of contract and misrepresentation claims pending the Village's reconsideration of the zoning issue.

In April 1986, the Village zoned Tract A-A as R-2. By that time, however, the market in Ruidoso for R-2 property had collapsed. Thus, when the Dacys sold Tract A-A in June 1986, they received only $150,000 for the property, compared with the $405,173 that the court found would have been its fair market value in 1984 had it been zoned R-2 at that time.

The Dacys therefore pursued their breach of contract claim against the Village.[2] The court held a hearing on the issue in April 1989 and afterwards entered findings of fact and conclusions of law. It determined that "[a] fair reading of [the 1983 agreement and the deed from the Village to the Dacys] would support a conclusion that was intended to allow the [Dacys] to build condominiums." It also found that the 1983 agreement "implied the duty of the Village to zone the property R-2." The court apparently reasoned that, by omitting paragraphs A(2) and A(11) of the restrictive covenants from the agreement and deed and thereby allowing subdivision of the property, the Village impliedly agreed to zone Tract A-A as R-2 so as to permit multi-family housing.[3]

In its findings, the court stated that the Dacys had incurred damages of $255,173,

1. Tract A-A was located adjacent to the Gavilan subdivision but was not a part of that subdivision.

2. The Dacys apparently dropped their misrepresentation claim, because the breach of contract claim was the only issue before the court at the April 1989 hearing.

3. The court's reasoning is not apparent from its findings of fact or conclusions of law. However, in its letter decision to the parties, the court stated:

> I understand [the Village's] argument that all the deed purported to do was to allow Dacy to subdivide the parcel, and did not speak to the issue of multi-family use, but I am assuming for the moment that the Village did, by implication, contract to zone the Tract A-A, R-2, and the court would find that the omission of the zoning provision from the contract was necessarily implied.

Additionally, at oral argument before this Court, counsel for the Dacys stated that the only evidence supporting an implied promise to zone Tract A-A as R-2 was the deletion of paragraphs A(2) and A(11) from the agreement and deed.

representing the difference in market value of Tract A-A as R-2 property in 1984, when the Dacys applied for and were denied rezoning, and June 1986, when the Dacys sold the property as R-2 for $150,000. However, the court concluded that there was no legal basis upon which the Dacys could recover those damages, because the implied contract to zone between the Dacys and the Village was unenforceable. It stated that "[a] contract to zone property between a zoning authority and an individual is illegal and an ultra vires bargaining away of the police power of the municipality" and that "[i]llegal contracts are void ab initio and the court must leave the parties as it finds them." Accordingly, the court awarded the Dacys no damages.

On appeal, the Dacys assert that the trial court erred in holding that the contract was illegal and unenforceable; they also assert that the Village should be estopped to claim that the contract was illegal. They urge us to reverse the trial court's holding of illegality and award them damages in the amount the court determined.

II. LEGALITY OF CONTRACT ZONING

This case presents this Court with our first opportunity to discuss in some detail the legality of "contract zoning." While a few of our previous opinions relate to contract zoning, none provides clear guidance on the subject. *See Westgate Families v. County Clerk,* 100 N.M. 146, 148, 667 P.2d 453, 455 (1983) (because the New Mexico Zoning Enabling Act expressly provides for zoning by representative bodies, it denies an exercise of zoning power by referendum); *Mechem v. City of Santa Fe,* 96 N.M. 668, 672, 634 P.2d 690, 694 (1981) (dictum) (endorsing validity of contract zoning under certain circumstances); *Spray v. City of Albuquerque,* 94 N.M. 199, 201, 608 P.2d 511, 513 (1980) (contracts attempting to curtail or prohibit a municipality's legislative or administrative authority are uniformly invalid).

A. Definition of Contract Zoning

At the outset, it is important to explain tract zoning has been variously defined by courts and commentators and has sometimes been used interchangeably with the term "conditional zoning." *See, e.g.,* 2 Robert M. Anderson, *American Law of Zoning 3d* § 9.21 (1986); 1 Norman Williams, Jr. & John M. Taylor, *American Planning Law* §§ 29.01-.04 (rev. ed. 1988). Contract and conditional zoning are distinct, however, and an appreciation of the distinction is important to understanding our holding today.

[1] "Contract zoning," properly used, describes an agreement between a municipality and another party in which the municipality's consideration consists of either a promise to zone property in a requested manner or the actual act of zoning the property in that manner. *Cf.* Nolan M. Kennedy, Jr., Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility,* 23 Hastings L.J. 825, 831 (1972) (defining contract zoning in slightly different terms). A contract to zone may be in the form of either a unilateral contract or a bilateral contract. *See id.* at 837-38. A bilateral contract involves reciprocal promises in which the municipality promises to zone property in a certain manner in return for some promise from the other party to the contract. *See id.* at 838. A unilateral contract, on the other hand, consists of a promise by only one of the contracting parties; the other party's consideration is action or forbearance rather than a promise. 1 Arthur L. Corbin, *Corbin on Contracts* § 21 (1963). Thus, in the context of contract zoning, a unilateral contract describes two possible situations: Either a municipality promises to rezone in return for some action or forbearance by the other contracting party, or the other contracting party makes a promise in return for the municipality's act of rezoning. *Cf.* Kennedy, *supra,* at 837 (describing unilateral contract zoning only in terms of a promise by the other contracting party in return for the municipality's action of rezoning; not describing the converse situation).

In comparison, conditional zoning is not

involve a promise by either party. Rather, conditional zoning describes the situation in which a municipality rezones on condition that a landowner perform a certain act prior to, simultaneously with, or after the rezoning. *Id.* at 831. The absence of an enforceable promise by either party distinguishes conditional zoning from contract zoning. *See id.* In the present case, we address only the validity of contract zoning; we do not consider the propriety of conditional zoning.

B. Illegal Contract Zoning

Numerous courts have criticized contract zoning, declaring it invalid per se. *See* Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals,* 65 N.C.L.Rev. 976, 982-83 (1987). While these courts have advanced several grounds for disapproving contract zoning, the most common rationale is that contract zoning is inherently flawed as a "problematic blend of contract and police powers." *Id.* at 982. Their opinions typically condemn contract zoning as an illegal bargaining away or abrogation of the police power. *See, e.g., Hartman v. Buckson,* 467 A.2d 694, 699-700 (Del.Ch.1983); *Hartnett v. Austin,* 93 So.2d 86, 89 (Fla. 1956) (en banc). As one commonly cited case states, "Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts." *V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment,* 8 N.J. 386, 86 A.2d 127, 131 (1952).

[2] We agree that in most situations contract zoning is illegal. However, we do not subscribe to a per se rule against all forms of contract zoning, nor does our rationale rest on the "bargaining away" or abrogation of the police power. Rather, we believe that contract zoning is illegal whenever it arises from a *promise* by a municipality to zone property in a certain

party to a bilateral contract to zone or when a municipality is a party to a unilateral contract in which the municipality promises to rezone in return for some action or forbearance by the other contracting party.

A contract in which a municipality promises to zone property in a specified manner is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures. Our statutes require notice and a public hearing prior to passage, amendment, supplement, or repeal of any zoning regulation. NMSA 1978, § 3-21-6(B) (Repl.Pamp.1985). The statutes also grant to citizens and parties in interest the opportunity to be heard at the hearing. *Id.* By making a promise to zone before a zoning hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public's comments on that action. Enforcement of such a promise allows a municipality to circumvent established statutory requirements to the possible detriment of affected landowners and the community as a whole. *See County of Ada v. Walter,* 96 Idaho 630, 533 P.2d 1199, 1201 (1975) (oral agreement to allow mobile homes on property was invalid because it did not comply with county zoning ordinance); *Midtown Properties, Inc. v. Township of Madison,* 68 N.J.Super. 197, 172 A.2d 40, 45-46 (Ct.Law Div.1961) (contract to zone illegal because it circumvented mandatory zoning procedures), *aff'd,* 78 N.J.Super. 471, 189 A.2d 226 (Ct.App.Div. 1963) (per curiam).

C. Legal Contract Zoning

[3] The foregoing analysis implies that one form of contract zoning is legal: a unilateral contract in which a party makes a promise in return for a municipality's *act* of rezoning. In this situation, the municipality makes no promise and there is no enforceable contract until the municipality acts to rezone the property. *See* 1 Corbin, *supra,* § 21, at 54. Because the municipal-

not circumvent statutory procedures or compromise the rights of affected persons. *Cf.* Kennedy, *supra,* at 837 (in a unilateral contract to zone, municipality makes no binding promise and there is no abrogation of the police power). Some courts have nonetheless condemned this form of contract zoning on the ground that the contracting party's promise provides improper motivation for the municipality's rezoning action. *See, e.g., City of Knoxville v. Ambrister,* 196 Tenn. 1, 263 S.W.2d 528, 530 (1953); *see also* Wegner, *supra,* at 979 n. 122 ("The distinction between bilateral and unilateral agreements seems problematic on policy grounds, however, because even unilateral agreements can serve as an incentive to government action."). We do not find this reasoning persuasive. Private interests are inherent in any zoning matter; therefore, it is disingenuous to condemn a method of zoning because it benefits private interests in some way. Moreover, any potential misconduct that might occur through unilateral contract zoning may be corrected through judicial review if the action of the zoning authority is improper. *See Singleterry v. City of Albuquerque,* 96 N.M. 468, 472, 632 P.2d 345, 349 (1981) (reviewing court upholds decision of zoning authority if not fraudulent, arbitrary, or capricious); *see also* Kennedy, *supra,* at 834.

III. CONSEQUENCES OF ILLEGAL CONTRACT ZONING

[4] If we assume the correctness of the trial court's finding of fact that the Village agreed in the 1983 Agreement to rezone the Dacys' property, this case involves a form of unilateral contract zoning: The Village promised to rezone Tract A–A in return for the Dacys' conveyance of property that the Village needed for the highway right of way. Under the principles set out above, this contract is unenforceable because the Village attempted to commit itself to specific zoning action without following the required statutory procedures.

The trial court concluded that the contract between the Village and the Dacys was illegal and that "[i]llegal contracts are void ab initio and the court must leave the parties as it finds them." It therefore concluded that it could award no damages to the Dacys. In its letter decision to the parties, the court stated that "any remedy, whether equitable or legal, is foreclosed as to an illegal contract." While we affirm the trial court's denial of relief to the Dacys, we explain our reasoning in some detail so as to clarify the legal rules regarding the availability of relief to a party to an illegal contract.

[5, 6] The trial court was correct in stating that damages are unavailable as relief to a party to an illegal contract. *See Restatement (Second) of Contracts* § 346(1) (1979) [hereinafter *Restatement*] ("The injured party has a right to damages for any breach by a party against whom the contract *is enforceable* ....") (emphasis added). Additionally, neither specific performance nor an injunction will be granted to a party to an illegal contract. *See id.* § 365 (specific performance and injunction are unavailable if act that would be compelled is contrary to public policy). Although the foregoing remedies are unavailable, it is not accurate to say that "any remedy ... is foreclosed as to an illegal contract." As Corbin states, "A party who has rendered part or all of the bargained-for-exchange, or has otherwise materially changed his position in reliance on the return promise in an 'illegal' bargain, has often seemed to deserve and has often been given a restitutionary remedy." 6A Corbin, *supra,* § 1534, at 818.

[7] Restitution, in the context of contract law, is a remedy that restores to a contracting party any benefit that he or she has conferred on the other party through part performance or reliance. *Restatement, supra,* §§ 344(c), 370. Restitution may be in the form of the specific restoration of land or chattels, the repayment of money, or the payment of the reasonable value in money of services rendered. 6A Corbin, *supra,* § 1535, at 821. In the present case, restitution to the Dacys, if granted, would probably take the form of a payment to them of the value of the land they conveyed to the Village, less

the proceeds of Tract A–A when they sold it in 1986.[4] (The court could not order the Village to return the land to the Dacys since it presumably has already been used by the Village for the highway right of way.)

The circumstances in which restitution will be awarded to a party to an illegal contract cannot be easily defined or categorized. *Id.* § 1534, at 818–19. The *Restatement* says that restitution is generally unavailable to a party who has rendered performance in return for a promise that is unenforceable "unless denial of restitution would cause disproportionate forfeiture." *Restatement, supra,* § 197. Whether the forfeiture is "disproportionate" depends on the extent of the denial of compensation compared to the gravity of the public interest involved and the extent to which the contract contravenes public policy. *Id.* comment b. Additionally, Corbin identifies the following factors (which we assume to be a nonexclusive list) as influencing whether a court will grant restitution: The degree of criminality involved in the illegal contract, the comparative innocence or guilt of the parties, the extent of public harm involved, the moral quality of the parties' conduct and the severity of the penalty or forfeiture that will result from denial of relief. 6A Corbin, *supra,* § 1534, at 818.

We do not believe that denying restitution in this case will cause a disproportionate forfeiture. Several factors support this conclusion. First, we have serious doubts that the Village even made a promise to rezone. As stated above, the only evidence to support such a promise was the omission of paragraphs A(2) and A(11) of the restrictive covenants from the agreement and the deed. The omission of these paragraphs allowed subdivision and possible multi-family use of Tract A–A and unlimited removal of trees and earth on the land. We see nothing in the deletion of these covenants that gave rise to an implied promise by the Village to rezone the property. In deleting these covenants from the agreement and deed, the Village authorized the *present* resubdivision of Tract A–A and *possible* future use of the property for multi-family housing, but we cannot see that it promised to rezone the property.[5]

A second factor influencing our decision is our belief that the Dacys bear some responsibility for their loss because they failed to protect themselves against the risk of a decline in the market for R–2 property. By entering into the agreement with the Village without demanding a time deadline for the rezoning, the Dacys assumed the risk that the Village would not promptly rezone and that the market in Ruidoso for R–2 property would drop. The Dacys could have expressly provided in the agreement that their transfer of land to the Village would not be effective unless and until the Village rezoned Tract A–A or unless the Village rezoned Tract A–A by a specified date. In that way, had the Village failed to comply with those terms, the Dacys would not have suffered any harm. By failing so to protect themselves, the Dacys undertook the risk that the market for R–2 property would collapse and that they would lose money on the deal.

4. The Dacys did not seek restitution in their complaint against the Village asserting breach of contract. Even had they requested such relief as an alternative to their claim for damages, and even if (contrary to the reasoning in the text *infra*) a court were to find a disproportionate forfeiture absent restitutionary relief, they still would have faced significant problems in securing this type of relief. *See* NMSA 1978, § 37-1-23(A) (Repl.Pamp.1990) (granting governmental entities immunity from actions based on contract, except actions based on *valid* written contract) (emphasis added); *Hydro Conduit Corp. v. Kemble,* 110 N.M. 173, 793 P.2d 855 (1990) (subcontractor's claim against state for restitution, on account of materials furnished to general contractor for construction of public-works projects, was "based on contract" and hence barred by § 37-1-23).

5. The district court seems to have shared our doubts about the existence of a promise to rezone. Although the court stated in its findings that "a fair reading" of the parties' agreement "would support a conclusion that [it] was intended to allow the [Dacys] to build condominiums" and that the agreement "implied the duty of the Village to zone the property R-2," the court said in its letter to the parties that it was "assuming for the moment" that the Village had by implication contracted to zone Tract A-A as R-2.

A final factor causing us to believe that the Dacys have not suffered a disproportionate forfeiture lies in the at least arguable unreasonableness of their reliance on the Village's purported promise to rezone Tract A-A. As mentioned previously, the Dacys have argued on appeal that the Village should be estopped to assert the invalidity of the claimed agreement to rezone. The estoppel asserted is "equitable estoppel," based on cases such as *Albuquerque Nat'l Bank v. Albuquerque Ranch Estates, Inc.*, 99 N.M. 95, 101, 654 P.2d 548, 554 (1982). It is clear, however, that this form of estoppel, like other forms,[6] requires the party asserting it to have reasonably relied on the other party's promise or representation. *See, e.g., id.* The reasonableness of the Dacys' reliance on the Village's "implied" promise to rezone—in a contract covering in considerable detail other aspects of the parties' transaction—is questionable to say the least.

We do not hold that the Dacys' reliance on the Village's putative promise to rezone was unreasonable as a matter of law; nor do we hold, as a matter of law, that the Village did not in fact make such a promise; nor do we hold—again, as a matter of law—that the Dacys assumed the risk that the real estate market in Ruidoso would collapse during 1985. We hold only that, as a matter of law, the Village's promise to rezone, if made, was unenforceable and that in the circumstances of this case denying restitution to the Dacys does not result in a disproportionate forfeiture.

The trial court's judgment is therefore affirmed.

IT IS SO ORDERED.

RANSOM, C.J., and BACA, J., concur.

6. For example, promissory estoppel. *See Restatement, supra,* § 90 (promissory estoppel may be available if promisor should reasonably have expected promise to induce action or forbearance by promisee); *Eavenson v. Lewis Means, Inc.*, 105 N.M. 161, 162, 730 P.2d 464, 465 (1986) (promissory estoppel requires that promisee act reasonably in justifiable reliance on promise as made).

114 N.M. 706

Susan KIRKPATRICK, d/b/a Kirkpatrick & Associates, Plaintiff-Appellant,

v.

INTROSPECT HEALTHCARE CORPORATION, a New Mexico corporation, d/b/a Introspect Healthcare of New Mexico and Daniel Lopez, Defendants-Appellees.

No. 19944.

Supreme Court of New Mexico.

Dec. 29, 1992.

Interior designer brought suit against corporation, alleging breach of contract and several related counts. The District Court, Bernalillo County, Burt Cosgrove, D.J., dismissed complaint for failure to state claim upon which relief can be granted. Designer appealed. The Supreme Court, Baca, J., held that: (1) written contract between designer and corporation was not contract for sale of goods under Article 2 of Uniform Commercial Code (UCC); (2) contract between designer and corporation unambiguously required corporation to purchase furnishings from designer; (3) dismissal of designer's entire complaint, without addressing all counts raised in her complaint, was error; and (4) trial court misapplied rule governing judgment upon multiple claims by entering final judgment as to all designer's claims.

Reversed and remanded.

1. Sales ⇐3.1

Written contract between interior designer and corporation, which provided that fee for design services would be generated through markups on furnishings that designer purchased and resold to corporation, was not contract for sale of goods under Article 2 of Uniform Commercial Code (UCC); contract's primary purpose was to provide interior design services and included itemized list of 23 different services to be performed. NMSA 1978, §§ 55-2-101 to 55-2-725.

2. Sales ⇐3.1

Under "primary purpose" test, Article 2 of the Uniform Commercial Code (UCC), which applies to contracts for sale of goods, applies to "mixed contracts" only if primary purpose of contract is to sell goods rather than to provide services. NMSA 1978, §§ 55-2-101 to 55-2-725.

See publication Words and Phrases for other judicial constructions and definitions.

3. Licenses ⇐8(1)

Professional and occupational licensing statutes for interior designers are intended to set standards and requirements for practice of and entrance into profession of interior design and do not represent legislative proclamation that interior design contracts are solely service contracts exempt from Uniform Commercial Code (UCC). NMSA 1978, §§ 61-24C-1 to 61-24C-16.

4. Sales ⇐3.1

Supreme Court determines whether Article 2 of Uniform Commercial Code (UCC), which applies to contracts for sale of goods, applies to given mixed contract on case-by-case basis by scrutinizing contract itself to determine whether primary purpose of contract is for sales or services. NMSA 1978, §§ 55-2-101 to 55-2-725.

5. Contracts ⇐198(2)

Contract between interior designer and corporation, which provided for design services to be rendered to corporation by designer, unambiguously required corporation to purchase furnishings from designer; contract explicitly stated that fee for designer's interior design services would be included in furnishings that would be purchased for facility being built by corporation.

6. Contracts ⇐176(2)

Whether or not contract is ambiguous is question of law for court.

7. Contracts ⇐143.5

When determining whether contract is ambiguous, court must consider contract as whole.

8. Contracts ⇐143(2)

Contract is ambiguous only if it is reasonably susceptible to different constructions.

9. Contracts ⇐147(2)

When language of contract clearly and unambiguously expresses agreed-upon intent of parties, Supreme Court will give effect to such intent.

10. Appeal and Error ⇐842(8)

For purpose of interpreting contract, when resolution of issue depends upon interpretation of documentary evidence, Supreme Court is in as good a position as trial court to interpret the evidence.

11. Contracts ⇐143.5

To make reasonable interpretation of contract, language of entire contract must be considered, and selected portions cannot support claim of ambiguity.

12. Appeal and Error ⇐842(1)

Appellate court will not determine questions of fact on appeal.

13. Appeal and Error ⇐1178(6)

Remand to trial court for trial on merits would be required to determine whether corporation breached contract with interior designer and to determine resulting damages to interior designer in event that corporation was found to have breached contract.

14. Pretrial Procedure ⇐643

Dismissal by trial court of plaintiff's entire complaint for failure to state claim upon which relief can be granted, without addressing all counts raised in plaintiff's complaint, was error; it could not be said that plaintiff failed to state claim upon which relief can be granted as to alternative counts without trial court conducting separate assessment of each distinct claim. SCRA 1986, Rule 1-012, subd. B(6).

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and ERICKSON, J.,

FORD LEASING DEVELOPMENT COMPANY, Plaintiff-Appellant,

v.

BOARD OF COUNTY COMMISSIONERS OF the COUNTY OF JEFFERSON, Defendant-Appellee.

No. 26445.

Supreme Court of Colorado,
En Banc.

Nov. 11, 1974.

Rehearing Denied Dec. 9, 1974.

Developer's predecessor in title filed application for rezoning from agricultural district to planned development district. The board of county commissioners denied rezoning. The District Court, Jefferson County, Roscoe Pile, J., upheld board's decision and held existing zoning ordinance constitutional, and developer, who was substituted as plaintiff after acquiring title to the property, appealed. The Supreme Court, Day, J., held that board was not estopped to deny the application for rezoning, that board's decision was supported by some competent evidence and was thus not an abuse of discretion, and that upon finding that developer was not deprived of any reasonable use of its property by zoning ordinance, district court properly held that the ordinance as applied to the property in question was constitutional.

Judgment affirmed.

1. Zoning 🔑192

Planned development application must meet all standards, procedures, and conditions of a planned development ordinance.

2. Zoning 🔑192

Where planned development application stated that one developer would handle proposed auto dealership and another developer would develop and sell townhouses, the application did not comply with county ordinance, which provided that a planned development must be under unified control.

3. Zoning 🔑151

Planned development is not a catchall; it is not supposed to inject into a neighborhood a use which would otherwise not be allowed.

4. Zoning 🔑151

Planned development should not usurp discretionary function of board of county commissioners to deny or grant applications for rezoning.

5. Zoning 🔑194

Where developer's application for rezoning of property from agricultural district to planned development district was denied by board of county commissioners, it was not necessary for the board to impose any final regulations.

6. Zoning 🔑151

Board of county commissioners properly refused to engage in contract zoning, which is illegal, when it refused to inform developer of whatever additional requirements and regulations were necessary in order to approve his applications for rezoning of property from agricultural district to planned development district.

7. Zoning 🔑21

Contract zoning is illegal as an ultra vires bargaining away of police power.

8. Zoning 🔑161

Where county planning commission approved proposed planned development subject to 17 restrictive recommendations, developer complied with only five of such recommendations, and developer did not strictly comply with county ordinance requiring that planned development must be under unified control, board of county commissioners was not estopped to deny developer its application for rezoning from agricultural district to planned development district.

9. Administrative Law and Procedure 🔑788

In order for a court to set aside decision of administrative body on certiorari review, there must be no competent evidence to support the decision. Rules of Civil Procedure, rules 106, 106(a)(4).

10. Administrative Law and Procedure 🔑676

On certiorari review of a decision of an administrative body, reviewing court is

limited to what appears in the record. Rules of Civil Procedure, rules 106, 106(a)(4).

11. Zoning ⚡741

Supreme Court will not sit as a "super-zoning commission."

12. Zoning ⚡702

Where question of whether proposed planned development was compatible with surrounding development was fairly debatable, board of county commissioners' denial of application for rezoning from agricultural district to planned development district was supported by some competent evidence, and thus the denial was not an abuse of discretion.

13. Zoning ⚡648, 672

Zoning ordinances, like other legislative enactments, are presumed valid, and one who challenges them has burden of proving beyond reasonable doubt that they are invalid.

14. Zoning ⚡27

Zoning ordinance is unconstitutional if it is not substantially related to public health, safety, or welfare.

15. Zoning ⚡672

Developer did not meet its burden of proof in his assertion that the zoning ordinance was unconstitutional, where ordinance zoned area in question for agricultural use and application for rezoning to planned development district was denied by board of county commissioners upon specific finding, based on fairly debatable evidence, that proposed rezoning was not in best interests of health, safety, welfare, and morals of citizens of county.

16. Constitutional Law ⚡278(1)

Zoning ordinance is unconstitutional as applied to landowner's property if it precludes the use of the property for any reasonable purpose and thus constitutes a confiscatory taking of property without due process of law.

17. Zoning ⚡684

In order to obtain rezoning to permit a use which a landowner seeks, he must prove that it is not possible to use and develop the property for any other use enumerated in the existing zoning.

18. Zoning ⚡648

Where record was replete with contrasts and contradictions on issue of whether developer could use and develop property for any use enumerated in existing zoning, which was for agriculture, developer, who sought rezoning to planned development district, did not meet its burden of proof beyond reasonable doubt that zoning ordinance as applied to it was unconstitutional.

19. Zoning ⚡684

Where present zoning of property was for agricultural use and developer sought rezoning to planned development district, developer failed to meet its high burden of proof in attempting to show that existing ordinance was unconstitutional as applied to it, where developer presented no evidence that there were no reasonable uses in the eight intervening zones.

20. Zoning ⚡164

Proof that it is not possible to use and develop land for any uses permitted in zones which are in between zone sought and existing zone is prerequisite to showing that property has been unconstitutionally confiscated under existing zoning.

21. Zoning ⚡38

Where developer was not deprived of any reasonable use of property by zoning ordinance, ordinance as applied to property in question was constitutional. Rules of Civil Procedure, rules 106, 106(a)(4).

22. Zoning ⚡164

Where application for rezoning of property from agricultural district to planned development district had been denied by board of county commissioners, developer who thereafter purchased the property and began process of appeals, had full and complete notice and knowledge of zoning restrictions on its property, and any hardship was self-inflicted.

Bradley, Campbell & Carney, Leo N. Bradley, Victor F. Boog, Golden, for plaintiff-appellant.

Patrick R. Mahan, County Atty., Gail E. Shields, Asst. County Atty., Golden, for defendant-appellee.

DAY, Justice.

We will refer to plaintiff-appellant as Ford and the Board of County Commissioners of Jefferson County as the Board. The latter denied Ford's application for rezoning. The district court upheld that decision. This appeal is from that judgment. We affirm.

I.

Ford's predecessor in title filed an application for rezoning from A–2 (Agricultural Two District) to P–D (Planned Development District) for approximately 23 acres located at the southwest corner of West Hampden Avenue and South Wadsworth Boulevard in Jefferson County. Ford was to develop and occupy the land. The plan was submitted first to the Jefferson County (Jeffco) planning commission. It approved the proposed planned development, subject to 17 restrictive recommendations of which, according to the record, Ford complied with only five. The Board denied the change.

Pursuant to C.R.C.P. 106(a)(4), review was sought in district court. While the matter was still pending, Ford acquired title to the property and was substituted as plaintiff.

A two-pronged challenge to the Board's action was launched in the district court. In the Rule 106 certiorari proceeding, it was claimed that the Board was estopped to deny the application because Ford had complied with recommendations of the planning commission on which its approval was predicated. As a second string to this bow Ford claimed that the Board was arbitrary, capricious and showed an abuse of discretion. A second claim sought a declaratory judgment that the existing zoning as applied to the property was an unconstitutional confiscation.

Trial was held in two phases. On certiorari the lower court reviewed only the record at the hearing before the Board. The constitutional question was accorded a complete trial *de novo*. At its conclusion, the district court affirmed the Board and held the zoning ordinance constitutional.

II.

The subject property is zoned A–2 (agricultural). The area at the time of the original zoning was generally undeveloped. Medium and high density residences have since been built, as have restricted commercial businesses.

The most extensive land use in the area is the 300 acre Academy Office Park, a multi-complex commercial use. However, that entire area is protected by extremely strict covenants, voluntarily imposed by the builder, which last until the year 2000. They are designed specifically to preserve an open green space motif. The Jefferson County Comprehensive Future Land Use Plan recommends low density residential and light restricted commercial uses for the area.

The planned development submitted by the Ford application would be a concentrated commercial and medium to high density residential use. An auto dealership would cover about eight acres. It would be buffered from the surrounding community by townhouses, which would cover approximately 13.5 acres. The entire combination development would be artfully landscaped. Ford argued that a heavy commercial use, planned as it is to blend with the area, would not be out of place. The Board came to a different conclusion.

III.

[1] We take up first the question of whether the Board is bound to grant the change. Ford cites Dillon Companies, Inc. v. Boulder, Colo., 515 P.2d 627 (1973), for the proposition that the Board is estopped

to deny its application for rezoning. We do not read *Dillon* as being that broad. In *Dillon* there were no findings of fact to support the city council's decision. *Dillon* also pointed out that a planned development application must meet all standards, procedures and conditions of a planned development ordinance.

[2] In addition to not implementing 12 of the planning commission's recommendations, Ford did not strictly comply with the Jeffco ordinance. Section 39-B and section 39-C-1 state in part that a planned development must be under unified control. The record reveals that *Ford* would handle the auto dealership and *Broker House,* which had a contract to purchase the residential site, would develop and sell the townhouses. That is separate, not unified, control.

Moreover, section 39-C-2 states in part that P-D parking, height, setback and area regulations shall be compatible with the surrounding development. The Board made a specific finding that the Ford proposal was "incompatible with the surrounding land uses at the present time." *See* Moore v. City of Boulder, 29 Colo.App. 248, 484 P.2d 134 (1971).

Ford argues additionally that the Jeffco ordinance mandates final compliance regulations and contends that the Board having failed to impose any final regulations, there was nothing remaining to satisfy. The resulting conclusion advanced is that Ford has met the county conditions by default and under the *Dillon* rule became entitled to the rezoning.

[3-5] Ford's thesis would require that any planned development proposal must automatically be granted by the Board, leaving to it only the power to issue final regulations. Then—merely by compliance—the plan would pass, *regardless* of whether the Board wants the design. Such bootstrapping is clearly obnoxious to the essence of planned development zoning. Planned development is not a catch-all. It is not supposed to inject in a neighborhood a use which would otherwise not be allowed. It should not usurp the discretionary function of the Board. Since Ford's application was denied no final regulations were necessary. This would be meaningless rhetoric, for there was nothing to comply with.

[6, 7] At the conclusion of extensive hearings, Ford requested the Board to inform it of whatever additional requirements and regulations were necessary in order to approve the application. This the Board refused to do. To act otherwise would be patent contract zoning, a concept held illegal in most states as an *ultra vires* bargaining away of the police power. 1 R. Anderson, American Law of Zoning §§ 8.-20-1.

[8] Thus, looking at the Jeffco statute as a whole, we cannot say that the rationale of *Dillon* applies in this case. The Board was not estopped to deny Ford its application for rezoning.

On the other phase of the certiorari review, Ford asserts that the district court erred in upholding the Board's arbitrary and capricious denial of the requested rezoning.

[9, 10] In order for a court to set aside a decision of an administrative body on certiorari review, there must be *no* competent evidence to support the decision. Board of County Commissioners v. Simmons, 177 Colo. 347, 494 P.2d 85 (1972); Marker v. Colorado Springs, 138 Colo. 485, 336 P.2d 305 (1959). The reviewing court is limited to what appeared of record, which in this case was substantial. It is obvious from the record that Ford has tried to propose an innovative planned development design. It is equally obvious that many others contest the feasibility of such a plan.

[11, 12] This Court will not sit as a "super-zoning commission." Garrett v. City of Littleton, 177 Colo. 167, 493 P.2d 370 (1972); Baum v. Denver, 147 Colo. 104, 363 P.2d 688 (1961). The question whether the proposed planned development was compatible with the surrounding development was fairly debatable. Radice v.

New York, 264 U.S. 292, 44 S.Ct. 325, 68 L.Ed. 690 (1923); *Simmons, supra.* Consequently, we cannot say that the zoning decision of the Board was supported by *no* competent evidence. In such a state of the record, it cannot be said there was a clear abuse of discretion.

IV.

Ford also asked for a declaratory judgment that the zoning ordinance as applied to its property is unconstitutional.

[13] Zoning ordinances—like other legislative enactments—are presumed valid. Ford has the burden of proving beyond a reasonable doubt that it is invalid. *Simmons, supra; Baum, supra.*

[14, 15] There are two methods to establish that a zoning ordinance is unconstitutional. First, it may be shown it is not substantially related to the public health, safety, or welfare. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303 (1926); City of Englewood v. Apostolic Christian Church, 146 Colo. 374, 362 P.2d 172 (1961). Relating to this, the Board made a specific finding that the "*rezoning* [was] not in the best interest of the health, safety, welfare and morals of the citizens of Jefferson County." As noted above, contentions regarding the Board's actions were fairly debatable. Thus, Ford has not met its burden of proof here.

[16–18] The second method is to show that the zoning ordinance precludes the use of Ford's property for *any* reasonable purpose. *Village of Euclid, supra*; Madis v. Higginson, 164 Colo. 320, 434 P.2d 705 (1967); *Baum, supra.* A trial *de novo* was held on this point. Considerable evidence and many witnesses were produced for both sides. The answers were far from uniform. Still, we do not feel that there has been a confiscatory taking of property from Ford without due process of law. True, whatever use is available is perhaps not the highest and best use. But that has never been the test. *Madis, supra.* We have held that in order to obtain rezoning to permit a use which the applicant seeks, he must prove that it is not possible to use and develop the property for *any* other use enumerated in the existing zoning. *Garrett, supra*; Wright v. Littleton, 174 Colo. 318, 483 P.2d 953 (1971); *Baum, supra.* The record is replete with contrasts and contradictions on this point. We cannot say as a matter of law that Ford met its burden of proof beyond a reasonable doubt.

[19, 20] Similarly, just because the land is unsuited for agricultural use does not mean the applicants can skip other intermediate zones up to planned development—the most advantageous for its purpose. Ford presented no evidence that there were no reasonable uses in approximately 8 intervening zones. Such proof is of crucial importance as a prerequisite that property is unconstitutionally confiscated. *Simmons, supra; Garrett, supra.* Without it, Ford failed to meet its high burden of proof.

[21] Upon finding that the landowners were not deprived of *any* reasonable use of their property by the zoning ordinance, the district court was perfectly justified in holding that the ordinance as applied to the property in question was constitutional.

[22] We note if there is hardship here it is self-inflicted. The application had been denied by the Board when Ford *thereafter* purchased the property and took up the burden of appeal through the courts. Thus, it had full and complete notice and knowledge. *Accord* Nopro Co. v. Cherry Hills Village, 180 Colo. 217, 504 P.2d 344 (1972); *Madis, supra.*

Judgment affirmed.

Henry duPont Ridgely of Ridgely & Ridgely, Dover, for defendant Town of Camden.

William S. Hudson of Hudson, Jones, Jaywork & Williams, Dover, for defendant Frank A. Robino, Inc.

LONGOBARDI, Vice Chancellor.

On November 6, 1979, David P. Buckson and Frank A. Robino, Inc. made an application to the Town Council of Camden to construct a subdivision of 88 townhouses on 9.671 acres of land. By letter dated December 26, 1979, the parties were advised by the Camden Town attorney that the application was subject to compliance with the town's zoning ordinance. On January 7, 1980, Buckson and Robino appeared at a Town Council meeting again offering the plan without having complied with applicable zoning regulations. The Council rejected the plan.

Through the winter and spring of 1980, the developers altered their plan and on June 23, 1980, a plan providing for 53 two-story townhouses was reviewed by the Planning Commission. One problem remained.

The Camden zoning ordinance required the developers to provide a minimum average of 7,500 square feet of open space per residential lot. The revised plan provided such an open space area but Buckson reserved the right to future use of that area rather than an outright, unencumbered dedication to its existence as "open space."

The Planning Commission recommended guarantees that the open space remain open. Buckson appealed this decision to the Town Council. Council upheld the Commission after a public hearing on August 18, 1980.

Buckson subsequently took the position that the Camden zoning ordinance, originally passed by the Town Council in December of 1975, was void because it was not passed in compliance with the requirements of 22 *Del.C.* § 304. That statute provides as follows:

> . . . no such regulations, restrictions or boundary shall become effective until after a public hearing in relation thereto, at which parties in interest and citizens shall have an opportunity to be heard. At least 15 days notice of the time and place of such hearing shall be published in an official paper or a paper of general circulation in such municipality.

In support of his argument, Buckson contends that an examination of the Council minutes for the relevant period indicates that Camden did not provide for a public hearing or for the necessary publication of the notice of the hearing. The Council countered that the ordinance was enacted pursuant to the provisions of the Camden Town Charter which only requires the posting of such ordinances in two public places. Unfortunately, no one can demonstrate compliance even with the Charter provisions.

Buckson then countered that he was prepared to litigate the invalidity of the zoning ordinance. Council, apparently alarmed at the prospects of litigation and the incidental expenses associated with it, entered into a "compromise" agreement with Buckson.

The "compromise" allows the developers to place 68 houses on 8.193 acres. Obviously, this is substantially different from the plan approved by Council in August of 1980. That plan would have allowed only 53 houses on 10.919 acres.

Subsequent to the "compromise" agreement, the Plaintiffs brought this action against the Defendants seeking an injunction against any compliance with the October 20th agreement. Defendant Buckson has moved for summary judgment asking this Court to determine, as a matter of law, that the Camden ordinance is, in fact, invalid and that the agreement between Camden and Buckson is valid. Plaintiffs have moved for summary judgment requesting that the Camden ordinance be deemed validly enacted, that the agreement between Buckson and Camden be deemed invalid and asking that Buckson be enjoined from building on the property in question until

proper approval has been determined and procedures followed.

The Plaintiffs have argued that Buckson should be estopped or barred by the doctrine of laches from challenging the validity of the Camden zoning ordinances. They insist that his initial compliance with the procedure established by the ordinance, *i.e.,* applying for building permits, going before the planning commission, demonstrated that he recognized the validity of the ordinance and only challenged it when it did not provide him with what he wanted.

[1, 2] An estoppel arises when a party, by his conduct or words, intentionally or unintentionally leads another, in reliance on such words or conduct, to change his position to his detriment. *Wilson v. American Insurance Company,* Del.Supr., 209 A.2d 902 (1965); see *Wolf v. Globe Liquor Co.,* Del. Supr., 103 A.2d 774 (1954). There is no basis on this record for finding that the Town of Camden in any way altered its position to its detriment due to Buckson's initial compliance with the procedure of obtaining approval of his plan.

[3, 4] The doctrine of laches is applicable when an individual's delay in making a claim works a disadvantage to another, as when an individual alters his position due to the delay. *McGinnes v. Department of Finance,* Del.Ch., 377 A.2d 16 (1977); *Bovay v. H.M. Byllesby & Co.,* Del.Ch., 12 A.2d 178 (1940). Additionally, it has been suggested that the individual who delays in asserting a claim must possess knowledge that his rights have in some way been affected. *Skouras v. Admiralty Enterprises, Inc.,* Del. Ch., 386 A.2d 674 (1978); *Elster v. American Airlines,* Del.Ch., 128 A.2d 801 (1957). In this case, there is no indication that Buckson was aware of any defects in the manner in which the Camden ordinance was adopted at the time he proceeded under the ordinance. There has been no demonstration, therefore, that there was a delay sufficient to establish laches by the Defendant Buckson because there is no showing that Buckson knew about the problems with the ordinance at the time he attempted to comply with it.

Under the provisions of Article II, Section 25 of the Delaware Constitution, the State Legislature clearly is empowered to delegate zoning authority to any political subdivision of the State. Section 25 provides:

> The General Assembly may enact laws under which municipalities and the County of Sussex and the County of Kent and the County of New Castle may adopt zoning ordinances, laws or rules limiting and restricting to specified districts and regulating therein buildings and structures according to their construction and the nature and extent of their use, as well as the use to be made of land in such districts for other than agricultural purposes; and the exercise of such authority shall be deemed to be within the police power of the State.

This constitutional provision is the source of any authority to zone which is possessed by the Town of Camden. Such authority was delegated to Camden under the terms of the statute which established the town charter in May, 1941. 43 *Del.Laws* Ch. 159. Under the terms of this charter, section 28, it was provided that the Camden Town Council:

> . . . may adopt zoning ordinances limiting and specifying districts and regulating thereon buildings and structures according to their construction and according to the nature and extent of the business to be carried on therein.
>
> The powers to be exercised under and by virtue of this provision shall be deemed to have been exercised under the police power and for the general welfare of the inhabitants.

[5] The exercise of zoning authority under the terms of both the charter and the provisions of Article II, Section 25 of the Constitution of the State of Delaware is designed for the protection of the general welfare and benefit of the entire public.

The Town of Camden is empowered by section 32 of its charter to enact ordinances

r resolutions on any subject within its owers. This would include zoning ordiances. Under paragraph 2 of section 32, owever, it is provided that "All ordinances r resolutions of general character relating ɔ the government of the Town shall not be f force and effect until the same shall have een posted in at least two public places in 'own." In 1975, the Town Council purportd to enact a zoning ordinance under secion 28 of its charter. Under this ordiance, the minimum average open space per esidential unit was established as 7,500 ɿuare feet. Apparently, the Council pubcly posted the proposed ordinance for thiry days prior to the adoption in at least one ublic place then adopted the ordinance on)ecember 1, 1975. Under these circumtances, there are questions concerning the fficacy of that statute.

Plaintiffs, who argue for the validity of he zoning ordinance, admit that there is no lear demonstration that the Council in fact osted the ordinance in two public places.)nly one public posting can be verified. 'laintiffs insist that this defect is not necssarily fatal.

[6, 7] The question of invalidity really prings from the failure of the Camden ouncil to follow the procedures provided y 22 *Del.C.* Ch. 3. This is so because the own charter is merely the font of delegatd legislative authority to zone while Title 2, Chapter 3 specifies the procedures and rerequisites which must be followed under ate law to make the exercise of that auıority effective. Admittedly, the Town ıarter was promulgated subsequent to the ıitial enactment of 22 *Del.C.* Ch. 3. Howver, the charter provision on zoning is the egislative grant to zone while 22 *Del.C.* h. 3 provides the specific prerequisites for nplementing that power. The charter prosion relative to the enactment of any or l ordinances is not inconsistent in this espect with section 302 but only suppleental. Under 22 *Del.C.* Ch. 3, if the muicipality does zone by district, section 304 quires "at least 15 days notice" prior to ıe holding of a public hearing on the plan and provides for publication of this notice in a local paper before the ordinance can take effect. Clearly, this requirement was never satisfied by the Town of Camden. Just as clearly, Camden did not comply with its charter provision requiring the posting of proposed ordinances in two public places.

The fact that the Town charter was enacted after the initial enactment of 22 *Del.C.* Ch. 3 is not evidence of a legislative intent to excuse Camden from complying with the purpose or prerequisites of Chapter 3. Nothing in the charter concerning the implementation of zoning ordinances is inconsistent with Chapter 3. It is only that Chapter 3 provides additional protection for the public in the form of notice and opportunity to be heard.

[8] The two statutes, therefore, should be construed together so that effect is given to every provision because there is no irreconcilable difference between them. *Green v. County Council of Sussex Cty.,* Del.Ch., 415 A.2d 481, 484 (1980), *aff'd.,* Del.Supr., 447 A.2d 1179 (1982); *Sands: Sutherland Statutory Construction,* 4th Ed., § 5102. Camden could have complied with the notice requirements of 22 *Del.C.* § 304 and with the public posting requirements of section 38(2) of its charter.

[9, 10] Plaintiffs suggest that there is a conclusive presumption that the ordinance was properly enacted and that the ordinance cannot be challenged as defective years after it has been accepted and relied on by the public. The authorities they cite for this proposition, however, deal with situations in which (1) the party challenging the statute has not in fact demonstrated the defect in enactment, or (2) where there has been such a delay, generally between ten to twenty years, in challenging the statute, that the Court felt it inequitable to undermine the reliance placed on the statute by the public. See *Taylor v. Schlemmer,* Mo. Supr., 353 Mo. 687, 183 S.W.2d 913 (1944); *Struyk v. Samuel Braen's Sons,* N.J.Super., 17 N.J.Super. 1, 85 A.2d 279 (1951); *Northville Area N.–P.H. Corp. v. City of Walled*

Lake, Mich.Ct.App., 43 Mich.App. 424, 204 N.W.2d 274 (1972); *Edel v. Filer Township, Manistee County,* Mich.Ct.App., 49 Mich. App. 210, 211 N.W.2d 547 (1973). In the present case, there is no doubt that the Town of Camden failed to comply with 22 *Del.C.* Ch. 3. Moreover, the five years that passed before this challenge was made to the ordinance is not a sufficient period to bar challenge to the statute under the totality of circumstances in this case. This is particularly so since there is no question that the statutory prerequisites were not satisfied and, therefore, the presumption of validity has been effectively countered. *Cf.* 82 C.J.S. *Statutes* §§ 82–83. Council may not ignore statutorily mandated procedures. *Green v. County Council of Sussex Cty.,* 415 A.2d 481, citing *Welldon v. Capano Realty, Inc.,* Del.Ch., 225 A.2d 486 (1966) and *Green v. County Planning & Zon. Com'n of Sussex Cty.,* Del.Ch., 340 A.2d 852 (1974), *aff'd.,* without opinion, Del.Supr., 344 A.2d 386 (1975).

[11] The Defendants have argued that the Town of Camden was acting properly in entering into a contract with Buckson. The "compromise", they contend, was an appropriate exercise of Camden's inherent authority to compromise claims against it. See 17 McQuillen, *Municipal Corporation,* 3rd Ed., § 48.17. The Court cannot agree, however, that the contract between these parties is anything but a private agreement to create a particular zoning district for the benefit of Buckson. The agreement itself refers to the plot plan submitted in November, 1979, as the basis for the street plan and layout; to Town subdivision regulations which were deemed applicable; to the developer's responsibility for on-site improvements in particular areas; to the agreement between the parties that the Camden Commons plot plan attached to the agreement is to be the plan accepted except for "minor or insignificant adjustments in property lines and street locations" as required. (See ¶ 18 of the agreement.) Overall, the agreement meets, in this Court's view, the legal definition of zoning, that is, the division of a community into zones or districts. See 82 Am.Jur.2d *Zoning & Planning* § 79; Anderson, *American Law of Zoning* § 9.01 (2nd Ed.); see also *Santmyers v. Town of Oyster Bay,* N.Y.Supr., 10 Misc.2d 614, 169 N.Y.S.2d 959 (1957). This agreement, in fact, creates a cognizable district in which the erection "construction . . . or use of buildings, structures or land" is determined. See 22 *Del.C.* § 303. The fact that only one district was created does not make it any less an exercise of zoning authority. The Town Council "may divide the municipality into districts of such number, shape and area as may deemed best. . . ." *Id.* Here, it chose to create only one.

[12, 13] While there is no doubt about the Town's ability to compromise claims, there is no question that the Town can only compromise particular types of claims like those "claims which exist in its favor or against it and which arise out of a subject matter concerning which the municipality has the general power to contract." *Anno-Municipal Claims—Power to Compromise,* 15 A.L.R.2d 1359. It may not, under the guise of compromise, impair a public duty owed by it. 56 Am.Jur.2d *Municipal Corporation, Etc.* § 806. By entering into the contract in question, Camden bargained away part of its zoning power to a private citizen. It simply does not possess the authority to normally contract such authority and the fact that this agreement was in furtherance of a compromise, an attempt to avoid Buckson's threats to sue, does not make it any more valid. See 82 Am.Jur.2d *Zoning & Planning* § 17; see *Andgar Associates, Inc. v. Board of Zoning Appeals,* N.Y.Supr., 30 A.D.2d 672, 291 N.Y.S.2d 991 (1968). As aptly put in one case concerning "contract zoning", that is, the contracting by a zoning authority to zone for the benefit of a private landowner:

> Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise con-

trolled by the considerations which enter into the law of contracts. The use restriction must needs have general application. The power may not be exerted to serve private interests merely, nor may the principle be subverted to that end. *V.F. Zahodiakin Eng. Corp. v. Zoning Board of Adjust.*, N.J.Supr., 8 N.J. 386, 86 A.2d 127, 131 (1952).

[14, 15] When possible, cases should be disposed of by summary judgment for the result is a prompt and economical way of disposing of litigation. *Davis v. University of Delaware,* Del.Supr., 240 A.2d 583 (1968). Summary judgment will be granted when there is no reasonable indication that a material issue of fact exists and the moving party is entitled to judgment as a matter of law. See *Tew v. Sun Oil Co.,* Del.Super., 407 A.2d 240 (1979); see also, *Vanaman v. Milford Memorial Hospital, Inc.,* Del.Supr., 272 A.2d 718 (1970). In this case, the parties have stipulated at oral argument that there are no additional facts that could be produced on the issue of how the zoning statute was enacted. As a matter of fact, the parties have agreed that there is no factual dispute on the evidence relative to that issue. On that basis, the exercise of deciding the motion for summary judgment was commenced.

For the foregoing reasons, the Defendants' motion for summary judgment is granted to the extent that the Camden zoning ordinance is determined to have been invalidly enacted but denied to the extent that it requests a determination that the contractual agreement between Camden and Buckson is valid. Plaintiffs' motion is granted in that the contractual agreement is deemed an invalid ultra vires exercise of municipal authority.

[16, 17] The Plaintiffs' claim for injunctive relief has been placed before the Court in the context of a motion for summary judgment. The question can be decided as a matter of law since no genuine issues of fact have been found and nothing more is to be submitted in support of the motion. To demonstrate a right to injunctive relief, the moving party must show (1) irreparable harm; (2) a likelihood of success on the merits, and (3) that the injury Plaintiffs will incur if the injunction is denied outweighs any injury to the nonmovant if the injunction is granted. *Gimbel v. Signal Companies, Inc.*, Del.Ch., 316 A.2d 599, 602 (1974), *aff'd.,* Del.Supr., 316 A.2d 619 (1974). Based on the entire analysis above, the Plaintiffs have demonstrated more than a likelihood of success on the merits of their case. They have, in fact, prevailed.

Due to the imminent injury to both (1) the policies for zoning underlying 22 *Del.C.* Ch. 3 and the Camden charter, and (2) the interests of adjoining landowners, irreparable injury has been shown. A balancing of the equities shows that Buckson is not seriously injured since he has recourse to the Camden authorities like anybody else for approval of a new plan. Buckson is, therefore, currently enjoined from building on his property. The injunction will be effective until such time as he receives a proper approval of a plan submitted and reviewed under a validly enacted zoning ordinance.

IT IS SO ORDERED.

Alan G. EMSLEY, Petitioner,

v.

Patricia G. EMSLEY (Bellezza-Aures), Respondent.

Family Court of Delaware, New Castle County.

Submitted: April 29, 1983.

Decided: July 21, 1983.

Mother petitioned for child support from father. The Family Court, Newcastle County, Poppiti, J., held that: (1) amount

paid for premiums on life insurance policies naming children as beneficiaries, required by court order, could be deducted from income used to compute amount of child support to be paid; (2) travel expenses of children relating to visitation, expenses which were paid for by father, could not be deducted from his income for purposes of determining child support; (3) business losses which involved no out-of-pocket expenditures could not be deducted from computation of income used to determine amount of child support; and (4) mother was entitled to attorney fees.

So ordered.

1. Parent and Child ⇨3.1(8)

Although in certain cases inclusion of capital gains or losses may be appropriate in computation of income for purposes of determining amount of child support to be paid, family court recognizes agreements of parties to exclude them from calculations.

2. Parent and Child ⇨3.3(7)

Amounts paid by spouses for premiums on life insurance policies required to be maintained for children should be deducted from income for purposes of determining amount of child support to be paid.

3. Parent and Child ⇨3.3(7)

While, ordinarily, the only allowable deductions from gross income for child support purposes are taxes, FICA, and other required or necessary expenses or payments, if the deductions claimed are required by law or by employer or directly benefit the children, they may be considered.

4. Parent and Child ⇨3.3(7)

Key to whether payments by party may be deducted from gross income for purposes of determining child support is whether claimed expenditures reasonably and directly benefit the children.

5. Parent and Child ⇨3.3(7)

Travel expenses of children relating to visitation, expenses which were paid for by father, could not be deducted from father's income for purposes of determining amount of child support to be paid.

6. Parent and Child ⇨3.1(1)

An individual's child support obligation comes first and may reduce one's ability to acquire and hold marketable assets, not the other way around.

7. Parent and Child ⇨3.3(7)

Family court is not restricted to tax law determinations as to what necessary and proper business expenses are deducted from income for purposes of determir amount of child support to be paid, ε purposes and policies of Internal Revenue Code are far different from those of statutes pertaining to child support. 13 Del.C. § 501 et seq.

8. Parent and Child ⇨3.3(9)

Order entered regarding arrears in child support payments may be in form of judgment recordable and enforceable through the Superior Court.

9. Parent and Child ⇨3.3(7)

Since mother's application for award of attorney fees was for fees incurred in petitioning for child support, court did not have to find that mother lacked available funds to engage and pay counsel but, rather, support obligor could be ordered to pay fees in order that neither estate of children nor estate of mother would be depleted by of legal action.

10. Parent and Child ⇨3.3(7)

In proceeding on petition for child support, attorney fees for representation before master and court, as well as costs, could be awarded to mother, since positions taken by father regarding business losses and visitation expenses were previously addressed by family court, and mother was substantially successful before master and before court regarding business loss issue.

11. Parent and Child ⇨3.3(7)

Order entered regarding attorney fees in child support proceeding may be in form

paint spray; Hardin's Bakeries, Inc., v. Ranager, 1953, 217 Miss. 463, 64 So.2d 705, holding that a baker's disability, caused by an allergy resulting from his contact with a mitten he was required to use in handling hot pans of bread as they came from the oven, resulted from "accidental injury", and cases therein cited; Schneider, Workmen's Compensation, Vol. 4, Sec. 1328; Larson, Workmen's Compensation, Vol. 1, Sec. 12.20.

Under the facts, as found by both the Deputy Commissioner and the Full Commission, claimant's pre-existing tubercular condition was accelerated or aggravated by his continued work and failure to have care and rest, *together with his inhalation of dust and fumes to which the public generally is not ordinarily exposed.* There was thus found to be a direct causal connection between claimant's injury and the exposure to a danger not ordinarily risked by the public (the inhalation of dust and fumes) even though this was not found to be the sole cause of his disability.

[2] We re-affirm the rule of Alexander Orr, Jr., Inc., v. Florida Industrial Commission, supra, 176 So. 172, that "excessive exposure may be found to have been the direct cause of the injury, though operating upon other conditions of common exposure", and we agree with the decisions from other jurisdictions, cited above, holding in effect that the fundamentally accidental nature of the injury is not altered by the fact that, instead of a single occurrence, it is the cumulative effect of the inhalation of dust and fumes to which a claimant is peculiarly susceptible that accelerates a claimant's pre-existing disability.

The claimant in the instant case is entitled to an award of compensation for that proportion of the acceleration or aggravation of his tubercular condition that is reasonably attributable to his inhalation of dust and fumes in the course of his employment. Accordingly, the order of the Full Commission is quashed with directions to remand the cause to the Deputy Commissioner for the entry of such an award upon an appropriate finding of fact.

It is so ordered.

TERRELL, C. J., and DREW and THORNAL, JJ., concur.

Fred HARTNETT, as Mayor and Commissioner of the City of Coral Gables, Florida, W. Keith Phillips, Lucille Neher, Robert L. Searle and John M. Montgomery, Members of the City Commission in and for the City of Coral Gables, Florida, Appellants,

v.

W. P. AUSTIN and Wilmeth F. Austin, his wife, Appellees.

Supreme Court of Florida, en Banc.

Dec. 5, 1956.

Action attacking validity of zoning ordinance. The Circuit Court for Dade County, Grady L. Crawford, J., determined that the ordinance was invalid. Defendants appealed. The Supreme Court, Thornal, J., held that where effectiveness of provisions of municipal zoning ordinance was conditioned upon necessity for subsequent execution of contract by municipality with private parties, such ordinance was invalid, because of absence of required degree of clarity and certainty.

Affirmed.

Roberts, J., dissented.

1. Municipal Corporations ⚷111(1)

A municipal ordinance should be clear, definite, and certain in its terms.

2. Municipal Corporations ⚷111(1)

An ordinance which is so vague that its precise meaning cannot be ascertained is invalid, even though it may otherwise be constitutional.

3. Municipal Corporations ⚷601(7)

Although authority to exercise power to enact zoning ordinances, when delegated by the state, is generally recognized, nevertheless, the restriction on property rights must be declared as a rule of law in the ordinance and not left to the uncertainty of proof by extrinsic evidence whether parol or written.

4. Municipal Corporations ⚷601(15)

A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and property owner.

5. Municipal Corporations ⚷589

A municipality cannot contract away the exercise of its police powers.

6. Municipal Corporations ⚷601(15)

When a zoning ordinance is amended by changing the classification of particular property, such amendment must be justified by change in the use value of the property involved.

7. Municipal Corporations ⚷111(1)

Where effectiveness of municipal zoning ordinance was conditioned upon necessity for subsequent execution of a contract by municipality with private parties, such ordinance lacked degree of clarity and certainty required of municipal legislation and was invalid.

8. Municipal Corporations ⚷601(5)

In exercising zoning powers a municipality must deal with well-defined classes of uses.

9. Municipal Corporations ⚷106(1)

Adoption of an ordinance is the exercise of municipal legislative power, and in the exercise of such a function city cannot legislate by contract.

10. Municipal Corporations ⚷645

Plaintiffs, who occupied homes immediately across street from proposed parking lot authorized by change in zoning ordinance approving such commercial development, and who relied on existing zoning conditions when they bought their homes, had a right to continuation of those conditions and could maintain suit to enforce them.

Edward L. Semple, Miami, for appellants.

Gustafson, Persandi & Vernis, Coral Gables, and Anderson & Nadeau, Miami, for appellees.

M. L. Mershon and W. O. Mehrtens and Evans, Mershon, Sawyer, Johnston & Simmons, Miami, amici curiae.

THORNAL, Justice.

Appellants, Hartnett and others, who were defendants below, seek reversal of a final decree holding a zoning ordinance of the City of Coral Gables to be invalid.

Several points are assigned for reversal. The determining question, however, is the validity of a zoning ordinance which is made contingent upon the subsequent execution of a contract between the city and private parties.

Burdines, Inc., alleging itself to be the holder of an option to purchase the property in question, requested the City Commission to change the zoning classification of the property from single-family residential use to commercial use. The change was necessary in order to enable Burdines to construct a large shopping center with an

adjoining parking lot. The City Commission, after hearing, adopted Ordinance No. 897 undertaking to amend its original zoning ordinance which was numbered 271.

Ordinance 897, which is here under attack, provided that the requested change should be made. However, the ordinance expressly provided that "all of the re-zoning is subject to and dependent upon the full and complete observance of the limitations, restrictions and other requirements imposed as hereinafter set forth". Following this provision a number of contingencies were prescribed as conditions to the effectiveness of the amendatory ordinance. In summary these conditions were: (1) a "Bay Point type wall" shall be placed around the perimeter of the property not less than 40 feet inside the property line abutting certain streets; (2) the 40-foot strip shall at all times be kept and maintained in a condition prescribed by the City Commission at the expense of the property owner; (3) suitable contracts shall be entered into between the city and the property owner covering the above requirements and also providing for control of lights on the premises in order to bring about "as little glare and disturbance" as possible to the people in the neighborhood (this expense was to be borne by the property owner); (4) the property owner should furnish and pay for adequate police protection within the re-zoned area; (5) to submit to the City Commission for approvel plans and specifications of any proposed building; and (6) the property owner shall not open access to certain abutting streets.

The appellees, Austin, who owned and occupied a home across the street from the area proposed to be re-zoned, filed a complaint seeking an injunction against the enforcement of the ordinance. The Chancellor agreed that the ordinance was invalid and permanently enjoined its enforcement. Reversal of this decree is now sought.

Appellants contend that the ordinance was a valid exercise of the zoning powers of the city; that in the absence of a clear showing as to invalidity, the ordinance should be upheld; that at most, need for the change in the zoning is "fairly debatable" and that therefore the decision of the City Commission should not be disturbed.

Appellees contend that the ordinance is clearly invalid; that they purchased their property in reliance upon the then-existing zoning ordinance; that they have a right to a continuance of the then-existing regulations in the absence of a showing of a change in the area that justifies the amendment; that there has been no such showing, and that further, the ordinance by its very terms is made contingent upon the subsequent execution of a contract with private parties and this results in a degree of indefiniteness and uncertainty that destroys the ordinance as a valid municipal enactment.

By very able briefs, the parties have raised for our consideration numerous questions. The point which we consider fatal to the ordinance disposes of the necessity to discuss all of the incidental questions.

[1, 2] It is a rule long recognized by the precedents that a municipal ordinance should be clear, definite and certain in its terms. An ordinance which is so vague that its precise meaning cannot be ascertained is invalid, even though it may otherwise be constitutional. The reason for the rule is the necessity for notice to those affected by the operation and effect of the ordinance. The provisions of a municipal ordinance which conditions its effectiveness upon the necessity for the subsequent execution of a contract with private parties such as was done in the case at bar cannot be held to provide the degree of clarity and certainty that is required of municipal legislation. See McQuillan on Municipal Corporations, 3d Ed., Vol. 5, Sec. 15.24.

The above announced rule is particularly applicable to the exercise of the zoning power which is an aspect of the police power.

[3] The above announced rule is particularly applicable to the exercise of the zoning power which is an aspect of the police power. While the authority to exercise this power, when delegated by the State, is generally recognized, nevertheless, the restriction on property rights must be declared as a rule of law in the ordinance and not left to the uncertainty of proof by extrinsic evidence whether parol or written. Johnson v. City of Huntsville, 1947, 249 Ala. 36, 29 So.2d 342.

[4–6] A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner. Such collateral agreements have been held void in all of the cases to which we have been referred. Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224; V. F. Zahodiakin Eng. Corp. v. Zoning Board of Adjust., 8 N.J. 386, 86 A.2d 127; Houston Petroleum Co. v. Automotive Prod. C. Ass'n, 9 N.J. 122, 87 A.2d 319; Rathkopf on The Law of Zoning and Planning, 3d Ed., Vol. 2, p. 392. Any contrary rule would condone a violation of the long established principle that a municipality cannot contract away the exercise of its police powers. When a zoning ordinance is amended by changing the classification of particular property, such amendment must be justified by a change in the use value of the property involved.

[7] We are not here receding in any fashion from our established rule that if the need for a change in a zoning ordinance is "fairly debatable" the decision of the governing authority will be given the benefit of the doubt. Here the ordinance expressly recognized that the change was justifiable *only:* (1) *if* the Bay Point Wall was built; (2) *if* there was a 40-foot set-back; (3) *if* the set-back area was landscaped and maintained; (4) *if* surrounding property owners were protected against glare and disturbance; and (5) *if* the property owner paid for police protection. All of these "ifs" were to be included in a proposed collateral private contract to be executed in the future. If the City Commission, after appropriate hearing, had determined that the highest and best use value of the land had changed from residential to commercial, then the "fairly debatable" rule might have a sphere of applicability. This was not done.

[8] In exercising its zoning powers the municipality must deal with well-defined classes of uses. If each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse. The residential owner would never know when he was protected against commercial encroachment. The commercial establishments on "Main Street" would never know when they had protection against inroads by smoke and noise producing industries. This is so because all genuine standards would have been eliminated from the zoning ordinance. The zoning classifications of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity. Both the benefits of and reasons for a well-ordered comprehensive zoning scheme would be eliminated.

[9] The adoption of an ordinance is the exercise of municipal legislative power. In the exercise of this governmental function a city cannot legislate by contract. If it could, then each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body. Such is certainly not consonant with our notion of government by rule of law that affects alike all similarly conditioned.

This opinion is not to be construed as being adversely critical of the policy adopted by appellants in this instance. Conceivably, if effectuated, the plan might re-

dound to the economic benefit of the community. We have dealt here solely with a question of municipal power, not policy. When the nub of the problem is isolated and subjected to the criterion of municipal power to act in the manner here revealed, we are compelled to reach the conclusion which we here announce. We find no authorities to the contrary.

[10] We encounter no difficulty in concluding that the appellees were entitled to bring the suit. They occupied their homes immediately across the street from the proposed parking area. They relied on the existing zoning conditions when they bought their homes. They had a right to a continuation of those conditions in the absence of a showing that the change requisite to an amendment had taken place. They allege that the contemplated change would damage them and that it was contrary to the general welfare and totally unjustified by existing conditions. This gave them a status as parties entitled to come into court to seek relief. True their rights were subject to the power of the city to amend the ordinance on the basis of a proper showing. Nonetheless, they have a right to insist that the showing be made.

We point out in passing that the applicant Burdines was not appealing to a Board of Adjustment for a variance on the basis of any hardship. They were seeking an outright change in the zoning ordinance by amendment. In this regard they were mere optionees of the property. Not being owners thereof, they would hardly have any standing before a Board of Adjustment on the basis of an alleged hardship. What we have here held might not be applicable to a proper application for a variance by an owner based on hardship. This is a point which we are not called upon to decide. For limitations on the authority to "amend" under the guise of a "variance" see Yolkey on Zoning Law and Practice, 2d Ed., Sec. 140, and many cases there cited.

As pointed out above, our solution to the vital question discussed disposes of the controversy. We deem it unnecessary to prolong our discussion by delving into the other points raised.

The Chancellor ruled correctly in holding the ordinance invalid and his decree is—

Affirmed.

DREW, C. J., TERRELL and O'CONNELL, JJ., and WALKER, Associate Justice, concur.

ROBERTS, J., dissents.

Edise M. THOMPSON, Appellant,

v.

Edmund B. THOMPSON, Appellee.

Supreme Court of Florida,

Special Division A.

Feb. 27, 1957.

Proceedings under Uniform Reciprocal Enforcement of Support Law Act by wife, who had been awarded $20 per week for alimony and support of her minor child by divorce decree of the Circuit Court of Volusia County, but who was a resident of Connecticut at the time of proceedings. The Circuit Court, Duval County, Claude Ogilvie, J., entered order of dismissal and wife appealed. The Supreme Court, Roberts, J., held that since the Act was designed to provide a remedy entirely separate from and independent of any remedy existing under other applicable provisions of law, the Circuit Court of Duval County, the place of ex-husband's residence had jurisdiction of the proceedings and could enforce the duty of support decreed by a sister county.

Reversed and remanded.

1. Judgment ⚷585(5)

Res judicata is not a defense in a subsequent action where the law under which the first judgment was obtained is different from that applicable to the second action.

2. Husband and Wife ⚷303, 315

Parent and Child ⚷3(3)

While the purpose of the 1953 Florida Uniform Support of Dependents Law was to secure support for "dependent wives and children" only, the 1955 Uniform Reciprocal Enforcement of Support Law applies to any persons to whom a duty of support is owed, and judgment of dismissal under 1953 Act was not res judicata on proceedings brought under 1955 Act. F.S.A. §§ 88.011 et seq., 88.031(6); Acts 1953, c. 27996, § 1 et seq.

3. Husband and Wife ⚷303

Parent and Child ⚷3(3)

The Uniform Reciprocal Enforcement of Support Law was intended to provide a simplified two-state procedure by which the obligor's duty to support an obligee residing in another state may be enforced expeditiously and with a minimum of expense to the obligee. F.S.A. §§ 88.011 et seq., 88.041, 88.281

4. Husband and Wife ⚷308

Parent and Child ⚷3(3)

Where wife had obtained divorce in Volusia County, Florida, but later became a resident of Connecticut and brought proceedings under Connecticut law and 1955 Uniform Reciprocal Enforcement of Support Law, which by its terms was designed to provide a remedy entirely separate from and independent of any remedy existing under other applicable provisions of law, the Circuit Court of Duval County, the place of ex-husband's residence had jurisdiction of the proceedings and could enforce the duty of support decreed in the divorce proceedings by a sister county. F.S.A. §§ 88.011 et seq., 88.041, 88.281.

Richard W. Ervin, Atty. Gen., and Reeves Bowen, Asst. Atty. Gen., for appellant.

Joseph C. Black, Jacksonville, for appellee.

ROBERTS, Justice.

This is an appeal from an order entered in a proceeding brought under the Uniform Reciprocal Enforcement of Support Law, Ch. 29901, Acts of 1955, appearing as Ch. 88, Fla.Stat.1955, F.S.A. (the "1955 Florida Act" hereafter).

The facts are not controverted and are as follows: the appellant and the appellee were divorced in 1953 by a decree of the Circuit Court of Volusia County, Florida, the decree providing for the payment to the appellant wife of $20 per week for alimony and support of the minor child of the parties pursuant to an agreement of the parties. The appellant is a resident of the State of Connecticut and the appellee resides in Jacksonville, Duval County, Florida. Connecticut has a Uniform Reci[illegible] Enforcement of Support Law, Ch. [illegible] Conn.Gen.Stat., 1953 Supp. (referred hereafter as "the Connecticut Law") substantially similar to the 1955 Florida Act, supra.

In 1954 the appellant sought to utilize the provisions of the Connecticut Law and the Florida Uniform Support of Dependents Law, Ch. 27996, Acts of 1953 (then in effect but since repealed by the 1955 Florida Act, supra), to enforce the appellee's duty of support decreed by the 1953 Volusia County divorce decree. Her petition was referred by the Connecticut court to the Circuit Court of Duval County (the place of appellee's residence) and was by

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:RIES

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ınd dismiss the suit.

:TITION TO REHEAR

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Glens Falls Insurance
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in this case; and once
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reached by the Court. None of these come within the purview of the petition to rehear. Rule 32 provides in part:

> "A rehearing will be refused where no new argument is made, and no new authority adduced, and no material fact is pointed out as overlooked."

As we observed in Sullivan v. Harpeth Development Corporation, 218 Tenn. 107, 401 S.W.2d 195, 199 [1966]:

> "Now, the office of petition to rehear is to call to the attention of the Court matters overlooked; not to re-argue those things which the losing party supposes were improperly decided, after the Court has given the same full consideration. This Court has said, and says again, that a petition for a rehearing should never be used for the purpose of re-arguing the case on the points already considered and determined; unless some new and decisive authority has been discovered, which was overlooked by this Court."

The burden of proof is of concern to the appellants. They admit they had the burden of proving wilful intentional conduct by the deceased under Section 50–910, T.C.A. On the issue of whether the original injury was the proximate cause of the subsequent death of plaintiff-appellee's husband, appellants insist the burden should have been cast upon the plaintiff; however, as we held in our opinion, the evidence reveals that the death of the deceased directly resulted from his on-the-job injury. Defendants argued that his conduct amounted to an "independent intervening cause", the burden of proof of which was upon the appellants, but which they failed to carry.

The petition to rehear is denied.

DYER, C. J., CHATTIN, J., and LEECH, Special Justice, concur.

FONES, J., dissents.

Odis F. HAYMON and Clark W. Taylor, Complainants, Appellants,

v.

CITY OF CHATTANOOGA et al.

Court of Appeals of Tennessee, Eastern Section.

Nov. 23, 1973.

Certiorari Denied by Supreme Court Feb. 4, 1974.

Owners of apartment building brought an action against city, its mayor, and its commissioners to enjoin the city from enforcing a stop-work order against the construction of more apartments being added to the existing building. The Chancery Court, Knox County, Herschel P. Franks, C., dismissed the action and the apartment owners appealed. The Court of Appeals, McAmis, Special Judge, held that where the owners' predecessors had entered into a covenant with board of zoning appeals that if board would rezone the land from R-2 to R-3, the owners would maintain a buffer zone of 200 feet between apartments and the nearest property owner and the owners, without knowledge of the covenant, obtained amendment to zoning ordinance, enacted pursuant to the covenant, reducing the buffer zone to 100 feet, the covenant and the ordinance were void as against public policy but that the owners who had access to the recorded covenant and who had expended $35,000 in planning new apartments were not entitled to erect the apartments on the basis of building permit issued under authority of the ordinance or on the basis of equitable estoppel.

Affirmed.

1. Zoning ⚿160

Where owners of land entered into a covenant with board of zoning appeals that if the board would rezone the land from R–2 to R–3, the owners would maintain a buffer zone of 200 feet between apart-

ments on the land and the nearest property owner and subsequent owners, without knowledge of the covenant, obtained amendment to zoning ordinance reducing the buffer zone to 100 feet, the covenant, the ordinance enacted in consideration thereof, and the amending ordinance were void as against public policy as was building permit issued to the subsequent owners.

2. Contracts ⚷126

Contracts made for the purpose of unduly controlling or affecting the exercise of legislative, administrative and judicial functions, are opposed to public policy.

3. Municipal Corporations ⚷621

A building permit is not a contract and may be changed or entirely revoked even though based upon valuable consideration if necessary in the exercise of the police power.

4. Estoppel ⚷54

As a general rule it is essential to the application of the principle of equitable estoppel that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the state of facts, but was also destitute of any convenient and available means of acquiring the knowledge, and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel.

5. Estoppel ⚷62.1

The doctrine of estoppel generally does not apply to acts of public authorities.

6. Estoppel ⚷62.4

Even though landowners had expended $35,000 in planning and laying foundations of new apartment building in reliance on building permit issued on the basis of ordinance amending prior ordinance, which had been passed in consideration of previous owners' covenant of record to maintain a buffer zone between their apartment building and the nearest property owner, where building inspector had indicated that there might be a covenant restricting the erection of the apartments in space between existing apartments and other property, the owners had at least constructive notice of the covenant and city was not estopped from revoking the permit.

Shattuck & Payne, Chattanooga, for appellants.

Eugene N. Collins City Attorney, and Randall L. Nelson, Chattanooga, for appellees.

OPINION

McAMIS, Special Judge.

Odis F. Haymon and Clark W. Taylor, owners of an apartment known as Chateau Royale, brought this action in the Chancery Court of Hamilton County against the City of Chattanooga, its Mayor and its Commissioners to enjoin the City from enforcing a stop-work order against the construction of twenty-eight apartments which complainants were in the process of adding to the existing apartment.

Defendants answered the bill asserting that at a time when the land in question was zoned R-2 complainants' predecessors in title appeared before the Board of Zoning Appeals and entered into an agreement to execute a covenant, to run for a period of 25 years, that, if the Board would re-zone the property R-3, a buffer zone of vacant property 200 feet in width would be left between the apartment and the nearest property owner; that this covenant was to run with the land and bind subsequent owners not to build apartments on the buffer strip; that such a covenant was duly executed and placed of record in the Office of the Register of Deeds for Hamilton County and has ever since remained of record and that in 1963, acting on this covenant, the Board, over the objection of neighboring property owners, after two hearings, re-zoned the property R-3.

Nothing further was done to develop the property until after it was purchased by complainants. Some time prior to 1971, complainants constructed one hundred apartments on the land, leaving intact and unimproved the buffer strip 200 feet in width.

On May 25, 1971, complainants had the title searched professionally but the covenant for some reason was not discovered. Ignoring and possibly being ignorant of the covenant except that they were advised by the building inspector that there might be such a covenant in existence, complainants made application to the Board to reduce the buffer strip to 100 feet to permit the construction of twenty-eight additional apartments. A new Board in the meantime having assumed office and being without knowledge of the covenant, passed an amendment to zoning ordinance reducing the buffer zone from 200 feet to 100 feet and the building inspector thereupon issued a building permit to effectuate the amendment.

Complainants then had plans drawn and entered into a contract for the construction of the new apartments and claim to have expended in drawing plans and laying foundations for the apartments approximately $35,000.00. At that juncture, apparently being advised of the covenant and its then current violation, the City revoked the building permit, precipitating the filing of this action.

[1] The Chancellor in a well reasoned opinion concluded that both the covenant and the ordinance passed in consideration thereof are void as a matter of law and that neither can be enforced. On this subject the Chancellor reasoned:

"The City, by entering into the agreement with the covenantors to rezone in consideration of the Covenant, should the Court uphold the Covenant, has placed itself in an untenable position of, on the one hand, finding through its Commissioners that the property should be rezoned to allow further construction, and, on the other, attempting to enforce the Covenant, which is in derogation of the City's Zoning Ordinance. The Court agrees with counsel for the City that a Zoning Ordinance is not controlled or changed by restrictive covenants running with the land, which may be privately enforced; however, the City cannot maintain conflicting positions, i. e., on one hand, that it covenanted with the private individuals to maintain certain zoning on this property and, on the other, subsequently and within the time covenanted enact an Ordinance contrary to its Covenant. The Court concludes that the Covenant and the Ordinance passed in consideration thereof are void, as a matter of law. See Osborne v. Allen, 143 Tenn. 343, 226 S.W. 221; City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528; Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429; Hartnett v. Austin, Fla., 93 So.2d 86; State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533.

"Ordinance 6302, which undertook to amend the Ordinance held void, is likewise void.

"The building permit issued to plaintiffs was issued under authority of said Zoning Ordinance and is likewise void. (See Taylor v. Shetzen, 212 Ga. 101, 90 S.E.2d 572.)"

We are in agreement with the Chancellor and affirm the decree.

We think the question at issue is ruled by the two Tennessee cases cited by the Chancellor. The principle underpinning both is so well stated in Whitley v. White, 176 Tenn. 206, 140 S.W.2d 157, 159, cited by the Court in Knoxville v. Ambrister that we can do no better than quote the pertinent portion of that opinion, which affirmed the decision of this Court:

[2] "Contracts made for the purpose of unduly controlling or affecting official conduct of the exercise of legislative, administrative and judicial functions, are plainly opposed to public policy. They strike at the very foundations of government and intend to destroy that confidence

in the integrity and discretion of public action which is essential to the preservation of civilized society. The principle is universal and is applied without any reference to the mere outward form and purpose of the alleged transaction."

However, more directly controlling is the holding of our Supreme Court in the Ambrister case.

In that case the Luttrell Estate made certain agreements affecting its property for a period of 50 years upon condition the City of Knoxville would re-zone certain of its property to permit the construction of an apartment building in an area zoned residential and, upon demand by the City, to convey the land to it for park and recreational purposes. Thereafter, the City filed its bill for a decree declaring that the land had been dedicated to the City in consideration for the re-zoning of the property.

After citing Osborne v. Allen, supra, and citing and quoting the above portion of the opinion in Whitley v. White, the Court, in the concluding portion of the opinion said:

"In the instant case the offer was to dedicate at a future date certain property in the City to public park purposes, or to convey it to the City for such purposes on condition that the City amend its zoning ordinance, a police measure, so as to meet the wishes of the offerors. Upon receipt of this offer the City Council did amend its zoning ordinance so as to meet those wishes. There seems to be no escape from the conclusion that the case falls within the facts of Osborne v. Allen, supra, and within the facts stated in the rule there applied. Hence, this illegal agreement will not be enforced at the instance of the City of Knoxville, who was a party to it."

Hickerson v. Flannery 42 Tenn.App. 329, 302 S.W.2d 508, cited in the brief is inapposite. There the property owner only bound himself to acts of a nature beneficial to the general public, such as landscaping and the like. The only principle common to that case and this seems to us to be that the covenant ran with the land, a principle which we do not understand to be here seriously questioned.[1]

The same rule with respect to the validity of contracts to influence zoning seems to prevail in numerous other jurisdictions, the consensus being that contracts entered into in consideration of concessions made or to be made favoring the applicant are frowned upon as being against public policy which dictates that zoning is an instrument of public authority to be used only for the common welfare of all the people. See generally Law of Zoning, Metzenbaum, Second Edition, pp. 967, 973, 1072, 3.

[3] It seems proper to note here that a building permit is not a contract and may be changed or entirely revoked even though based upon a valuable consideration if necessary in the exercise of the police power. Howe Realty Co. v. City of Nashville, 176 Tenn. 405, 141 S.W.2d 904; Law of Zoning, supra, p. 1158. See also Moore v. Memphis Stone & Gravel Co., 47 Tenn. App. 461, 339 S.W.2d 29.

It is strongly contended, however, that a court of equity should hold the City estopped to revoke the building permit after complainants have expended large sums of money relying upon the validity of the permit. While we are not unsympathetic with the plight in which complainants find themselves, we can not accede to this contention.

The principle is well established that where both parties have the same means of ascertaining the true facts there can be no estoppel. Crabtree v. Bank, 108 Tenn. 483, 67 S.W. 797; Parkey v. Ramsey, 111 Tenn. 302, 76 S.W. 812.

[4] "It is essential, as a general rule, to the application of the principle of equitable estoppel, that the party claiming to have been influenced by the conduct or declarations of another to his injury, was himself not only destitute of knowledge of the

1. Nothing in this opinion is to be construed as holding that a planning commission, without a covenant, can not prescribe reasonable conditions for the benefit of the general public.

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state of the facts, but was also destitute of any convenient and available means of acquiring such knowledge, and that where the facts are known to both parties, or both have the same means of ascertaining the truth, there can be no estoppel." Crabtree v. Bank, supra; Hankins v. Waddell, 26 Tenn.App. 71, 167 S.W.2d 694.

[5] It is proper to add that, generally, the doctrine of estoppel does not apply to acts of public authorities. State v. Williams, 207 Tenn. 695, 343 S.W.2d 857.

[6] The record suggests, as above noted, that the building inspector said enough to put complainants upon inquiry as to the existence of the covenant. In any event the instrument creating the covenant and making it run with the land was of record and complainants had constructive notice of its existence. It seems to be unquestioned that to narrow the buffer strip would be to the disadvantage of nearby owners of residential property. We fail to see why they should suffer loss under all the circumstances of this case.

Affirmed and remanded for enforcement of the decree. Complainants and sureties will pay all costs.

PARROTT and SANDERS, JJ., concur.

Gary SHARP, Plaintiff-in-Error,

v.

STATE of Tennessee, Defendant-in-Error.

Court of Criminal Appeals of Tennessee.

March 7, 1974.

Certiorari Denied by Supreme Court June 17, 1974.

Rehearing Denied July 15, 1974.

Defendant was convicted in Circuit Court, Sevier County, George R. Shepherd, J., of murder in second degree, and he appealed in error. The Court of Criminal Appeals, Galbreath, J., held that testimony of credible and corroborated witnesses was sufficient to support conviction; that statute dealing with punishment for murder in first degree which had been declared unconstitutional, had no bearing on case in that defendant was convicted of second-degree murder; that there was no error in instructing jury in accord with statute which provided for jury fixing minimum and maximum terms of convicted defendants; and that it was not error to deny motion for mistrial on ground that arresting officer testified that he found a knife on defendant, even though knife had not been made available for inspection by defense counsel prior to trial as required by statute, since all evidence on weapon causing death related to straight razor and fact that defendant had small pocket knife when arrested had no bearing on his guilt or innocence.

Affirmed.

Oliver, J., concurred except to last paragraph.

1. Homicide ⟹254

Testimony of credible and corroborated witnesses that they saw defendant walk up behind victim, grab him by back of head, and split his throat open with straight razor, was sufficient to support conviction of second-degree murder.

2. Homicide ⟹146, 152

All killings are presumed to be murder in second degree, and jury may infer malice from use of deadly weapon.

3. Constitutional Law ⟹49

Fact that statute dealing with punishment for murder in first degree had been declared unconstitutional had no bearing on case wherein defendant was convicted of second-degree murder. Pub.Acts 1973, c. 192.

4. Criminal Law ⟹796

Since it was valid function of legislature to provide various punishments which

err in denying plaintiff's counsel the right of summation?

The complaint seeks damages for the anticipatory breach of an alleged oral contract made between the parties on May 5, 1948, for the purchase of newsprint to be delivered in the future, it being claimed that the oral contract was confirmed by the plaintiff on the following day. Immediately on receipt of the letter of confirmation the defendant, on May 7, advised plaintiff it had not agreed to accept delivery on the terms mentioned therein, that of billing it on a basis of gross weight for net weight. Plaintiff's source of supply in Holland steadfastly refused the net weight type of billing but plaintiff later agreed to reimburse the defendant for the difference. While the question of gross for net billing was still open the plaintiff kept seeking and asking the defendant for the "specifications" for the paper. This went on for several months, the negotiations between the parties being open for further agreement, and were never furnished or agreed upon. The necessity for such an agreement is amply evidenced by the cabled requests for the specifications sent from Holland to the defendant, by letters, and by the fact that the newsprint was never completed or shipped.

[1, 2] It is fundamental that the essential element to the valid consummation of a contract is a meeting of the minds of the contracting parties and that until there is such a meeting of the minds either party may withdraw and end all negotiations. Water Commissioners of Jersey City v. Brown, 32 N.J.L. 504 (E. & A.1866); Wilson v. Windolph, 103 N.J.Eq. 275, 143 A. 346 (E. & A.1928); P. Ballantine & Sons v. Gulka, 117 N.J.L. 84, 186 A. 722 (Sup.Ct. 1936). "So long as negotiations are pending over matters relating to the contract, and which the parties regard as material to it, and until they are settled and their minds meet upon them, it is not a contract, although as to some matters they may be agreed", Tansey v. Suckoneck, 98 N.J.Eq. 669, 671, 130 A. 528, 529 (E. & A.1925). If the defendant had furnished specifications which the plaintiff could not meet at the price fixed surely the plaintiff would not be answerable for any breach of the contract.

[3, 4] There was a sharp conflict in the testimony presented and the trial court had the opportunity and advantage of observing the witnesses and was in a position to evaluate their credibility to a greater extent than can an appellate tribunal. His findings of fact are entitled to great weight. The credibility of witnesses is an important consideration in the determination of factual issues. Gellert v. Livingston, 5 N.J. 65, 78, 73 A.2d 916 (1950). While an appellate court is not bound by a finding of fact made by the trial court it is required to give due regard to the opportunity of that court to observe the demeanor of a witness and to judge of his credibility. In re Perrone's Estate, 5 N.J. 514, 523, 76 A.2d 518 (1950).

[5] We are convinced there was ample evidence to support the holding below that no contract existed between the parties.

The point briefed and argued that the plaintiff was denied his right of summation merits little consideration under the facts exhibited.

After the completion of testimony the trial court reserved decision and directed counsel to submit briefs, advising them that oral argument would be permitted following the submission of briefs, if necessary or desirable, at such time as might be suitable. Later plaintiff's counsel by letter stated to the court that he requested permission to file a reply brief or in the alternative that he be permitted to argue the matter orally to which the court replied that due to the pressure of time the matter could not be argued orally but that counsel might file a reply brief.

[6] It will thus be observed that plaintiff asked for oral argument only in the alternative, *i. e.*, in lieu of the opportunity to file a reply brief. He was given this opportunity and did so. No complaint that opportunity was not given to argue orally was made below and no objection made to the course taken. It is only on appeal that for the first time plaintiff complains that he was denied the right of summation. Cf. Roberts Electric Inc. v. Foundations & Excavations, Inc., 5 N.J. 426, 75 A.2d 858 (1950). Whatever rights plaintiff's counsel had were expressly waived by him.

Having reached the aforesaid conclusions we are not called upon to decide the defendant's point that the action was barred by the statute of frauds, there not being a sufficient memorandum in writing to meet the requirements of that statute.

The judgment is affirmed.

For affirmance: Justices HEHER, OLIPHANT and WACHENFELD—3.

For reversal: Chief Justice VANDERBILT and Justice BURLING—2.

9 N.J. 122

HOUSTON PETROLEUM CO. v. AUTOMOTIVE PRODUCTS CREDIT ASS'N, Inc.

No. A-80.

Supreme Court of New Jersey.

Argued Feb. 18, 1952.

Decided March 17, 1952.

Action by the Houston Petroleum Co., a corporation of the State of New Jersey, against Automotive Products Credit Association, Inc., a corporation, for an injunction and specific performance of an agreement creating covenants restricting use of realty. The Superior Court, Chancery Division, entered judgment dismissing the complaint, 11 N.J.Super. 357, 78 A.2d 310, and plaintiff appealed. The Superior Court, Appellate Division, 15 N.J.Super. 215, 83 A.2d 239, reversed and set aside the judgment of the Chancery Division, and defendant filed a petition for certification with the Supreme Court which was granted, 8 N.J. 248, 84 A.2d 669. The Supreme Court, Burling, J., held that under the circumstances of the case the restrictive covenants were not enforceable by the plaintiff.

Judgment of the Superior Court, Appellate Division, reversed, and the judgment of the Superior Court, Chancery Division, reinstated and affirmed.

Vanderbilt, C. J., and Wachenfeld, J., dissented.

1. Municipal Corporations ⚷601(15)

Agreement between city and parties' common grantor for the reclassification of certain tracts so that they should come within and be subject to provisions of light industrial district of zoning ordinance of city and that when zoned as light industrial district premises should be subject to certain covenants and restrictions set forth in agreement constituted an abuse of zoning power by city and therefore agreement was ultra vires, illegal and void.

2. Municipal Corporations ⚷601(1, 7)

The zoning power may not be exerted to serve private interests merely nor may the principle be subverted to that end, and a purported contract so made is ultra vires and all proceedings to effectuate it are coram non judice and utterly void.

3. Municipal Corporations ⚷601(5)

A contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations.

4. Municipal Corporations ⚷601(15)

Where contract between city and parties' common grantor for rezoning of tract as light industrial provided that when zoned as light industrial district tract would be subject to certain covenants and restrictions and covenants were imposed not only for purpose of obtaining rezoning of tract but were themselves limited in duration to period of time during which premises remained zoned for light industry and agreement provided for release or modification of covenants at any time by agreement to which city was made a necessary party, covenants in themselves exhibited a plan in contravention of public policy incorporated in constitutional and statutory provisions relating to zoning, and restrictive covenants, being violative of public policy of State, were illegal, and, agreement establishing covenants being void, plaintiff was not entitled to their enforcement.

5. Contracts ⚷108(1)

A contract in contravention of the public policy of the state will not be enforced.

6. Municipal Corporations ⚷601(15)

Agreement entered into between parties' common grantor and city which purported to modify previous contract between common grantor and city under which common grantor agreed that tract should be subject to certain covenants and restrictions when tract was zoned as light industrial district, by which modification common grantor agreed to bind his remaining lots, was in violation of public policy implicit in zoning laws and illegal and therefore plaintiff's right against defendant could not be enforced based on the modification agreement.

7. Covenants ⚷49

A restrictive covenant is a contract dependent on reciprocal or mutual burdens and benefits shared by each lot owner brought within scheme thereof.

8. Covenants ⚷77

Any neighborhood scheme of restrictive covenants to be enforceable must apply to all lots of like character brought within scheme.

9. Covenants ⚷77

Where plaintiff's lot, which was released from restrictive covenants applying to other lots in tract, was of like character with remainder of tract, and attempted release of plaintiff's premises was effected for benefit of agent for plaintiff, restrictive covenants would not be enforceable by plaintiff against defendant.

10. Injunction ⚷109

A plaintiff who has by his own conduct defeated the object and purpose of a restrictive covenant applying to a tract of realty is not entitled to injunctive relief for its enforcement.

11. Covenants ⚷77

Where provision in original agreement for application of restrictive covenants to tract was applicable to entire tract and included no permission for release of one portion or more of tract from those restrictions, attempt to release one portion by purported modification of agreement and to enforce restrictions against balance of tract was a corruption of apparent purpose of restriction and to that extent attempted enforcement was in restraint of competition and for such purpose plaintiff had no standing to enforce the restrictive covenants.

12. Injunction ⚷62(1)

Courts of equity do not aid one man to restrict another in use to which he may lawfully put his property unless right to such aid is clear.

William C. Nowels, Maplewood, argued the cause for defendant-appellant (Stein & Stein, Jersey City, attorneys; Frederick Z. Feldman, Jersey City, on the brief).

Samuel Koestler, Elizabeth, argued the cause for plaintiff-respondent (Koestler & Koestler, Elizabeth, attorneys).

The opinion of the court was delivered by

BURLING, J.

This is a civil action. The plaintiff instituted the suit by complaint against the defendant in the Superior Court, Chancery Division, seeking the remedy of injunction for the enforcement of certain restrictive covenants relating to real property. After trial, the Superior Court, Chancery Division, entered judgment dismissing the complaint. 11 N.J.Super. 357, 78 A.2d 310 (Ch.Div.1951). The plaintiff pursued an appeal to the Superior Court, Appellate Division, 15 N.J.Super. 215, 83 A.2d 239 (App.Div.1951) and that court reversed and set aside the judgment of the Chancery Division. Thereupon the defendant filed a petition for certification with this court, which was granted. Houston Petroleum Co. v. Automotive Products Credit Association, Inc., 8 N.J. 248, 84 A.2d 669 (1951).

There is little controversy here as to the facts which became the foundation of this suit. The plaintiff in its complaint claimed, and the defendant in the pretrial order admitted, that one Lotta D. Byrnes and others, partners trading as Byrnes Realty Company (hereinafter called Byrnes), being the owners of a tract of land (including the premises in question) located in the City

of Linden, County of Union and State of New Jersey, on the northwesterly side of New Jersey State Highway No. 25 (also known as Edgar Road) entered into a certain agreement in writing with the City of Linden dated April 15, 1947, recorded April 17, 1947 in Book 1620 of Deeds for Union County at page 434, etc., which included the following pertinent language: "Whereas, Byrnes Realty Company has applied to the Mayor and Common Council of the City of Linden, in the County of Union, to reclassify said premises so that the same shall come within and be subject to the provisions of Section 6–E (light industrial district) of the zoning ordinance of the said City of Linden; and whereas, Byrnes Realty Company in connection with its said application has agreed that said lands and premises if and when zoned as a light industrial district, shall be subject to the covenants and restrictions hereinafter set forth; * * *."

The covenants and restrictions contained in the aforesaid agreement included a setback of 75 feet from the northerly line of the right-of-way of State Highway No. 25 and a provision that the area between the northerly line of the right-of-way of said highway and the setback line be "seeded and suitably planted, excepting, however, such part of said area (not to exceed fifty (50%) per cent thereof) as shall be constructed and used for driveways and parking space."

It was further provided that said covenants and restrictions should become effective on the rezoning of the area as requested by Byrnes and continue in effect so long as the premises remained so zoned or until April 1, 1977, provided that they might be released or modified at any time by agreement in writing between the City of Linden and the owner or owners of all or all portions of said land and premises.

The City of Linden, by ordinance adopted on the same date (April 15, 1947) rezoned the Byrnes tract described in the above mentioned agreement to include said lands and premises in "Section 6–E (light industrial district)." It is clear from the evidence introduced at the trial of this cause that this rezoning was effected on consideration of the making of the aforesaid agreement. It was also claimed and admitted that on March 29, 1948 Byrnes conveyed all the said tract, subject to the covenants and restrictions contained in the aforesaid agreement, to Industrial Land Corporation, which in turn on the same date and likewise subject to said covenants and restrictions conveyed all land and premises to Clifford J. Colville and others trading as Macner Realty Company (hereinafter referred to as Macner). In the pretrial order it was stipulated that the deeds for said conveyance contained the following language: "This conveyance is made subject to * * * covenants and restrictions imposed upon said premises by a certain agreement made between the grantor and the City of Linden, dated April 15, 1947, * * *."

It was further claimed and admitted that on July 1, 1949 Macner, then being owners of the entire tract, entered into an agreement in writing with the City of Linden modifying the agreement of April 15, 1947 as to a certain 300 feet of the frontage of said tract on State Highway No. 25, so as to relieve that portion of the tract of the setback and seeding and planting covenants and restrictions, and that this modification agreement was recorded on July 22, 1949.

Macner thereafter, by deed dated August 1, 1949 and duly recorded, conveyed the aforesaid portion of said tract which had been released from the restrictions to one Sand who subsequently conveyed the same portion to Houston Petroleum Co., a New Jersey corporation (hereinafter called the plaintiff); Macner also conveyed an adjoining portion of the tract, subject to restrictions and conditions of record, to the plaintiff on May 16, 1950. By deed dated June 12, 1950 and duly recorded, Macner conveyed, likewise subject to restrictions and conditions of record, to Automotive Products Credit Association, Inc., a New Jersey corporation (hereinafter called the defendant) a portion of the Byrnes tract immediately adjoining the plaintiff's additional portion of the tract, aforesaid, and also fronting on State Highway No. 25. It was further admitted in the pretrial order that on July 11, 1950 the building inspector

a building permit for the construction upon its portion of the tract a large gasoline service station in conformity with plans and specifications which showed that the defendant intended to seed and plant less than 10 per cent of the land area, between the line of State Highway No. 25 and the 75-foot setback line, and to pave 90 per cent of the said land area with bituminous pavement and concrete slabs, in clear violation of the covenants and restrictions hereinabove quoted, and that the defendant commenced to place gasoline pumps on the premises in positions designated in the aforesaid plans.

The plaintiff filed its complaint in this cause on July 17, 1950 in the Superior Court, Chancery Division, seeking to have the defendant enjoined from violating the covenants and restrictions imposed on its said property by the aforesaid agreement of April 15, 1947 between Byrnes and the City of Linden, and by supplemental complaint filed October 5, 1950 sought a judgment in the nature of a mandatory injunction to require the defendant to remove such part of its construction as was violative of said covenants and restrictions. An interlocutory injunction was denied by the trial court on July 31, 1950. After trial final judgment was entered on January 29, 1951 in the Superior Court, Chancery Division, in favor of the defendant and dismissing the plaintiff's complaint. On the plaintiff's appeal to the Superior Court, Appellate Division, the judgment was reversed and remanded, on August 30, 1951, with direction that a mandatory injunction be issued directing the removal of the improvements violating the covenant. The defendant filed with this court its petition for certification to the Appellate Division to review said judgment of reversal, and said petition was granted resulting in this appeal as aforesaid.

[1] The defendant asserted below and asserts here among its questions involved on appeal that the covenants and restrictions sought by plaintiff to be enforced are invalid and unenforceable for the reason, *inter alia*, that the agreement of April 15, 1947, between Byrnes and the City of Linden constituted an abuse of the zoning power by the City, and was therefore *ultra vires*, illegal and void. With this contention we agree.

[2] The latest exposition of the law applicable to the foregoing conclusion is contained in V. F. Zahodiakin, etc., Corp. v. Zoning Board of Adjustment of City of Summit, 8 N.J. 386, 86 A.2d 127 (1952). This court there held, 8 N.J. at pages 394–395, 86 A.2d 127 that the zoning power may not be exerted to serve private interests merely nor may the principle be subverted to that end, that a purported contract so made was *ultra vires* and all proceedings to effectuate it were *coram non judice* and utterly void.

The same principle is implicit in the decisions of this court in Beckmann v. Township of Teaneck, 6 N.J. 530, at page 535, 79 A.2d 301 (1951) wherein the asserted authority of a municipality to contract for the exercise of legislative powers was denied by the court and Anschelewitz v. Borough of Belmar, 2 N.J. 178, 183, 65 A.2d 825, 827 (1949) wherein the court said: "A municipality cannot act as an individual does. It must proceed in conformity with the statutes, or in the absence of statute agreeably to the common law, by ordinance or resolution or motion. * * * Especially is this so where real property is concerned. * * *"

[3–5] Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations. See Bassett on Zoning, p. 184 (1940). Compare Speakman v. Mayor & Council of North Plainfield, 8 N.J. 250, 257, 84 A.2d 715 (1951); Lynch v. Hillsdale, 136 N.J.L. 129, 134, 54 A.2d 723 (Sup.Ct.1947), affirmed per curiam 137 N.J.L. 280, 59 A.2d 622 (E. & A.1948); N. J. Good Humor, Inc., v. Borough of Bradley Beach, 124 N.J.L. 162, 164–165, 168–169, 11 A.2d 113 (E. & A.1940); Friedman v. Maines, 151 A. 472, 8 N.J. Misc. 703 (Sup.Ct.1930), affirmed per curiam, 110 N.J.L. 454, 166 A. 148 (E. & A. 1933). The covenants in question not only were imposed on the land for the purpose of obtaining rezoning of the Byrnes tract,

but are themselves limited in duration to the period of time during which the premises remain zoned for light industry. Thus they seem related not to the benefit of individual portions of the tract but to zoning for the entire tract. In addition, the recorded agreement provides for release or modification of the covenants at any time by an agreement *to which the City of Linden is made a necessary party*. This again is referable to zoning, and is within the particular condemnation of the law as stated in the Zahodiakin case, supra. Thus it may be concluded that the covenants in themselves exhibit a plan in contravention of the public policy incorporated in the constitutional and statutory provisions relating to zoning. The former Supreme Court of this State in Sharp v. Teese, 9 N.J.L. 352, 354 (Sup.Ct.1828) held: "The attempt to contravene the policy of a public statute is illegal. Nor is it necessary to render it so that the statute should contain an express prohibition of such attempt. It always contains an implied prohibition; and to such attempt the principles of the common law are invariably and deadly hostile, not always by an interference between the parties themselves, or by enabling the one to recall from the other, where *in pari delicto*, what may have been obtained; but by at all times refusing the aid of the law to carry into effect or enforce any contract which may be the result of such intended contravention." And this court has reiterated the rule that a contract in contravention of the public policy of this State will not be enforced. Lobek v. Gross, 2 N.J. 100, 102, 65 A.2d 744 (1949). We therefore conclude that the restrictive covenants in question, being violative of the public policy of this State implicit in our zoning laws, are illegal. Compare Driscoll v. Burlington-Bristol Bridge Co., 8 N.J. 433, 86 A.2d 201 (1952); Stack v. P. G. Garage, Inc., 7 N.J. 118, 121–122, 80 A.2d 545 (1951). The agreement establishing the covenants being illegal and void, the plaintiff is not entitled to their enforcement.

[6] Among the questions involved are two further propositions. The first of these is whether upon the basis of the common grantor's express agreement in writing (the purported "modification agreement" of July 1, 1949) to bind his remaining land, the plaintiff's rights should be enforced. And the second is whether there was created by the common grantor a neighborhood plan or scheme to the enforcement of which the plaintiff is entitled. It was upon these propositions that the Superior Court, Appellate Division, principally rested its judgment. The common grantor's purported modification agreement of July 1, 1949, approved by resolution of the Common Council of the City of Linden on July 19, 1949, is subject to the same condemnation as has been hereinabove addressed to the original agreement between Byrnes and the city, and is void as against public policy.

[7–10] The principles upon which the existence of a neighborhood scheme depends are so firmly established that no repetition here is deemed necessary. Acting upon the premise that a neighborhood scheme was created by the common grantors, independent of the illegal municipal agreement, it is unenforceable by the plaintiff. It is settled that a restrictive covenant is a contract dependent upon reciprocal or mutual burdens and benefits shared by each lot owner brought within the scheme thereof. Weinstein v. Swartz, 3 N.J. 80, 86, 68 A.2d 865 (1949). The mutual and reciprocal burdens and benefits of the original neighborhood plan (effected by the Byrnes covenants) were so altered by the purported modification agreement as to render them unenforceable by the plaintiff for lack of mutuality. Compare Weinstein v. Swartz, supra; Welitoff v. Kohl, 105 N.J.Eq. 181, 147 A. 390, 66 A.L.R. 1317 (E. & A.1929). Upon the Byrnes conveyance to Macner the scheme established by Byrnes was undisturbed, for the entire tract was the subject of the conveyance. The plaintiff argues to the effect that the neighborhood scheme that became established is not the result of the Byrnes agreement, but of the Macner modification agreement, and therefore the plaintiff is entitled to the protection of the covenants, on the settled principles that the common grantor may or may not bind himself by the restrictions, Clarke v. Kurtz, 123 N.J.Eq. 174, 177, 196 A. 777 (E. & A.1937)

formity of the restrictions over the entire tract subject to the scheme is not required, Weinstein v. Swartz, 3 N.J. 80, 86, 68 A.2d 865 (1949). To this argument defendant interposes the established rule that any neighborhood scheme to be effective and enforceable must apply to all lots of like character brought within the scheme. *Ibid.* There is no doubt, under the circumstances of this case, that plaintiff's lot which was released from the restrictions was "of like character" with the remainder of the tract. It is also settled that a plaintiff who has by his own conduct defeated the object and purpose of a covenant of this nature is not entitled to injunctive relief for its enforcement. Compare Dalstan v. Circle Amusement Co., 130 N.J.Eq. 354, 356, 22 A.2d 245 (E. & A.1941); DeGray v. Monmouth Beach Co., 50 N.J.Eq. 329, 24 A. 388 (Ch. 1890), affirmed 67 N.J.Eq. 731, 63 A. 1118 (E. & A.1894). The plaintiff in the present case has not proved its right to the application of the doctrine of the Clarke case, supra. The record shows that the common grantor, Macner, accepted title subject to, and was bound by, the covenants in the Byrnes agreement. Assuming but not deciding that Macner, being owner of the entire tract, could alter the neighborhood scheme previously established and eliminate its own premises therefrom without destruction of the scheme, it does not appear that such was the course followed. The attempted release of the plaintiff's premises was effected for the benefit of Sand who was acting as agent for the plaintiff. We find that under the circumstances of this case the restrictive covenants would not be enforceable by the plaintiff.

An additional question presented by the defendant on this appeal is whether a plaintiff may enforce the covenants involved in this litigation for the purpose of stifling competition. The source of the defendant's contention lies in the law approved by the former court of Chancery in the case of Coudert v. Sayre, 46 N.J.Eq. 386, 389, 19 A. 190, 191, (Ch.1890) namely: "'Every owner of real property has a right to so deal with it, as to restrain its use by his grantee, within such limits as to prevent its appropriation to purposes which will impair the value or diminish the enjoyment of the land which he retains. The only restriction on this right is, that it shall be exercised reasonably, with due regard to public policy, and without creating any unlawful restraint of trade.'"

[11] We find that restrictions were placed on the *entire* tract and were not designed for the purpose now asserted. The provision for release or modification is applicable to the entire tract and includes no permission for release of one portion or more of the tract from those restrictions. This is evident from the text of the clause. The attempt to release one portion by the purported "modification agreement" and to enforce the restrictions against the balance of the tract is a corruption of the apparent purpose of the restrictions. To this extent the attempted enforcement was admittedly in restraint of competition. It is obvious upon this view of the matter that for such purpose the plaintiff has no standing. Compare Brewer v. Marshall and Cheeseman, 19 N.J.Eq. 537 (E. & A.1868); Irving Investment Corp. v. Gordon, 3 N.J. 217, 221, 69 A.2d 725 (1949).

[12] The defendant's fifth and final question involved on this appeal presents the general argument that courts of equity do not aid one man to restrict another in the uses to which he may lawfully put his property unless the right to such aid is clear. This is a recognized rule in this State. Howland v. Andrus, 81 N.J.Eq. 175, 181, 86 A. 391 (E. & A.1913). Under the circumstances of this case the plaintiff is not entitled to enforcement of the restrictive covenants against the defendant.

For the reasons stated, the judgment of the Superior Court, Appellate Division is reversed, and the judgment of the Superior Court, Chancery Division, is reinstated and affirmed.

For reversal: Justices HEHER, OLIPHANT and BURLING—3.

For affirmance: Chief Justice VANDERBILT and Justice WACHENFELD —2.

9 N.J. 134

REIMANN v. MONMOUTH CONSOLIDATED WATER CO.

No. A-73.

Supreme Court of New Jersey.

Argued Feb. 4, 1952.

Decided Feb. 14, 1952.

Herman Reimann, individually and formerly trading as Oakhurst Recreation Center, brought action against the Monmouth Consolidated Water Company, a body corporate, to recover for fire loss allegedly due to lack of water and pressure at fire hydrants served by defendant. The Superior Court, Law Division, Monmouth County, entered judgment for defendant, and plaintiff appealed, and the appeal was certified to the Supreme Court on its own motion. The Supreme Court, Case, J., held that defendant as public utility furnishing water in township was not liable to plaintiff as owner of recreation center which was destroyed by fire allegedly because water volume and pressure at fire hydrants were insufficient to combat the fire, in absence of any contract between defendant and plaintiff that defendant would furnish sufficient water for fire protection.

Judgment affirmed.

Vanderbilt, C. J., and Heher, J., dissented.

1. Waters and Water Courses ⚷206

Public utility furnishing water in township was not liable to owner of recreation center which was destroyed by fire allegedly because public utility's water volume and pressure at fire hydrants were insufficient to combat the fire, in absence of any contract between public utility and owner of recreation center that public utility would furnish sufficient water for fire protection.

2. Courts ⚷90(1)

Where decision of Court of Errors and Appeals holding that a public water company is not liable to an individual for loss by fire resulting from insufficient supply of water at insufficient pressure at fire hydrants to extinguish a fire, in absence of contract between parties for sufficient supply at sufficient pressure, stood for nearly 40 years without having been attacked or weakened, and rates of water companies

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THE LEAGUE OF RESIDENTIAL NEIGHBORHOOD ADVOCATES, a California non-profit corporation; LARRY FAIGIN; THOMAS LARKIN; EDWARD C. CAZIER; CYNTHIA CHVATAL; J. LARSON JAENICKE; ELIZA LEWIS; GARY J. HERMAN, SR.; MARGARET KUHNS; MADELINE WARREN, Plaintiffs-Appellants, v. CITY OF LOS ANGELES; CONGREGATION ETZ CHAIM; JAMES HAHN, Mayor, City of Los Angeles; ROCKY DELGADILLO, City Attorney, City of Los Angeles, Defendants-Appellees.

No. 06-56211

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

498 F.3d 1052; *2007 U.S. App. LEXIS 19824*

July 10, 2007, Argued and Submitted, Pasadena, California
August 21, 2007, Filed

PRIOR HISTORY: [**1]
Appeal from the United States District Court for the Central District of California. D.C. No. CV-03-04890-CAS. Christina A. Snyder, District Judge, Presiding.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant city entered into a settlement agreement with defendant congregation allowing it to operate a synagogue in a residential-zoned area. Plaintiff neighbors sued alleging that the settlement agreement was void because a conditional use permit was granted without providing notice and a hearing to the affected community. The U.S. District Court for the Central District of California dismissed the action with prejudice. The neighbors appealed.

OVERVIEW: The court rejected the district court's analysis--a comparison between a traditional conditional use permit (CUP) and the settlement agreement--because it ignored the plain language of Los Angeles, Cal., Municipal Code § 12.08. The congregation sought, and the settlement agreement granted, permission to operate a synagogue in a residential zone even though congregational worship was considered a conditional use under Los Angeles, Cal., Municipal Code § 12.24, and required a permit. The court held the city impermissibly circumvented the procedural and substantive limitations contained in Los Angeles, Cal., Municipal Code § 12.24. Because the city did not satisfy those formalities when it entered into the settlement agreement, the agreement was invalid and unenforceable under state law. The court rejected any argument that the city could have circumvented its zoning procedures by referencing its general authority to settle litigation under Los Angeles, Cal., City Charter § 273(c). Absent a finding that federal law was violated or would be violated, the district court could not approve the settlement agreement that authorized the city to disregard its own zoning ordinances.

OUTCOME: The dismissal of the neighbor's collateral attack on the settlement agreement was reversed and the case was remanded for further proceedings.

LexisNexis(R) Headnotes

Civil Procedure > Pleading & Practice > Defenses, Demurrers, & Objections > Failures to State Claims
Civil Procedure > Appeals > Standards of Review > De Novo Review
[HN1] A circuit court of appeals reviews de novo a district court's dismissal of claims under *Fed. R. Civ. P. 12(b)(6)*. All facts alleged in the complaint are assumed true.

Civil Procedure > Settlements > Settlement Agreements > General Overview
[HN2] A federal consent decree or settlement agreement cannot be a means for state officials to evade state law. State officials can not agree to terms which would exceed their authority and supplant state law. Some rules of law are designed to limit the authority of public officeholders. They may chafe at these restraints and seek to evade them, but they may not do so by agreeing to do something state law forbids.

Governments > Local Governments > Ordinances & Regulations
[HN3] In California, a duly enacted local ordinance has the same binding force as a state statute.

Real Property Law > Zoning & Land Use > General Overview
[HN4] Los Angeles, Cal., Municipal Code § 12.08(A) limits the use of buildings or structures in an R1 residential zone primarily to one or two-family dwellings.

Real Property Law > Zoning & Land Use > General Overview
[HN5] See Los Angeles, Cal., Municipal Code § 12.08(A).

Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN6] Among the conditional uses requiring approval under Los Angeles, Cal., Municipal Code § 12.08(A) are the operation of Churches/Houses of worship. Los Angeles, Cal., Municipal Code § 12.24(T)(3)(b).

Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN7] The procedure for reviewing conditional use permit (CUP) applications requires an initial decision by the Zoning Administrator, public notice, and a public hearing. Los Angeles, Cal., Municipal Code § 12.24(C), (D). Furthermore, the decision-maker must issue a series of factual findings before granting a CUP. § 12.24(E). Any aggrieved person may administratively appeal the decision of the Zoning Administrator to the Planning Commission and, if still unsatisfied, to the City Council. § 12.24(I).

Real Property Law > Zoning & Land Use > General Overview
[HN8] Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public. *Cal. Civ. Code § 3513*. Any such agreement to circumvent applicable zoning laws is invalid and unenforceable.

Real Property Law > Zoning & Land Use > Nonconforming Uses
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN9] Los Angeles, Cal., Municipal Code § 12.08(A) states that all conditional use is forbidden in an R1 zone unless approved pursuant to the provisions of Los Angeles, Cal., Municipal Code § 12.24.

Governments > Local Governments > Police Power
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN10] Land use regulations involve the exercise of the state's police power, and it is settled that the government may not contract away its right to exercise the police power in the future.

Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN11] Departures from standard zoning by law require administrative proceedings, including public hearings, followed by findings for which the instant density exemption might not qualify. Both the substantive qualifications and the procedural means for a variance discharge public interests. Circumvention of them by contract is impermissible.

Civil Procedure > Settlements > Settlement Agreements > Validity
Governments > Local Governments > Claims By & Against
[HN12] Los Angeles, Cal., City Charter § 273(c) generally empowers the city council to approve or reject settlement of litigation that does not involve only the payment or receipt of money. This provision does not purport to authorize contractual exemptions from zoning requirements. Such exemptions are illegal, and § 273(c) cannot grant the city more authority than is permitted under California law.

Constitutional Law > Supremacy Clause > Federal Preemption
[HN13] Once a court has found a federal constitutional or statutory violation, a state law cannot prevent a necessary remedy.

Civil Procedure > Settlements > Settlement Agreements > Validity
Constitutional Law > Supremacy Clause > Federal Preemption
[HN14] Upon properly supported findings that such a remedy is necessary to rectify a violation of federal law, a district court can approve a consent decree which overrides state law provisions. Without such findings, however, parties can only agree to that which they have the power to do outside of litigation.

COUNSEL: Leslie M. Werlin, McGuire Woods, Los Angeles, California, for the plaintiffs-appellants.

Susan S. Azad, Latham & Watkins, Los Angeles, California, for defendant-appellee Congregation Etz Chaim.

Tayo A. Popoola, Los Angeles, California, for defendants-appellees City of Los Angeles, James K. Hahn, and Rocky Delgadillo.

JUDGES: Before: Barry G. Silverman, William A. Fletcher, and Richard R. Clifton, Circuit Judges.

OPINION BY: Barry G. Silverman

OPINION
[*1053]

SILVERMAN, Circuit Judge:

An Orthodox Jewish congregation applied for a conditional use permit to operate a synagogue in an area zoned solely for residential use. Neighbors of the proposed synagogue objected and, ultimately, the City of Los Angeles denied the application. The Congregation then filed a federal lawsuit alleging that the denial of the permit violated its federal and state constitutional rights. All these claims were later dismissed. However, while the lawsuit was pending, Congress passed the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), *42 U.S.C. § 2000cc*. Concerned about the force [**2] of this new federal law and seeking to avoid further litigation, the City entered into a settlement agreement that allowed the Congregation to operate the synagogue under certain conditions.

Neighbors of the synagogue brought the present action, alleging that the Settlement Agreement is void because, in settling the lawsuit as it did, the City effectively granted the Congregation a conditional use permit without providing notice and a hearing to the affected community. This, they say, violated state law and their right to due process.

We agree with the neighbors on their state law claim. To paraphrase Justice O'Connor in a different context, the pendency of litigation is not a blank check for a city when it comes to the rights of its residents. In the Settlement Agreement, the City granted a conditional use right without first giving affected persons notice and an opportunity to be heard, thereby violating state law. A settlement agreement cannot override state law absent a specific determination that federal law has been or will be violated. Since no such findings were made here, the Settlement Agreement is invalid and unenforceable.

I. Background

Congregation Etz Chaim, an Orthodox Jewish [**3] congregation, acquired property on Highland Avenue in the Hancock Park [*1054] neighborhood of Los Angeles. In light of the area's designation as an "R1" residential zone under Los Angeles Municipal Code § 12.08, the Congregation sought from the City a conditional use permit ("CUP") to allow for congregational religious worship and services on the property. In October 1996, the City's Zoning Administrator denied the application and the requested variances. This action was later upheld by the Board of Zoning Appeals and the Los Angeles City Council.

Then, in 1997, the Congregation brought a federal action under *42 U.S.C. § 1983*, alleging that the City's denial of its CUP application violated state and federal law. In June 1998, while this federal action was pending, the Congregation petitioned for a writ of mandate in Los Angeles Superior Court, seeking to overturn the City's denial of the CUP. The Superior Court upheld the denial and the California Court of Appeal affirmed.

Shortly thereafter, the Congregation filed an amended complaint in the federal action to include an alleged violation of RLUIPA. RLUIPA's effective date was September 22, 2000. Pub. L. No. 106-274, 114 Stat. 803 (2000). Citing [**4] to the preclusive effect of the state court proceedings, the district court granted summary judgment to the City on all issues raised by the Congregation in its original complaint. However, the court denied the City's motion for summary judgment with respect to the newly added RLUIPA claim.

On September 27, 2001, the City and the Congregation settled. The City denied any violation of federal law on its part. However, the Settlement Agreement authorized the use of the Highland property for congregational worship, subject to several restrictions. It restricted the number of congregants and the number of cars at the property during services. Moreover, the Congregation could not hold weddings, funerals, banquets, fund-raising events, or offer day care services. Finally, the Congregation had to maintain the property's residential exterior and could not post signs, posters, or flyers on the premises.

Pursuant to the Agreement, the district court dismissed the Congregation's federal action with prejudice on February 1, 2002, with the court retaining jurisdiction over the subject matter and the parties for a period of five years. [1] The League of Residential Neighborhood Advocates and individual [**5] Hancock Park homeowners (collectively, "the League"), none of whom were parties to the first federal court action, filed a complaint under *42 U.S.C. § 1983* against the City, Mayor James Hahn, City Attorney Rocky Delgadillo (collectively, "the City"), and the Congregation. [2] The League argued that local zoning ordinances denied the City authority to enter into such an agreement. It also asserted federal and state constitutional violations.

1 The City and the Congregation have since been involved in litigation over the scope and enforcement of the Settlement Agreement. *See Congregation Etz Chaim v. City of Los Angeles, 371 F.3d 1122 (9th Cir. 2004).* Additionally, while the district court initially agreed to retain jurisdiction over the Settlement Agreement and the parties for five years, on September 6, 2006, the court entered a joint stipulation and order extending its jurisdiction until February 1, 2012.

2 This action was originally assigned to the Honorable Harry L. Hupp. On February 2, 2004, it was reassigned to the Honorable Christina A. Snyder following the death of Judge Hupp.

On December 22, 2003, the district court granted the Congregation's motion to dismiss with prejudice. The [**6] court found that the Settlement Agreement did not create a CUP, and that the privileges granted to the Congregation did not run with the land and were created by contract against a threat of litigation. Further, the court [*1055] found, these privileges would be enforced through contractual, and not criminal, sanctions. Therefore, the court held, the City did not have to comply with the standards and procedures outlined in the local zoning ordinances for the granting of a CUP.

The district court later granted the City's motion for judgment on the pleadings with leave to amend, concluding that "the law of the case established by the December 22, 2003 order . . . bar[red] any claim predicated on the theory that the Settlement Agreement is a de facto CUP." The League thereafter amended its complaint against the City, which the district court dismissed with prejudice under *Fed. R. Civ. P. 12(b)(6).*

The League appealed. We remanded the case to the district court for reconsideration of its ruling in light of *Trancas Property Owners Ass'n v. City of Malibu, 138 Cal. App. 4th 172, 41 Cal. Rptr. 3d 200 (2006).* In *Trancas*, the California Court of Appeal invalidated a city's decision to settle a lawsuit by granting the functional [**7] equivalent of a zoning variance without complying with statutory zoning procedures. *Id. at 181-82.* Having previously held that the Settlement Agreement did not grant a de facto CUP, the district court found *Trancas* distinguishable and affirmed its earlier order.

II. Jurisdiction

The district court had subject matter jurisdiction over the League's constitutional claims under *28 U.S.C. §§ 1331, 1343(a)*, and over its state claims under *28 U.S.C. § 1367(a).* Furthermore, the district court retained subject matter jurisdiction over the Settlement Agreement for the purpose of issuing any order construing, modifying, enforcing, terminating, or reinstating its terms. *See Flanagan v. Arnaiz, 143 F.3d 540, 544-45 (9th Cir. 1998).* We have jurisdiction pursuant to *28 U.S.C. § 1291.*

III. Standard of Review

[HN1] We review de novo the district court's dismissal of the League's claims under *Fed. R. Civ. P. 12(b)(6). See Holcombe v. Hosmer, 477 F.3d 1094, 1097 (9th Cir. 2007).* All facts alleged in the complaint are assumed true. *Id.*

IV. Discussion

[HN2] A federal consent decree or settlement agreement cannot be a means for state officials to evade state law. *See Keith v. Volpe, 118 F.3d 1386, 1393 (9th Cir. 1997)* (holding [**8] that state officials "could not agree to terms which would exceed their authority and supplant state law"); *Perkins v. City of Chicago Heights, 47 F.3d 212, 216 (7th Cir. 1995)* ("'Some rules of law are designed to limit the authority of public officeholders . . . . They may chafe at these restraints and seek to evade them,' but they may not do so by agreeing to do something state law forbids.") (internal citation and alteration omitted). [HN3] In California, a duly enacted local ordinance has the same binding force as a state statute. *See, e.g., Empire Fire & Marine Ins. Co. v. Bell, 55 Cal. App. 4th 1410, 1419, 1422, 64 Cal. Rptr. 2d 749 (1997).* We must therefore review the validity of the City's action under state law before examining any possible interaction with federal law.

A. The Settlement Agreement was not authorized by state law

[HN4] Los Angeles Municipal Code § 12.08(A) limits the use of buildings or structures in an R1 residential zone primarily to one or two-family dwellings:

> [HN5] A. Use. No building, structure or land shall be used and no building or structure shall be erected, structurally altered, enlarged or maintained except for the following uses . . . .
>
> . . .
>
> [*1056] 6. Conditional uses enumerated in *Sec. 12.24* when [**9] the location is approved pursuant to the provisions of said section.

[HN6] Among the conditional uses requiring approval are the operation of "Churches/Houses of worship." Los Angeles Municipal Code § 12.24(T)(3)(b).

[HN7] The procedure for reviewing CUP applications requires an initial decision by the Zoning Administrator, public notice, and a public hearing. *Id.* § 12.24(C), (D). Furthermore, the decision-maker must issue a series of factual findings before granting a CUP. *Id.* § 12.24(E). Any aggrieved person may administratively appeal the decision of the Zoning Administrator to the Planning Commission and, if still unsatisfied, to the City Council. *Id*. § 12.24(I).

[HN8] Municipalities may not waive or consent to a violation of their zoning laws, which are enacted for the benefit of the public. *See Hansen Bros. Enters., Inc. v. Bd. of Supervisors, 12 Cal. 4th 533, 48 Cal. Rptr. 2d 778, 907 P.2d*

1324, 1343 (Cal. 1996); *Trancas, 138 Cal. App. 4th at 181-82*; *see also Cal. Civ. Code § 3513*. Any such agreement to circumvent applicable zoning laws is invalid and unenforceable. *See Smith v. City of San Francisco, 225 Cal. App. 3d 38, 55, 275 Cal. Rptr. 17 (1990).*

The League contends that the Settlement Agreement did just that; it granted use permission to the Congregation [**10] outside of the required statutory processes and, therefore, is void. The district court rejected this argument because it determined that the Settlement Agreement was not a CUP. It was created by agreement and its obligations did not run with the land. Enforcement would not be accomplished through criminal law, but through contractual remedies. Therefore, because the Settlement Agreement was something less than a traditional CUP, the procedures and standards mandated by Los Angeles Municipal Code §§ 12.08, 12.24 were never triggered.

We disagree. The district court's analysis -- a comparison between a traditional CUP and the terms of the Settlement Agreement -- ignores the plain language of [HN9] Los Angeles Municipal Code § 12.08: All "conditional use" is forbidden in an R1 zone unless "approved pursuant to the provisions of [Section 12.24]." The question is not whether the Congregation has been granted, in all respects, the de facto equivalent of a CUP. The question, rather, is whether, within the framework of the City's zoning ordinance, the Congregation could engage in the uses permitted by the Settlement Agreement without first obtaining a CUP. Therefore, we need only ask whether the [**11] Settlement Agreement grants the Congregation permission to engage in a "conditional use" as defined by the ordinance that is forbidden in the absence of a valid CUP. If so, the statutory framework is triggered in full.

Here, the answer is evident. The Congregation sought, and the Settlement Agreement granted, permission to operate a synagogue on the Highland property. In an R1 zone, congregational worship is considered a "conditional use" under Section 12.24, and requires a permit. Before allowing such a use, the City was required to comply with the ordinance's procedural formalities. Because the City did not satisfy those formalities when it entered into the Settlement Agreement, the Agreement is invalid and unenforceable under state law.

The California Court of Appeal's recent decision in *Trancas* confirms our conclusion. There, the City disapproved a developer's tract maps and the developer filed suit. *138 Cal. App. 4th at 176-77*. In order to settle the claims, the City approved, in a closed session, a written agreement to rescind the disapproval [*1057] and exempt the developer from all present and future zoning density restrictions that would otherwise block the development. *Id. at 178-79*.

The [**12] *Trancas* court invalidated the agreement on two grounds.

First, it held the provision exempting the developer from all future density restrictions to be unlawful. *Id. at 181*. [HN10] "'Land use regulations . . . involve the exercise of the state's police power, and it is settled that the government may not contract away its right to exercise the police power in the future.'" *Id.* (quoting *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546, 556 (Cal. 1976)).*

Second, the court focused on another provision that exempted the developer from *existing* density limitations in the zoning code. *Id. at 181* (summarizing provision as an "agreement that the development need not comply with density limitations different from the density set forth in the covenant"). The court held:

> This contractual exemption from an element of the city's zoning is indistinguishable from the one condemned by *Avco*. Moreover, it functionally resembles a variance. Such [HN11] departures from standard zoning, however, by law require administrative proceedings, including public hearings, followed by findings for which the instant density exemption might not qualify. *Both the substantive qualifications and the procedural means* [**13] *for a variance discharge public interests. Circumvention of them by contract is impermissible.*

Id. at 182 (emphasis added and citations omitted).

Here, the Settlement Agreement violated both principles of *Trancas*. The City *did* bargain away its right to exercise its police power over the Highland property so long as the Congregation is in existence. It is now contractually obligated to tolerate the conditional use approved in the Agreement and may not enforce Section 12.08 or any other zoning ordinance to the extent that they deviate from the Agreement's provisions.

Moreover, in doing so, the City impermissibly circumvented the procedural and substantive limitations contained in Los Angeles Municipal Code § 12.24. It granted the Congregation a right to use property in a residential neighborhood for congregational worship without going through the necessary procedures and issuing the requisite factual findings.

Finally, we reject any argument that the City may circumvent its zoning procedures by referencing its general authority to settle litigation under § 273(c) of the city charter. [HN12] Section 273(c) generally empowers the city council "to approve or reject settlement of litigation that does [**14] not involve only the payment or receipt of money." This provision does not purport to authorize contractual exemptions from zoning requirements. *Trancas* clearly holds that such exemptions are illegal, and § 273(c) cannot grant the City more authority than is permitted under California law. *See Elysian Heights Residents Assn., Inc. v. City of Los Angeles, 182 Cal. App. 3d 21, 40, 227 Cal. Rptr. 226 (1986)* ("Local legislation in conflict with general law is void.") (citation and alteration omitted).

We hold that Settlement Agreement is invalid and unenforceable as a matter of California law.

B. There was no judicial determination that federal law had been or would be violated

Our inquiry is not yet complete. The City might not have to comply with the procedural and substantive limitations set [*1058] forth in its zoning ordinances if there has been a violation of federal law or if compliance will result in such a violation. *Cf. Perkins, 47 F.3d at 216* ("[HN13] Once a court has found a federal constitutional or statutory violation, however, a state law cannot prevent a necessary remedy.").

The district court validated the Settlement Agreement by referencing RLUIPA, *42 U.S.C. § 2000cc*: "[The Settlement Agreement] was negotiated [**15] against the background not only of City zoning law, but federal law which might or might not be held valid after long and expensive litigation." On this theory, the City had the right to settle the Congregation's claim rather than litigate over RLUIPA's uncertain legal landscape.

This logic contains one critical flaw. By placing its imprimatur on the Settlement Agreement, the district court effectively authorized the City to disregard its local ordinances in the name of RLUIPA. Such judicial action is authorized only when the federal law in question mandates the remedy contained in the settlement. *See Keith, 118 F.3d at 1393* ("Under the Constitution, the district court could not supersede California's law unless it conflicts with any federal law."). As summarized by the Seventh Circuit:

> [HN14] [U]pon properly supported findings that such a remedy is *necessary* to rectify a *violation of federal law*, the district court can approve a consent decree which overrides state law provisions. Without such findings, however, parties can only agree to that which they have the power to do outside of litigation.

Perkins, 47 F.3d at 216; *see also Cleveland County Ass'n for Gov't by the People v. Cleveland County Bd. of Comm'rs, 330 U.S. App. D.C. 20, 142 F.3d 468, 477 (D.C. Cir. 1998).*

Here, [**16] the district court held that a *potential* violation of federal law allowed a settlement agreement authorizing the City to disregard its zoning regulations. This was incorrect. Before approving any settlement agreement that authorizes a state or municipal entity to disregard its own statutes in the name of federal law, a district court must find that there has been or will be an *actual* violation of that federal law. [3]

3 Even if such a finding is made, a district court would then have to consider the appropriateness of the agreed-to remedy under federal law.

Such a finding could not have been made in this case. While a district court would not be bound by the parties' stipulation that a violation of federal law had occurred or would occur, the district court here was presented with a settlement agreement that specifically reiterated the City's denial of all of the allegations of the complaint, and disclaimed any "admission of liability . . . under any federal, state, or local law, including [RLUIPA]."

Absent a finding that federal law was violated or would be violated, the district court could not approve a settlement agreement that authorized the City to disregard its own zoning ordinances. [**17] Since no such finding was made, the Settlement Agreement is invalid and unenforceable. [4]

4 In light of this holding, we decline to reach any of the League's constitutional claims.

V. Conclusion

We reverse the district court's dismissal of the League's collateral attack on the Settlement Agreement and we remand the case to the district court for further proceedings consistent with this opinion.

REVERSED AND REMANDED FOR FURTHER PROCEEDINGS.

341 Md. 366

MONTGOMERY COUNTY, Maryland et al.

v.

REVERE NATIONAL CORPORATION, INC.

No. 118, Sept. Term, 1994.

Court of Appeals of Maryland.

Feb. 6, 1996.

Billboard company sought to hold county in contempt and to enforce settlement agreement with county allowing billboard company to maintain its existing billboards for ten years. The Circuit Court, Montgomery County, J. James McKenna, J., vacated settlement agreement. Appeal was taken. The Court of Special Appeals reversed. After writ of certiorari was granted, 101 Md.App. 731, 101 Md.App. 734, the Court of Appeals, Eldridge, J., held that: (1) order incorporating settlement agreement was final judgment which ordinarily could not be revised in absence of fraud, mistake or irregularity; (2) settlement agreement was not invalid attempt to obligate district council by advance contract for particular zoning; (3) county zoning regulations flatly prohibiting all billboards did not preclude enforcement of settlement agreement, absent compliance with state statute requiring compensation for any sign required to be removed by county; (4) provisions of settlement agreement stating that agreement would supersede conflicting law and enlarging jurisdiction of sign review board were unenforceable; and (5) county could not rely on invalid provision of settlement agreement, which had been waived by billboard company in order to excuse county's failure to perform its obligations under agreement.

Judgment of Court of Special Appeals vacated and remanded with directions.

1. **Judgment** ⟹301

Order incorporating settlement agreement between county and billboard company was final judgment which ordinarily could not be revised in absence of fraud, mistake or irregularity, even if order did not provide ruling on merits of underlying challenge to validity of county's zoning regulations; settlement agreement ended case by granting billboard company right to maintain its existing billboards for ten years after which county could fully implement its total ban against billboards. Md.Rule 2–535(b).

2. **Zoning and Planning** ⟹131, 351

District council's zoning enactments under authority of Regional District Act are not subject to approval or veto of county executive and, thus, do not constitute legislation within meaning of State Constitution and county charter; county council acts as administrative agency when it sits as district council in zoning matters. Const. Art. 11–A, § 1 et seq.; Code 1957, Art. 28 § 8–101 et seq.; Acts 1992, c. 643, § 1; Montgomery County, Md., County Charter § 208.

3. **Counties** ⟹129

Municipal Corporations ⟹254

Counties and municipalities are normally bound by their contracts to same extent as private parties and, thus, are not afforded defense of governmental immunity in contract actions against them.

4. **Zoning and Planning** ⟹4, 160

Local government is generally prohibited from contracting away exercise of zoning power or obligating itself by advance contract to provide particular zoning.

5. **Zoning and Planning** ⟹81

Settlement agreement between county and billboard company, allowing billboard company to maintain its existing billboards for ten years after which county would be able to fully implement total zoning ban against billboards, was not invalid attempt to obligate district council by advance contract for particular zoning; agreement contemplated no action whatsoever by district council.

6. **Public Contracts** ⟹14

As general matter, executive discretion in enforcement and execution of laws can be limited by contract.

7. Counties ⚖126

County government executive branch's entry into contract, in carrying out laws and functions of government, is exercise of executive discretion and, thus, requirement that government adhere to that exercise of discretion by being held to its contract ordinarily does not constitute unlawful interference with executive discretion.

8. Counties ⚖124(1)

Settlement agreement with county allowing billboard company to maintain its existing billboards for ten years was not rendered unenforceable as illegal contract by existence of county zoning ordinance flatly prohibiting all billboards, in light of unenforceability of ordinance absent any offer by county to compensate billboard company in compliance with state statute expressly requiring payment of fair market value for any outdoor advertising required to be removed by county. Code 1957, Art. 25, § 122E(b); Montgomery County, Md., Code § 59–F–1.65.

9. Compromise and Settlement ⚖9

Provision of settlement agreement between county and billboard company stating that agreement would supersede conflicting law was contrary to law and unenforceable.

10. Compromise and Settlement ⚖9

Provision of settlement agreement between county and billboard company allowing billboard company to appeal denial of billboard relocation request to county sign review board was invalid attempt to enlarge subject matter jurisdiction of board by contract. Montgomery County, Md., Ordinance § 6–115.

11. Compromise and Settlement ⚖20(1)

Billboard company waived any contractual entitlement under invalid provision of settlement agreement between county and billboard company, providing for appeal to county sign review board for denial of request to relocate billboard, and thus, county could not rely on invalid provision to excuse county's failure to perform its obligations under settlement agreement.

Frank E. Couper, Senior Assistant County Attorney, (Marc P. Hansen, Acting County Attorney; Alan M. Wright, Senior Assistant County Attorney, on brief), Rockville, for Petitioners.

Walter E. Diercks (Darrin N. Sacks, Eric M. Rubin, Rubin, Winston, Diercks, Harris & Cooke, on brief), Washington, DC, for Respondent.

Argued before ELDRIDGE, RODOWSKY, CHASANOW, KARWACKI, BELL and RAKER, JJ.

ELDRIDGE, Judge.

The issue in this case is whether Montgomery County is bound by the provisions of a settlement agreement incorporated in a circuit court judgment. The agreement, ending sixteen years of litigation between the County and the owner of a billboard company, granted to the owner the right to maintain its billboards within the County for a period of ten years, despite a County zoning regulation prohibiting all billboards. Montgomery County contends that the agreement was void from its inception because it impermissibly undermined legislative and executive discretion in the enactment and enforcement of the County's zoning regulations.

I.

In 1968, the Montgomery County Council, sitting as a district council, amended its zoning regulations concerning outdoor signs and billboards. The new regulatory language governed the placement, height and width of billboards within the County. The 1968 regulations provided that any existing billboards not conforming with the new standards were required to be removed at the end of a period of two years from the effective date of the regulations or four years from the date the billboards were erected, whichever occurred later. After the expirations of the time periods provided for in the regulations, controversies arose between Montgomery County and Rollins Outdoor Advertising, Inc., over billboards owned by Rollins. Montgomery County contended that the billboards did not comply with the standards set

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ıper, Senior Assistant County
·c P. Hansen, Acting County
ı M. Wright, Senior Assistant
ıey, on brief), Rockville, for

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in, Winston, Diercks, Harris &
ef), Washington, DC, for Re-

ıre ELDRIDGE,
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forth in the 1968 regulations and that they should be removed.

In 1974, Rollins filed an action against Montgomery County, the County Executive and the Council,[1] in the Circuit Court for Montgomery County, challenging the validity of the 1968 billboard regulations and seeking injunctive and declaratory relief.[2] The bill of complaint alleged that Rollins, which operated and maintained billboards in Montgomery County, had been denied permission to erect a new billboard and that the denial was "based upon the discriminatory setback provisions" of the 1968 regulations.[3] The bill of complaint also alleged that Rollins had been ordered, without an offer of just compensation, to remove numerous existing billboards which did not conform to the location specifications set forth in the 1968 regulations.

Rollins asserted that Montgomery County's enactment and enforcement of the 1968 regulations violated Articles 17 and 24 of the Maryland Declaration of Rights,[4] as well as the Fourteenth Amendment to the United States Constitution. Specifically, Rollins maintained that the billboard regulations constituted prohibited retrospective legislation, that they violated "substantive" due process and equal protection principles, and that they deprived Rollins of property without just compensation.

In 1986, while the above-described litigation was still pending, the district council amended the zoning regulations to prohibit all billboards within the County.[5] Neither the 1986 amendment, nor the 1968 regulations, provided for compensation to the owners of billboards. Rollins amended its bill of complaint, adding contentions that the County's ban on billboards violated state statutes mandating just compensation when a governmental subdivision requires the removal of billboards, as well as Article III, § 40, of the Maryland Constitution.[6] Rollins also main-

1. Hereinafter, the defendants will be referred to collectively as "Montgomery County," or simply as "the County."

2. After the suit was filed in 1974, Rollins was sold to Reagan Outdoor Advertising, Inc., which was later sold to Revere National Corporation. Revere, the named party in the present proceeding, is the successor-in-interest to Rollins and Reagan.

3. The setback provisions stated:

"No billboard shall be closer than one hundred (100) feet to any property line nor located closer than six hundred sixty (660) feet to the right-of-way line of any highway which is part of the interstate highway system, nor closer than two hundred (200) feet to the right-of-way line of any other street or road."

4. Article 17 of the Maryland Declaration of Rights states:

"That retrospective Laws, punishing acts committed before the existence of such Laws, and by them only declared criminal, are oppressive, unjust and incompatible with liberty; wherefore, no *ex post facto* Law ought to be made; nor any retrospective oath or restriction be imposed, or required."

Article 24 of the Declaration of Rights states:

"That no man ought to be taken or imprisoned or disseized of his freehold, liberties or privileges, or outlawed, or exiled, or, in any manner, destroyed, or deprived of his life, liberty or property, but by the judgment of his peers, or by the Law of the land."

At the time Rollins's bill of complaint was filed in 1974, the present Article 24 of the Declaration of Rights had been numbered Article 23. We shall use the current numbering.

5. Section 59–F–1.65 of the Montgomery County code, as adopted by the district council in 1986, stated:

"Commercial signs or structures that advertise products or businesses not connected with the site or building on which they are located are prohibited."

6. Rollins relied on Maryland Code (1957, 1994 Repl.Vol.), Art. 25, § 122E, which states as follows:

"**§ 122E. Compensation for removed outdoor advertising sign.**

"(a)(1) In this section the following words have the meanings indicated.

(2)(i) 'Fair market value' means a value, determined by a schedule adopted by the Department of Transportation, that includes the value of integral parts of an outdoor advertising sign, less depreciation.

(ii) 'Fair market value' does not include a value for loss of revenue.

(3)(i) 'Outdoor advertising sign' means an off-premises outdoor sign:

1. Commercially owned and maintained; and

2. Used to advertise goods or services for sale in a location other than that on which the sign is placed.

(ii) 'Outdoor advertising sign' includes signs composed of painted bulletin or poster panel, and usually referred to as billboards.

tained that Montgomery County's regulations violated the Fifth and Fourteenth Amendments to the United States Constitution by denying just compensation to Rollins and violated the First Amendment to the United States Constitution by restricting Rollins's ability to disseminate speech.

In April 1990, sixteen years after the filing of the original bill of complaint, Rollins's successor-in-interest, Reagan Outdoor Advertising, Inc., entered into a written settlement agreement with Montgomery County. In addition to being signed by the county attorney and county and Reagan officials, the agreement was signed by the trial judge below the words, "SO ORDERED." The circuit court's docket entry for April 11, 1990, reads as follows: "Stipulated Consent Agreement (McKenna, J.) Granted...."

The settlement agreement permitted Reagan to continue "maintain[ing] within the County ... forty-seven [billboards]" for a period of ten years. Reagan could replace and relocate billboards to a new location if either "(i) a lease for the premises on which a sign is located is not to be continued, or (ii) an outdoor advertising structure has been destroyed or has deteriorated to the point that it is no longer in a safe condition." Relocation of billboards was limited to not "more than five signs within any calendar year," with Reagan having the sole discretion as to which signs were to be relocated. The agreement placed certain restrictions on where billboards could be relocated but stated that "in no event shall the County utilize procedures or fees to impair Reagan from exercising its rights under this Agreement." In the contract, the parties expressly agreed upon the "dismissal of any and all pending litigation between the County and Reagan...." Finally, the agreement stated that "[i]n the event either party fails to perform its obligations under this Agreement the other party shall be entitled to seek an orde the Court to enforce the Agreement..

In March 1992, Revere National Corp tion, the successor-in-interest to Rea sought the County's permission to const a replacement billboard pursuant to the p visions of the settlement agreement. request was denied in May 1992 beca according to the County, the settlem agreement entered into by the parties v "void *ab initio*," and Revere was requesti "to build a prohibited sign," whereas t county regulations banned all billboards.

Upon the County's denial of its reque Revere filed in the Circuit Court for Mo gomery County a "Motion to Adjudicate D fendants In Contempt of Court and For A Order to Enforce Stipulated Consent Agre ment." After setting forth the pertine facts, Revere's Motion asserted that the d fendants "have violated the April 11, 199 Order of this Court." Revere sought to hav the defendants adjudicated in contemp sought an order requiring the defendants t comply with the settlement agreemen "which was entered as an order of the [cir cuit] Court," and requested compensator damages.

In response, the County filed a "Motion T Vacate The Stipulated Consent Agreement o April 11, 1990," as embodied in the court' order. The County asserted that the settle ment agreement "is void *ab initio* because i purports to permit what the Montgomer County Zoning Ordinance prohibits, namel the existence of 47 billboards in Montgomer County." The County went on to state tha it "has no authority to make such an agree ment or to consent to a court order whic violates the Zoning Ordinance's prohibitio on billboards...." The County requeste the court to find that the settlement agree ment "is void *ab initio* and order that it b

(b) A county or municipality shall pay the fair market value of an outdoor advertising sign, removed or required to be removed by the county or municipality, that was lawfully erected and maintained under any State, county, or municipal law or ordinance."

Rollins also relied on Maryland Code (1977, 1993 Repl.Vol.), § 8-737 of the Transportation Article, which also prohibits a governmental subdivision from requiring the removal of a billboard contiguous to a federal aid primary high way without paying just compensation.

Article III, § 40, of the Maryland Constitutio states:

"The General Assembly shall enact no La authorizing private property, to be taken fo public use, without just compensation, a agreed upon between the parties, or awarde by a Jury, being first paid or tendered to th party entitled to such compensation."

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The circuit court, after a hearing, denied the County's motion to vacate the settlement agreement and, without ruling on Revere's motion, stated that the denial of the County's motion to vacate the settlement agreement, as embodied in the 1990 court order, was final and appealable. Montgomery County then noted an appeal to the Court of Special Appeals. In April 1993, the Court of Special Appeals, in an unreported opinion, dismissed the appeal on the ground that the appeal was premature because the trial court had not yet ruled on the pending motions from Revere and thus a final judgment did not exist. *See* Maryland Rule 2–602(a).

After receiving additional memoranda and holding another hearing, the circuit court on November 18, 1993, entered an order granting the County's motion to vacate the settlement agreement and denying Revere's motion to enforce the agreement and to hold the defendants in contempt. The circuit court expressed the view that the April 11, 1990, order approving the settlement agreement was not a final judgment terminating the action brought by Revere's predecessor in 1974, and that, therefore, the April 1990 order remained subject to revision at anytime under Maryland Rule 2–602(a).[7] The circuit court further held that the settlement agreement and April 1990 order should be vacated because Montgomery County had no power to enter into an agreement contrary to its zoning regulations.

Revere appealed, and the Court of Special Appeals reversed the circuit court's order in another unreported opinion. The Court of Special Appeals held that the settlement agreement, as embodied in the April 1990 circuit court order, constituted a final judgment terminating the action instituted by Revere's predecessor in 1974. The intermediate appellate court further held that Montgomery County had not shown any valid basis to set aside the 1990 judgment. The Court of Special Appeals explained:

> "[Montgomery County] maintains that it had no ability to agree to the terms contained in the agreement because the County Executive and executive branch officials who are obligated to enforce the Zoning Ordinance cannot implement an agreement that violates the Zoning Ordinance. We shall not address that contention, however; it is of no consequence in this case.
>
> "When an agreement is incorporated into an enrolled decree, an attack may not be made upon the agreement without simultaneously challenging the validity of the decree.... Inasmuch as the Stipulated Consent Agreement was incorporated into the court's judgment, appellee's attack in the lower court was upon an enrolled decree. To set aside an enrolled decree, it is necessary to demonstrate fraud, mistake or irregularity. Maryland Rule 2–535.
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> "In summary, since the order vacated was a final, enrolled judgment, the court erred in vacating it, absent fraud, mistake, or irregularity, on the grounds that the agreement incorporated therein was void *ab initio* because one of the parties had no authority to enter into it."

Montgomery County filed in this Court a petition for a writ of certiorari which we granted. *Montgomery County v. Revere National Corp.*, 336 Md. 705, 650 A.2d 295 (1994). Montgomery County argues that the Court of Special Appeals erred in holding that the April 11, 1990, order constituted a final judgment. The County asserts that the

ɔard contiguous to a federal aid primary high- ay without paying just compensation.

Article III, § 40, of the Maryland Constitution tates:

"The General Assembly shall enact no Law authorizing private property, to be taken for public use, without just compensation, as agreed upon between the parties, or awarded by a Jury, being first paid or tendered to the party entitled to such compensation."

7. Rule 2–602(a) states as follows:

"(a) **Generally.**—Except as provided in section (b) of this Rule, an order or other form of decision, however designated, that adjudicates fewer than all of the claims in an action (whether raised by original claim, counterclaim, cross-claim or third-party claim), or that adjudicates less than an entire claim, or that adjudicates the rights and liabilities of fewer than all the parties to the action:

(1) is not a final judgment;

(2) does not terminate the action as to any of the claims or any of the parties; and

(3) is subject to revision at any time before the entry of a judgment that adjudicates all of the claims by and against all of the parties."

April 1990 order did not dispose of all the underlying issues in the case, was therefore not final, and is subject to revision at any time pursuant to Rule 2–602(a)(3). Alternatively, Montgomery County contends that if the April 1990 order was a final judgment, the judgment can still be set aside because *ultra vires* acts of a county or municipality, even if embodied in a final court judgment, are "void." Finally, the County argues that the settlement agreement, as incorporated in the April 1990 order, exceeds the authority of Montgomery County because it violates the County's zoning regulation that prohibits all billboards. Thus, according to the County, the circuit court did not err in vacating the 1990 order.

Revere, on the other hand, asserts that the Court of Special Appeals correctly held that the April 1990 order was a final judgment. Moreover, because the April 1990 order was a final judgment, Revere contends that the circuit court was prohibited from revising the judgment absent fraud, mistake, or irregularity, and that there was no fraud, mistake or irregularity in the present case. *See* Rule 2–535. Finally, Revere argues that the County did not exceed its authority in entering into the settlement agreement.

II.

We shall first address the issue of whether the April 1990 order constituted a final judgment. If the April 1990 order was not a final judgment, it "is subject to revision at any time before the entry of a [final] judgment...." Rule 2–602(a)(3). If the April 1990 order was a final judgment, however, it would ordinarily be subject to revision only during a thirty-day period after the entry of the order on April 11, 1990. Rule 2–535(a). After the thirty-day period, Rule 2–535(b) authorizes revision of a judgment only "in case of fraud, mistake or irregularity." [8]

The County maintains that the settlement agreement, as incorporated in the April 1990 court order, "did not resolve any of the constitutional or statutory issues raised in the Amended complaint" and "granted none of the relief prayed for." (County's brief in this Court at 33–34). For this reason, according to the County, the April 1990 order was not final. A similar argument was recently rejected by this Court in *Horsey v. Horsey*, 329 Md. 392, 401–402, 620 A.2d 305, 310 (1993), where we stated:

> "Contrary to the view expressed by the defendant ... in this case, a trial court's order sometimes may constitute a final appealable judgment even though the order fails to settle the underlying dispute between the parties. Where a trial court's order has 'the effect of putting the parties out of court, [it] is a final appealable order.' *Houghton v. County Comm'rs. of Kent Co.*, 305 Md. 407, 412, 504 A.2d 1145, 1148 (1986), and cases there cited. *See, e.g., Wilde v. Swanson*, 314 Md. 80, 85, 548 A.2d 837, 839 (1988) ('An order of a circuit court ... [may be] a final judgment without any adjudication by the circuit court on the merits'); *Doehring v. Wagner*, 311 Md. 272, 275, 533 A.2d 1300, 1301–1302 (1987) (trial court's order 'terminating the litigation in that court' was a final judgment); *Walbert v. Walbert*, 310 Md. 657, 661, 531 A.2d 291, 293 (1987) (circuit court's unqualified order was a final judgment because it 'put Denise Walbert out of court, denying

8. Maryland Rule 2–535 provides as follows:
"**REVISORY POWER**
(a) **Generally.**—On motion of any party within 30 days after entry of judgment, the court may exercise revisory power and control over the judgment and, if the action was tried before the court, may take any action that it could have taken under Rule 2–534.
(b) **Fraud, Mistake, Irregularity.**—On motion of any party filed at any time, the court may exercise revisory power and control over the judgment in case of fraud, mistake or irregularity.
(c) **Newly Discovered Evidence.**—On motion of any party filed within 30 days after entry of judgment, the court may grant a new trial on the ground of newly-discovered evidence that could not have been discovered by due diligence in time to move for a new trial pursuant to Rule 2–533.
(d) **Clerical Mistakes.**—Clerical mistakes in judgments, orders, or other parts of the record may be corrected by the court at any time on its own initiative, or on motion of any party after such notice, if any, as the court orders. During the pendency of an appeal, such mistakes may be so corrected before the appeal is docketed by the appellate court, and thereafter with leave of the appellate court."

on April 11, 1990. Rule 2–535(a). thirty-day period, Rule 2–535(b) revision of a judgment only "in ud, mistake or irregularity." [8]

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her the means of further prosecuting the case at the trial level'); *Houghton v. County Com'rs of Kent Co.*, 307 Md. 216, 221, 513 A.2d 291, 293 (1986); *Concannon v. State Roads Comm.*, 230 Md. 118, 125, 186 A.2d 220, 224–225 (1962), and cases there cited."

See also Moore v. Pomory, 329 Md. 428, 432, 620 A.2d 323, 325 (1993) (dismissal without prejudice, although not an "adjudication on the merits," was a final and appealable judgment).

[1] Thus, an order entered on the docket pursuant to Rule 2–601, and having the effect of terminating the case in the circuit court, is a final judgment. Montgomery County's position, that all of the issues and claims in a case must be resolved on the merits in order that there be a final judgment, would undermine the effectiveness of settlement agreements as a mechanism for ending litigation.

It is clear that, upon the entry of the settlement agreement as an order of the court on April 11, 1990, the case begun by Revere's predecessor in 1974 was over. The settlement agreement, which comprises the substance of the April 1990 order, discloses that the parties intended to terminate over sixteen years of litigation. There was nothing further for the court to resolve after the agreement was executed and entered as an order. Section 4(a) of the agreement specifies that, "[i]n consideration of the Agreement reached herein, Reagan and the County hereby release each other from any claims or obligations which arise from the complaint in the above-captioned matter." Section 5(a) of the agreement states that agreement becomes effective "upon execution ... and incorporation of th[e] Agreement into a final judgment...." The parties agreed to the "dismissal of any and all pending litigation between the County and Reagan."

Moreover, in a real sense the agreement did dispose of the claims and issues raised by the parties. In lieu of the relief which it sought in the litigation, namely having the challenged zoning regulations invalidated under state statutes and/or on constitutional grounds and receiving compensation or damages, the billboard company received the right to maintain its 47 existing billboards for a ten-year period. Although the County did not receive a judicial ruling on the validity of the regulations, nevertheless the County did not have to pay compensation, was able to limit the billboard company to 47 billboards, and could fully implement the ban on the company's billboards after the ten-year period. The settlement agreement was a typical compromise with respect to the claims, issues, and positions of the parties. The billboard company gave up its claims for relief against Montgomery County in return for what it received under the agreement.

Therefore, we agree with the Court of Special Appeals that the April 11, 1990, order was a final judgment. Moreover, we agree with the Court of Special Appeals that there was no fraud, mistake or irregularity, within the meaning of Rule 2–535(b), so as to authorize revision of the judgment under that rule. *See, e.g., Tandra S. v. Tyrone W.*, 336 Md. 303, 315–318, 648 A.2d 439, 445–446 (1994); *Autobahn Motors v. Mayor & City Council of Baltimore*, 321 Md. 558, 583 A.2d 731 (1991); *Hamilos v. Hamilos*, 297 Md. 99, 465 A.2d 445 (1983); *Weitz v. MacKenzie*, 273 Md. 628, 331 A.2d 291 (1975); *Schwartz v. Merchants Mort. Co.*, 272 Md. 305, 322 A.2d 544 (1974); *Household Finance Corp. v. Taylor*, 254 Md. 349, 254 A.2d 687 (1969), and cases there cited.

III.

Montgomery County contends that, even if the April 11, 1990, order was a final judgment, the County exceeded its legal authority in entering into the settlement agreement and that this is a valid basis for vacating the judgment. The County argues that a final judgment is not binding or preclusive, and is subject to collateral challenge, when a county or municipality exceeds its legal authority in entering into a settlement agreement that is incorporated in a final judgment.

The cases have recognized certain unusual and narrowly limited situations when final judgments based on consent of the parties, although not subject to revision under rules like Maryland Rule 2–535, have been deemed non-preclusive or subject to collateral attack. *See, e.g., Green v. Sollenberger*, 338 Md. 118,

131, 656 A.2d 773, 779 (1995) (final adoption decree, not authorized by adoption statutes, is subject to collateral attack and voidable); *Varsity Amusement Company v. Butters,* 155 Colo. 330, 339, 394 P.2d 603, 607 (1964) ("a judgment entered by agreement or consent does not have a [res judicata] effect where to give that effect would render impotent another important public policy"); *Blazek v. City of Omaha,* 232 Neb. 562, 565, 441 N.W.2d 205, 207 (1989) ("Except where an important public policy would be violated, judgments entered by agreement or consent are generally given a conclusive effect and are res judicata.")

The leading case in this area appears to be *Kelley v. Town of Milan,* 127 U.S. 139, 8 S.Ct. 1101, 32 L.Ed. 77 (1888). There, earlier litigation between the Town and holders of the Town's bonds had been terminated when the Town's officials consented to a decree adjudging the bonds to be valid obligations of the Town. In a subsequent lawsuit between the Town and the bondholders, the Supreme Court concluded that the Town was not bound by the earlier judgment. The Court held that, because the Town lacked authority under the laws of Tennessee to issue the bonds, the Town officials had no right to bind the Town by a settlement agreement incorporated in a final judgment. The Supreme Court explained (127 U.S. at 159, 8 S.Ct. at 1111, 32 L.Ed. at 85):

> "The declaration of the validity of the bonds, contained in the decree, was made solely in pursuance of the consent to that effect contained in the agreement signed by the [parties]. The act of the Mayor in signing that agreement could give no validity to the bonds, if they had none at the time the agreement was made. The want of authority to issue them extended to a want of authority to declare them valid. The Mayor had no such authority. The decree of the court was based solely upon the declaration of the Mayor, in the agreement, that the bonds were valid....
>
> "The adjudication in the decree cannot, under the circumstances, be set up as a judicial determination of the validity of the bonds.... This was not the case of a submission to the court of a question for its decision on the merits, but it was consent in advance to a particular decisi
> ... [which] gave life to invalid bonds...

Consequently, under the *Kelley* principle, tl act of placing a settlement agreement mac by a local government in the form of a cou judgment, in an effort to give it the force an effect of a final judgment, will not cure th lack of fundamental power in the governmen tal entity to make the agreement.

The cases, in considering whether loca governments are bound by final consen judgments reflecting agreements which the governments had no authority to make, have generally reached the same conclusion as *Kelley v. Town of Milan, supra,* although the courts have used various approaches and reasons. Several cases rely on public policy. *See, e.g., Blazek v. City of Omaha, supra,* 232 Neb. at 565, 441 N.W.2d at 207. One court has viewed a final judgment embodying a governmental settlement agreement as "constructive fraud" when the officials entering into the agreement lack the authority to bind the municipality as to matters contained therein. *See, Connor v. Morse,* 303 Mass. 42, 47–48, 20 N.E.2d 424, 426–427 (1939). Another court has theorized that, since governmental officials are trustees of the municipal entity, and thus represent the citizens of that entity, their lack of authority as to matters agreed upon in a settlement agreement cannot be binding on their trustors, even if incorporated in a final judgment. *See, Union Bank v. Commissioners of Oxford,* 119 N.C. 214, 226, 25 S.E. 966, 969 (1896) ("when parties act in a representative capacity, such judgments do not bind the *cestuis que trustent* unless the trustees had authority to act ...").

A number of cases have simply stated that a municipality's lack of authority regarding the matters stipulated in a settlement agreement incorporated in a final judgment is a sufficient basis for either vacating a judgment or not applying the doctrine of res judicata. *See, e.g., State v. Great Northern Ry. Co.,* 134 Minn. 249, 256, 158 N.W. 972, 975 (1916) ("The parties could not accomplish [pursuant to a consent judgment] what they had absolutely no power to accomplish in any manner ..."); *Martin v. Territory,* 5 Okla.

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188, 48 P. 106 (1897); *Mellette County v. Arnold*, 76 S.D. 210, 214, 75 N.W.2d 641, 643 (1956) ("a consent judgment in which officials representing a county or other governmental agency assume obligations against it unauthorized by law is void"); *Coolsaet v. City of Veblen*, 55 S.D. 485, 490, 226 N.W. 726, 729 (1929) ("consent decree was not beyond the power of the city's officials and attorneys"). As explained by the Supreme Court of Minnesota in *City of St. Paul v. Chicago, St. P., M. & O. Ry. Co.*, 139 Minn. 322, 326, 166 N.W. 335, 336–337 (1918),

> "[a] judgment against a municipality, not rendered as the judicial act of a court, but entered pursuant to a stipulation of the officers of the municipality, is of force and effect only so far as such officers had authority to bind the municipality. The fact that by consent of the municipal officers an agreement or stipulation made by them has been put in the form of a judgment, in an attempt to give it the force and effect of a judgment does not cure a lack of power in the officers to make it, and if such power be lacking the judgment as well as the stipulation is void."

Regardless of the various theories employed, underlying these decisions is the recognition that the fundamental public policy of a state may sometimes require that a final consent judgment be vacated or not given preclusive effect.

We need not in the present case, however, explore or decide the scope and limits, under Maryland law, of the principles discussed in *Kelley v. Town of Milan, supra*, and the other above-cited cases. We shall assume, *arguendo*, that it would have been proper to vacate the settlement agreement and judgment of April 11, 1990, if the agreement were clearly *ultra vires* as contended by Montgomery County. Nevertheless, for the reasons set forth in Part IV below, we do not agree that the substance of the agreement was clearly *ultra vires*.

IV.

A.

Before addressing Montgomery Count; argument that the April 1990 settleme agreement exceeded the County's authorit it would be useful to review certain gener principles of Maryland law concerning zonir in Montgomery County and contracts of loc: governments.

Unlike most other home rule chartere counties in Maryland which receive their basic zoning authority from Article XI–A of th Maryland Constitution, the Express Power: Act, Code (1957, 1994 Repl.Vol.), Art. 25A § 5(x), and their county charters, the exclusive source of Montgomery County's zoning authority is the Regional District Act, Code (1957, 1993 Repl.Vol., 1995 Supp.), Art. 28, § 8–101 *et seq. See, e.g., Mossburg v. Montgomery County, Md.*, 329 Md. 494, 502–503, 620 A.2d 886, 890 (1993); *Chevy Chase View v. Rothman*, 323 Md. 674, 685, 594 A.2d 1131, 1136 (1991). *See also Northampton v. Pr. George's Co.*, 273 Md. 93, 327 A.2d 774 (1974); *Pr. George's Co. v. Md.–Nat'l Cap.*, 269 Md. 202, 306 A.2d 223, *cert. denied*, 414 U.S. 1068, 94 S.Ct. 577, 38 L.Ed.2d 473 (1973).[9]

[2] The Regional District Act specifies that the Montgomery County Council, sitting as a district council, "may by ordinance adopt and amend the text of the zoning ordinance. . . ." Art. 28, § 8–101(b)(2). The Regional District Act sometimes refers to the zoning enactments of a district council as "ordinances," sometimes refers to them as "regulations," and sometimes uses the phrase "ordinance regulations" (*e.g.*, § 8–101(c)). The zoning enactments of the district council in Montgomery County are no longer subject to the approval or veto of the County Executive, Ch. 643, § 1, of the Acts of 1992.[10] Thus, the district council's zoning enactments do not constitute legislation within the meaning of Article XI–A of the Maryland Constitution and the Montgomery County Charter.

9. Code (1957, 1995 Repl.Vol.), Art. 66B, relating to zoning, is generally not applicable to chartered counties. *See* Art. 66B, § 7.03.

10. Legislation enacted by the County Council pursuant to the Montgomery County Charter, the Express Powers Act, and Article XI–A of the Constitution, however, is subject to the County Executive's veto authority. *See* § 208 of the Montgomery County Charter.

See Biggs v. Md.–Nat'l Cap. P. & P. Comm'n, 269 Md. 352, 354–355, 306 A.2d 220, 222 (1973) (zoning enactment of a district council "was not subject to the Charter provisions respecting referendum and emergency legislation"). Instead, "when it sits as the District Council in a zoning matter the County Council is an 'administrative agency'. . . ." *Co. Council v. Carl M. Freeman Assoc.,* 281 Md. 70, 74, 376 A.2d 860, 862 (1977). *See also Mont. Co. v. Woodward & Lothrop,* 280 Md. 686, 711, 376 A.2d 483, 497 (1977), *cert. denied,* 434 U.S. 1067, 98 S.Ct. 1245, 55 L.Ed.2d 769 (1978); *Mont. Co. v. Nat'l Capital Realty,* 267 Md. 364, 376, 297 A.2d 675, 681 (1972); *Hyson v. Montgomery County,* 242 Md. 55, 67, 71–72, 217 A.2d 578, 585–586, 588 (1966).

[3] Turning to government contracts generally, under Maryland law counties and municipalities are normally bound by their contracts to the same extent as private entities. *See, e.g., Fraternal Order of Police v. Baltimore County,* 340 Md. 157, 665 A.2d 1029 (1995); *American Structures v. City of Balto.,* 278 Md. 356, 364 A.2d 55 (1976). Thus, Maryland law has never recognized the defense of governmental immunity in contract actions against counties and municipalities. *Board v. Town of Riverdale,* 320 Md. 384, 389, 578 A.2d 207, 210 (1990); *Md.–Nat'l Cap. P. & P. Comm'n v. Kranz,* 308 Md. 618, 622, 521 A.2d 729, 731 (1987); *American Structures v. City of Balto., supra,* 278 Md. at 359–360, 364 A.2d at 57. This Court has repeatedly held that, "as long as the execution of the contract [is] within the power of the governmental unit," the local government is answerable in damages for breaching that contract. *American Structures,* 278 Md. at 359–360, 364 A.2d at 57, and cases there cited. Under some circumstances, courts have ordered that local governments specifically perform their contracts. *See, e.g., Cohen v. Baltimore County,* 229 Md. 519, 523–525, 185 A.2d 185, 187–188 (1962); *Bd. of Co. Comm. v. MacPhail,* 214 Md. 192, 199–200, 133 A.2d 96, 101 (1957).

B.

[4] There is a type of contract, particularly relevant to Montgomery County's argument in this case, which is ordinarily beyond the authority of local government entities. Local governments are generally prohibited from "contracting away the exercise of zoning power," *Attman v. Mayor,* 314 Md. 675, 686, 552 A.2d 1277, 1283 (1989). "[T]he zoning authority [cannot] obligate itself by advance contract to provide zoning," *ibid.*

Attman v. Mayor, supra, involved a controversy between a developer and the City of Annapolis concerning a "conditional use authorization" for an office building to be constructed by the developer. Under the Annapolis City Code, a "conditional use authorization" could only be issued by the city council, composed of the mayor and aldermen. The developer was granted a conditional use by the city council and began construction of the office building. Later, the developer sought a modification of the conditional use authorization which would permit the basement of the building to be used for purposes other than the housing of mechanical equipment. The city council granted the requested modification on the condition that the developer provide certain additional parking spaces. The developer, claiming that these new parking requirements were "arbitrary, capricious, and impossible to fulfill," challenged the city council's action by filing a lawsuit in the circuit court. Shortly before a scheduled circuit court hearing, the parties reached an oral agreement. Nevertheless, a dispute soon arose concerning the terms of that oral agreement. It was clear that both sides had agreed to seek a continuance of the court hearing and agreed that the developer should file a new application with the city council for a conditional use. The developer contended that the city council had agreed that it would grant the new application with certain specified less onerous parking requirements. The city council, however, maintained that it simply had agreed to consider these parking requirements, but that it did not purport to bind itself to grant the application with the less onerous parking requirements. Thereafter, the city council rejected the developer's new application for a conditional use authorization. The developer filed, in the pending circuit court proceeding,

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This Court's opinion in *Attman v. Mayor,* 314 Md. at 685–686, 552 A.2d at 1283, initially pointed out that the city council's grant of a conditional use authorization was similar to new zoning or rezoning for purposes of the principle that a government ordinarily cannot obligate itself by advance contract to provide a particular zoning. The *Attman* opinion, written by Judge McAuliffe for the Court, went on to review our prior cases involving this principle, including those invalidating agreements and those upholding agreements relating to zoning. The Court reasoned that it is only where "the zoning authority … obligate[s] itself by advance contract to provide zoning" that the principle is applicable. 314 Md. at 686, 552 A.2d at 1283. The Court explained that, if such contracts were upheld, they would "render meaningless the prescribed zoning procedures" and would violate the requirement that the zoning authority "exercise its unconstrained independent judgment in deciding matters of reclassification … [and] in deciding requests for special exceptions, conditional uses, or variances." 314 Md. at 686–687, 552 A.2d at 1283.

We concluded in *Attman* that, if the developer's version of the oral agreement was correct, the agreement would be invalid as an attempt to bind the city council in advance to render a particular zoning decision. On the other hand, the Court held that, if the terms of the oral agreement were as contended for by the city council, and if the agreement "did not surrender or impair the right and obligation of the city council to independently and impartially consider the application in accordance with procedures established by law," then the agreement would be valid. 314 Md. at 688–689, 552 A.2d at 1284.

In the case at bar, Montgomery County principally relies upon the *Attman* opinion. The County, citing *Attman,* argues that it has no "legal authority to amend or repeal provisions of the Zoning Ordinance or to relinquish the District Council's authority under state law and County Charter over billboard zoning matters for 10 years in the future." (County's brief in this Court at 13). The County asserts that "[t]he principles stated by this Court in *Attman* … apply equally to this case." *Ibid.* According to the County, the county government is powerless to "cede legislative authority … over zoning matters that is specifically granted by state law and County Charter." (*Id.* at 14).

Preliminarily, to the extent that the County relies upon legislative authority pursuant to the Montgomery County Charter, the reliance is misplaced. As previously discussed, the provisions of the Montgomery County Charter granting legislative authority have no application to zoning enactments of the district council.

[5] The County's reliance upon the *Attman* opinion is also misplaced. The settlement agreement in this case did not obligate the district council to rezone or amend the zoning regulations. In fact, unlike either version of the oral contract involved in *Attman,* the written settlement agreement in the case at bar contemplated no action whatsoever by the district council. This was simply not a contract providing for any type of decision by the zoning authority.

C.

Montgomery County also complains that the settlement agreement limited executive authority and discretion in the enforcement of the County's laws. The County contends that it may not, by contract, "relinquish the County Executive's legal obligation to enforce the … laws and ordinances of the County." (County's brief in this Court at 13). The County asserts that no county contract "can cede … executive enforcement authority over zoning matters…." (*Id.* at 14).

Of course, under certain circumstances and in some contexts, an attempt by a government to limit future executive discretion by contract would be invalid. *See, e.g., Fraternal Order of Police v. Baltimore County, supra,* 340 Md. at 169–171, 665 A.2d at 1034–1036, and cases there cited. For example, a contract by a Governor purporting to limit the Governor's constitutional authority and

discretion in the future appointment of judges would clearly be unenforceable.

[6] Nevertheless, as a general matter, executive discretion in the enforcement and execution of the laws can be limited by contract. *See, e.g., Fraternal Order of Police v. Baltimore County,* 340 Md. at 168, 171, 665 A.2d at 1034–1036; *Funger v. Mayor of Somerset,* 249 Md. 311, 328, 239 A.2d 748, 757 (1968); *Greenbelt v. Bresler,* 248 Md. 210, 215–217, 236 A.2d 1, 4–5 (1967); *Cohen v. Baltimore County, supra,* 229 Md. at 523–525, 185 A.2d at 187–188; *Bd. of Co. Comm. v. MacPhail, supra,* 214 Md. at 199–200, 133 A.2d at 101. In fact many, if not most, government contracts limit to some extent executive discretion in carrying out the laws and functions of government. If future executive discretion could not lawfully be limited by contract, a great many government contracts would be unenforceable. As pointed out earlier, however, governments are generally bound by their contracts.

This Court's opinion in *Bd. of Co. Comm. v. MacPhail, supra,* 214 Md. 192, 133 A.2d 96, specifically rejected an argument by a local government that a contract, entered into by that government, was unenforceable because it limited or interfered with executive discretion. The *MacPhail* case involved a contract between the County Commissioners of Harford County[11] and Larry MacPhail, the owner of a large farm in Harford County. Under the terms of the contract, the County Commissioners agreed to grade and pave a four-mile county public road which ran to and through the farm. In return, Mr. MacPhail agreed to forebear from filing a threatened lawsuit against the County, based on earlier alleged undertakings by the County Commissioners regarding the road. After entering the contract, the County Commissioners refused to perform, arguing, *inter alia,* that the contract was beyond their authority and interfered with the future exercise of discretion by the county government. The circuit court rejected this argument and issued an injunction requiring the County Commissioners to perform the contract. This Court, in an opinion by Judge Hammond, affirmed, stating (214 Md. at 199–200, 133 A.2d at 101):

> "The chancellor, noting that generally a court will not interfere with the discretion of public officials and, so, ordinarily will not tell the County Commissioners what roads to select for improvement or how improvements should be made, held that in the case before him, '* * * the Commissioners exercised their discretion by agreeing to improve the road under consideration.' He added: 'The purpose of this proceeding, therefore, is not to interfere with the County Commissioners in the exercise of their discretion but to require them to perform and carry out any agreements which they made in the exercise of their discretion. The Court is of the opinion that an injunction will lie under such circumstances.' We concur. We think the evidence warranted the action the chancellor took since the agreement he required to be executed was sufficiently definite and certain properly to be the subject of what, in effect, was specific performance, and since the fixing of the amount of a judgment for breach of contract would be almost impossible and a judgment would not be a duplicate or substantial equivalent of the promised performance.... The decree merely directed the County Commissioners to construct the MacPhail road, as they had agreed to do...."

[7] Thus, as the *MacPhail* opinion explains, when the executive branch of the county government, in carrying out the laws and functions of government, enters into a contract, such action constitutes the exercise of executive discretion. A requirement that the government adhere to that exercise of discretion, and be held to its contract, ordinarily does not constitute an unlawful interference with future executive discretion.

11. "County Commissioners, under Art. VII, § 1, of the Maryland Constitution, largely 'act as administrators or in an executive capacity'...." *Legislative Redistricting,* 331 Md. 574, 621 n. 6, 629 A.2d 646, 670 n. 6 (1993), quoting *City of Bowie v. County Comm'rs,* 258 Md. 454, 461, 267 A.2d 172, 176 (1970). *See also Boswell v. Prince George's Co.,* 273 Md. 522, 533, 330 A.2d 663, 669 (1975).

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D.

Finally, Montgomery County argues that implementation of the settlement agreement would clearly be in violation of law because the local zoning regulations flatly prohibit all billboards. Relying upon *Hanna v. Bd. of Ed. of Wicomico Co.*, 200 Md. 49, 53–58, 87 A.2d 846, 848–850 (1952), Montgomery County asserts that a "public contract must comply with law or be declared null and void," (County's brief in this Court at 16).

In determining whether implementation of the settlement agreement would involve activity in violation of law, however, it is necessary to examine all of the applicable law and not simply the district council's zoning regulations. Although a particular activity might be prohibited under local zoning regulations viewed in isolation, when all of the applicable law is considered, including prevailing state or federal law, the local zoning prohibition may be invalid or superseded. *See, e.g., Harrison v. Schwartz*, 319 Md. 360, 572 A.2d 528, *cert. denied*, 498 U.S. 851, 111 S.Ct. 143, 112 L.Ed.2d 110 (1990); *People's Counsel v. Maryland Marine*, 316 Md. 491, 560 A.2d 32 (1989). *See also Kirsch v. Prince George's County*, 331 Md. 89, 626 A.2d 372, *cert. denied*, — U.S. —, 114 S.Ct. 600, 126 L.Ed.2d 565 (1993); *Md.-Nat'l Cap. P. & P. Comm'n v. Chadwick*, 286 Md. 1, 405 A.2d 241 (1979). Local zoning ordinances, regulations or determinations frequently are unenforceable in light of enactments by the General Assembly. *See, e.g., Mossburg v. Montgomery County, supra*, 329 Md. 494, 620 A.2d 886; *Chevy Chase View v. Rothman, supra*, 323 Md. 674, 594 A.2d 1131; *West Mont. Ass'n v. MNCP & P Com'n*, 309 Md. 183, 196, 522 A.2d 1328, 1329 (1987) ("[Montgomery] County enjoys no inherent power to zone or rezone, and may exercise that power only to the extent and in the manner directed by the Legislature"); *Crozier v. Co. Comm. Pr. George's Co.*, 202 Md. 501, 506, 97 A.2d 296, 298 (1953).

[8] When all of the applicable law is considered, it is not at all clear that Revere's contractual right under the settlement agreement to maintain its 47 billboards for ten years was in violation of law. Rather, it is Montgomery County's position in this case which appears to be in violation of law. In arriving at this conclusion, we need not reach the federal and state constitutional provisions invoked by Revere. Montgomery County's argument entirely overlooks Code (1957, 1994 Repl.Vol.), Art. 25, § 122E(b), enacted by the Maryland General Assembly in 1983. This statute unequivocally mandates that "[a] county or municipality shall pay the fair market value of an outdoor advertising sign, removed or required to be removed by the county or municipality...." [12]

Neither the district council's 1986 regulations prohibiting all billboards, nor any other enactments by Montgomery County which have been called to our attention, provide for compensation to the owner of pre-existing lawfully erected billboards. Insofar as the record in this case discloses, Montgomery County has never offered compensation to Revere or its predecessors. Instead, prior to the April 1990 settlement agreement, Montgomery County resisted the demands by Revere's predecessors for compensation.

The district council's regulations purporting to ban billboards must be considered in conjunction with Art. 25, § 122E. As pointed out by this Court in *Hanna v. Bd. of Ed. of Wicomico Co., supra*, 200 Md. at 57, 87 A.2d at 850, a case relied upon by Montgomery County, "no [government agency] ... has the right to ignore or circumvent the mandate of the Legislature." Under § 122E, Montgomery County has no authority to ban pre-existing lawfully erected bill-

12. Although § 122E was placed in the article of the code which primarily deals with county commissioners, it seems clear from the statutory reference to municipalities, as well as counties, that § 122E is not limited to county commissioner counties. Moreover, § 122E is contained in a two-section subtitle in Art. 25, entitled "Outdoor Advertising," and the other section in that subtitle relates exclusively to a single county which is a chartered county. The Court of Special Appeals, in *Chesapeake v. City of Baltimore*, 89 Md.App. 54, 64–67, 597 A.2d 503, 508–510 (1991), after reviewing the language and legislative history of the statute, held that "it is clear that § 122E was intended to apply to all counties as well as to all municipalities, including Baltimore City...."

boards without paying the fair market value of the billboards. In light of § 122E and the facts disclosed by the record in this case, the trial court erred in holding that Revere's right under the settlement agreement to maintain 47 billboards for ten years was clearly contrary to law. Considering all of the applicable law and the circumstances, the agreement allowing Revere to maintain its 47 pre-existing billboards for ten years appeared to be a reasonable, lawful compromise and resolution of the dispute.

E.

There are two provisions of the 1990 settlement agreement which, as Montgomery County correctly argues, are in violation of law. Both provisions, therefore, are unenforceable.

[9] The first of these provisions is a clause in the settlement agreement which recites that "[t]his Agreement ... shall supersede conflicting law." Of course, neither government officials nor private parties may validly contract to "supersede" applicable law. A contractual provision which is contrary to law is invalid. *See, e.g., Larimore v. American Ins. Co.,* 314 Md. 617, 552 A.2d 889 (1989); *Lee v. Wheeler,* 310 Md. 233, 528 A.2d 912 (1987); *Maryland Cl. Emp. Ass'n v. Anderson,* 281 Md. 496, 508, 380 A.2d 1032 (1977), *Hanna v. Bd. of Ed. of Wicomico Co., supra,* 200 Md. at 53–54, 87 A.2d at 848 (1952).

The second of these provisions grants to the sign owner a remedy before an administrative agency known as the "Sign Review Board." Montgomery County argues that this provision is both invalid and non-severable. Consequently, according to the County, the invalidity of this provision requires the invalidation of the entire settlement agreement.

In a 1968 regulation adopted by the district council, referred to as "Ordinance No. 6–114," the district council created a "Sign Review Board" with delineated jurisdiction and powers. One limitation on the Board's authority was that it could not permit any sign which was prohibited by the zoning regulations. A section of the 1968 sign regulations adopted by the district council ("Ordinance No. 6–115"), captioned "Right of Appeal," provided for an appeal by the sign owner to the Sign Review Board when an application for a sign permit was denied by county officials but "where a variance may be permitted" under the regulations.

The 1990 settlement agreement specifically authorized Revere to apply to the Sign Review Board when Revere believed that a sign request should be granted under the terms of the settlement agreement. Montgomery County argues that, under the district council's zoning regulations, the Sign Review Board's jurisdiction is limited to the situation where a sign is permitted under a variance and that the Board has no jurisdiction to permit a prohibited billboard. Montgomery County states that "[t]he Stipulated Consent Agreement purports to confer jurisdiction on the Sign Review Board to permit or approve billboards while the Zoning Ordinance prohibits such jurisdiction," (County's brief in this Court at 20). The County asserts that the jurisdiction of an administrative agency is delineated by law and "cannot be enlarged ... by private agreements or by litigation settlements between parties." (*Id.* at 21).

[10] We agree with Montgomery County that the subject matter jurisdiction of an administrative agency ordinarily cannot be enlarged by agreement. *See, e.g., Attorney Griev. Comm'n v. Hyatt,* 302 Md. 683, 690, 490 A.2d 1224, 1227 (1985). We further agree with Montgomery County that the 1990 settlement agreement improperly purports to enlarge the jurisdiction of the Sign Review Board.[13] We do not agree with Montgomery County, however, that this one provision renders invalid the entire settlement agreement.

[11] The provisions in the sign regulations for an appeal by the sign owner to the Sign Review Board, and the invalid clause in the settlement agreement allowing Revere to

13. In fact, under the Regional District Act, Code (1957, 1993 Repl.Vol.), Art. 28, § 8–110(a), it appears that the jurisdiction of the Sign Review Board must be limited to the matter of special exceptions and variances.

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[11] The provisions in the sign regula- ons for an appeal by the sign owner to the ign Review Board, and the invalid clause in e settlement agreement allowing Revere to seek a remedy from the Sign Review Board, constitute an additional procedural remedy for the benefit of the sign owner. Revere in the present case did not attempt to avail itself of the invalid procedural remedy. Re- vere "waived" any contractual entitlement purportedly granted by the settlement agree- ment to appeal to the Sign Review Board. A party to a contract ordinarily may waive a contractual provision intended for its benefit. If the party does so, the other party cannot rely on the provision to escape liability under the contract. The provision is treated as severable under the circumstances. *Twining v. Nat'l Mortgage Corp.,* 268 Md. 549, 302 A.2d 604, 607 (1973). *See also, e.g., University Nat'l Bank v. Wolfe,* 279 Md. 512, 523, 369 A.2d 570, 576 (1977); *Shoreham v. Randolph Hills,* 248 Md. 267, 274–276, 235 A.2d 735, 740–741 (1967).

Consequently, the invalid provision in the settlement agreement, giving the sign owner a right to appeal to the Sign Review Board, would not excuse Montgomery County's fail- ure to perform its obligations under the agreement.

JUDGMENT OF THE COURT OF SPECIAL APPEALS VACATED, AND CASE REMANDED TO THE COURT OF SPECIAL APPEALS WITH DIRECTIONS TO VACATE THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY AND REMAND THE CASE TO THAT COURT FOR FURTHER PROCEEDINGS NOT INCONSISTENT WITH THIS OPINION. COSTS IN THIS COURT AND IN THE COURT OF SPECIAL APPEALS TO BE PAID BY MONTGOMERY COUNTY.

Board must be limited to the matter of special exceptions and variances.

341 Md. 395

Peter Donald HARLEY

v.

STATE of Maryland.

No. 160, Sept. Term, 1993.

Court of Appeals of Maryland.

Feb. 6, 1996.

Defendant was convicted in the Circı Court, Prince George's County, James] Rea, J., of first-degree felony murder, se ond-degree murder, robbery with dead weapon, attempted robbery with dead weapon, and use of handgun in commission felony. Defendant appealed. The Court Special Appeals remanded. Defendant file pro se petition for writ of certiorari. Th Court of Appeals, 331 Md. 87, 626 A.2d 37(denied relief. On remand, the Circuit Cour upheld state's use of peremptory challenges Defendant appealed. After grant of certiora ri, 333 Md. 650, 636 A.2d 1027, the Court o Appeals held that prosecutor provided suffi cient race-neutral reasons for exercise of per emptory challenges against four African American prospective jurors.

Affirmed.

1. **Criminal Law ⟹1158(3)**

Trial judge's findings in evaluating *Bat son* challenge are essentially factual and ac corded great deference on appeal and, thus trial judge's determination as to sufficienc of reasons offered for peremptory strikes wi not be reversed unless it is clearly erroneous U.S.C.A. Const.Amend. 14.

2. **Constitutional Law ⟹221(4)**

Jury ⟹33(5.15)

In determining whether reason offere for peremptory strike is valid or satisfactor questions before trial judge are whether rea son is pretext for purposeful discriminatio and whether reason itself does not den equal protection. U.S.C.A. Const.Amend. 14

3. **Jury ⟹33(5.15)**

Prosecutor provided sufficient race-neu tral reasons for exercise of peremptory cha

1

Kevin Delray ROBINSON, Appellant,

v.

STATE of Florida, Appellee.

No. 1D02–1142.

District Court of Appeal of Florida, First District.

June 6, 2002.

An appeal from the Circuit Court for Alachua County. R.A. "Buzzy" Green, Judge.

Appellant, pro se.

Robert A. Butterworth, Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. *See Luckey v. State,* 811 So.2d 802 (Fla. 1st DCA 2002).

WOLF, VAN NORTWICK AND POLSTON, JJ., concur.

2

James POUGH, Appellant,

v.

STATE of Florida, Appellee.

No. 1D02–1145.

District Court of Appeal of Florida, First District.

June 6, 2002.

An appeal from the Circuit Court for Duval County. Henry E. Davis, Judge.

Appellant, pro se.

Robert A. Butterworth, Attorney General, and James W. Rogers, Assistant Attorney General, Tallahassee, for Appellee.

PER CURIAM.

AFFIRMED. *See Jones v. State,* 791 So.2d 580 (Fla. 1st DCA 2001).

WOLF, VAN NORTWICK and POLSTON, JJ., concur.

3

MORGRAN COMPANY, INC., Appellant,

v.

ORANGE COUNTY, Appellee.

No. 5D01–2621.

District Court of Appeal of Florida, Fifth District.

June 7, 2002.

Real estate developer brought breach of contract and promissory estoppel claim against county arising out of developer's attempt to develop 437 acres locate in county into primary residential, mixed-use land development. The Circuit Court, Orange County, Ted P. Coleman, J., dismissed complaint. Developer appealed. The District Court of Appeal, Griffin, J., held that: (1) developer was not entitled to recover on breach of contract claim, and (2) developer was entitled to amend to attempt to seek some other remedy or plead some other cause of action after dismissal.

Affirmed in part; reversed in part; and remanded.

1. **Counties** ⚷129

Zoning and Planning ⚷160

Real estate developer was not entitled to recover on breach of contract claim brought against county arising out of developer's attempt to develop 437 acres locate in county into primary residential, mixed-use land development, where contract was "contract zoning"; as part of development agreement county had obligation to "support" developer's request for rezoning, and thus, if board of county commissioners had contracted to support developer's request for rezoning, it had invalidly contracted away its discretionary legislative power as final decisionmaking authority. West's F.S.A. §§ 163.3220–163.3243.

2. **Pretrial Procedure** ⚷695

Real estate developer that brought promissory estoppel claim against county arising out of developer's agreement to develop 437 acres locate in county into primary residential, mixed-use land development was entitled to amend to attempt to seek some other remedy or plead some other cause of action after dismissal of initial complaint. West's F.S.A. §§ 163.3220–163.3243.

3. **Estoppel** ⚷62.1

Estoppel cannot be applied against a governmental entity to accomplish an illegal result.

4. **Estoppel** ⚷85

A party cannot reasonably rely upon a promise, the enforcement of which would be contrary to established public policy.

5. **Pleading** ⚷233.1, 241

Leave to amend should be granted unless allowing amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile.

Deborah L. Martohue and George L. Hayes, III, of Hayes & Martohue, P.A., St. Petersburg, for Appellant.

Gary M. Glassman, Vivien J. Monaco and Marc Peltzman, Assistant County Attorneys, Orlando, for Appellee.

GRIFFIN, J.

Morgran Company, Inc. ["Morgran"] sued Orange County for breach of contract and promissory estoppel and appeals the dismissal of its complaint. Although we affirm, we write because Morgran contends the decision represents a misapplication of the law of contract zoning. This case may also serve as a cautionary tale for anyone who enters into a contract with Orange County.

Morgran is a developer of real estate. Its complaint against Orange County related to its attempt to develop 437 acres located in Orange County into a primarily residential, mixed-use land development. The complaint alleges that the property was originally zoned agricultural; that Morgran was required to apply for an amendment to the County's Comprehensive Policy Plan ["CPP"] in order to develop the property as desired; that the property also had to be rezoned to the Planned Development ["PD"] classification; that the amendment to the CPP was approved by Orange County's Board of County Commissioners in November of 1998; that following the amendment to the CPP, the County entered into a "Developer's Agreement" providing that the County would adopt an amendment to the CPP, and would "support and expeditiously process" Morgran's rezoning application in exchange for Morgran's agreement to donate 50 acres to the County for use as a park once the rezoning was accomplished; that

Morgran submitted its application for rezoning on March 8, 2000, but the County breached its obligation to "support and expeditiously process" the request for rezoning by, instead, affirmatively advocating the denial of the application; and that their application for rezoning was ultimately denied by the County in a hearing before the Board of County Commissioners. Morgran seeks to recover damages, including the difference in the value of the property if zoned PD, delay damages, expenditures associated with the rezoning application and attorney's fees.

Apparently, the cause of Orange County's decision to renege on its agreement was a subsequent edict by then County Chairman, Mel Martinez, that the county reject any development requests for rezoning in areas where the Orange County School Board considered the schools to be overcrowded. When Morgran sought to have Orange County abide by its agreement, the county disavowed the contract as a void effort to engage in contract zoning.[1]

[1] Contract zoning is, in essence, an agreement by a governmental body with a private landowner to rezone property for consideration. This practice has long been disapproved in Florida in cases such as *Hartnett v. Austin*, 93 So.2d 86 (Fla.1956) and *Chung v. Sarasota County*, 686 So.2d 1358 (Fla. 2d DCA 1996). Orange County's position is that its agreement to "support and expeditiously process" Morgran's rezoning application is unambiguously void as a matter of law, since this agreement with Morgran requires the County to contract away its police powers.

In *Hartnett*, Burdine's Department Store wanted to buy land and build a shopping center. It asked the city to change the zoning classification of the property to commercial use. The city refused to make the change unless Burdine's: (1) built a wall; (2) maintained a 40′ setback; (3) landscaped the setback; (4) protected the neighbors against glare and disturbance; and (5) paid for additional police protection. The ordinance required reference to extraneous contracts between the city and the developer. Austin, who owned property across from the proposed development, opposed the rezoning. The Supreme Court agreed that the ordinance which provided that the change would be made, if the conditions were met, was invalid, explaining:

> A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement to be executed between the city and the property owner. Such collateral agreements have been void in all of the cases to which we have been referred. Any contrary rule would condone a violation of the long established principle that a municipality cannot contract away the exercise of its police powers.

93 So.2d at 89. The *Hartnett* court noted that "[i]f each parcel of property were zoned on the basis of variables that could enter into private contracts then the whole scheme and objective of community planning and zoning would collapse." *Id.*

Relying on cases such as *Hartnett* and *Chung*, Orange County reasons that if the County cannot be bound to *approve* the rezoning application, it likewise cannot be bound to *support* that application. Morgran responds that there is a distinction between an obligation to support the request for rezoning and an obligation to approve the request. They urge that both parties, aware of the law of contract zoning, developed this carefully worded, highly negotiated contract language that "does not purport, either impliedly or expressly, to restrict or any way interfere with, the exercise of the Board of County Commissioner's police power as the final zoning authority in the County."

This argument, we fear, draws too fine a distinction. Morgran entered into its Developer's Agreement with "Orange County, a political subdivision of the State of Florida." The governing body of Orange County is the Board of County Commissioners. The agreement was executed by Mel Martinez, "Orange County Chairman," on behalf of the Board of County Commissioners. Orange County's zoning decisions are made by the Planning and Zoning Commission and the Board of Zoning Adjustment. *See* §§ 501 and 502 of the Orange County Code. However, review of these initial zoning decisions are taken to the Board of County Commissioners, which considers the issue *de novo* and which has final authority.

Development agreements are expressly permitted by the Florida Statutes. *See* §§ 163.3220–.3243, Fla. Stat. (1999). A development agreement has been defined as "a contract between a [local government] 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." Brad K. Schwartz, Development Agreements: Contracting for Vested Rights, 28 B.C. Envtl. Aff. L.Rev. 719 (Summer 2001). Florida law permits local governments to impose "conditions, terms and restrictions" as part of these agreements, where necessary for the public health, safety or welfare of its citizens. § 163.3227(1)(h), Fla. Stat. (1999). The problem in this case lies with Orange County's obligation to "support" Morgran's request for rezoning, as part of that development agreement. If the Board of County Commissioners has already contracted to "support" Morgran's request for rezoning, it has invalidly contracted away its discretionary legislative power as the final decisionmaking authority. The clause in the contract which provides that the "rezoning process is subject to all County ordinances and regulations governing rezoning," does not cure the problem. In *Chung*, in rejecting a similar argument, the court noted that any hearings regarding the issue of rezoning would "be a pro forma exercise since the County has already obligated itself to a decision." 686 So.2d at 1360. The court rejected *Molina v. Tradewinds Development Corp.*, 526 So.2d 695 (Fla. 4th DCA 1988) to the extent it implied that an obligation to comply with applicable zoning regulations precluded a finding of illegal contract zoning.

We have found one court only that has distinguished a contract for support of an activity from a contract to rezone. In *Prock v. Town of Danville*, 655 N.E.2d 553 (Ind.Ct.App.1995), a case not cited by either party, the court found that an agreement between the Town of Danville and a waste disposal company, which owned land annexed by the town, whereby the town agreed to actively "support" the waste disposal company's operation of the landfill, as well as any future efforts to expand the

1. Orange County also contended that suit was precluded by virtue of the terms of paragraph 3(i) of the Developer's Agreement:

> Notwithstanding the County's agreement to support and expeditiously process the rezoning of the Property as set forth above, Developer understands that such rezoning process is subject to all County ordinances and regulations governing rezoning, including, but not limited to, review by the Development Review Committee ("DRC"), all applicable public hearings, and approval by the Board of County Commissioners. Further, Developer understands and concedes that the County will not and cannot by law waive the requirements governing the rezoning process.

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landfill, was not an invalid contract for zoning. The court reasoned that:

> Although pursuant to the HCA the Town agreed to actively support Waste Management's operation of the landfill as well as any efforts it may make in the future to expand the landfill, the Town was not contractually bound to zone the property in a particular way or to promise that in the future it would rezone the property to expand the landfill. Further, the Town did not promise to support Waste Management's efforts regardless of whether those efforts were in compliance with the Town's statutory zoning procedures. Thus, we cannot agree with the Plaintiffs' contention that by promising to support Waste Management's efforts regarding the landfill, the Town bartered away its decision making authority regarding zoning for the landfill.

Id. at 560. The court noted that the Town had already rezoned the annexed property when it entered into the agreement to "support" future efforts to expand the landfill. Even this case, therefore, by negative inference, supports the County's position. We also note that Florida appears to take a stricter view of contract zoning than many other jurisdictions.

Morgran urges that the contractual provision that binds the County to support rezoning means only County *staff*, not the Board. First, given the absence of language of such pivotal importance in the agreement, we decline to find a latent ambiguity. Second, we doubt it would matter.[2] Morgran seemingly draws a distinction between the Board acting in its executive (governing) capacity and the Board acting in its quasi-judicial capacity in zoning cases. We find this distinction to be unworkable. Whichever hat it is wearing, the County is still the County.

[2–4] Morgran next complains that the trial court erred in the dismissal with prejudice of its claim for promissory estoppel. The rule, however, is that estoppel cannot be applied against a governmental entity to accomplish an illegal result. *Branca v. City of Miramar*, 634 So.2d 604 (Fla.1994). It has been specifically held that estoppel cannot be used by a landowner to enforce a contract which constitutes "contract zoning." *P.C.B. Partnership v. City of Largo*, 549 So.2d 738, 741–42 (Fla. 2d DCA 1989) ("A party entering into a contract with a municipality is bound to know the extent of the municipality's power to contract, and the municipality will not be estopped to assert the invalidity of a contract which it had no power to execute."). Additionally, a party cannot reasonably rely upon a promise, the enforcement of which would be contrary to established public policy. *Brine v. Fertitta*, 537 So.2d 113 (Fla. 2d DCA 1988).

[5] The only remaining question in this case is whether Morgran should have been given leave to amend to attempt to seek some other remedy or plead some other cause of action. Morgran was not given leave to amend after dismissal of its initial complaint and claims the right to do so. Morgran has failed to identify another viable cause of action, however, in its brief and was no more specific at oral argument. *See Dacy v. Village of Ruidoso*, 114 N.M. 699, 845 P.2d 793 (1992); *P.C.B.* Leave to amend should be granted unless allowing the amendment would prejudice the opposing party, the privilege to amend has been abused, or amendment would be futile. *State Farm Fire & Cas. Co. v. Fleet Fin. Corp.*, 724 So.2d 1218 (Fla. 5th DCA 1998).

2. It is also doubtful that an agreement for county *staff* support only could support a provable damage claim, even one for restitution.

The trial court apparently concluded, based on the undisputed facts, that leave to amend would be futile, and it may prove right. We conclude, however, that Morgran should be given one more opportunity to attempt to state a claim or seek a different remedy, if it chooses. We express no opinion about the viability of any such claim at this stage, however.

AFFIRMED in part; REVERSED in part; and REMANDED.

SAWAYA and ORFINGER, R. B., JJ., concur.

Michael P. WELCH, as assignee of David J. and Adele Pinkster, Howard Pinkster d/b/a A.T.I.M.A. Prime Properties, and American Rental Dealers Insurance, Appellant,

v.

COMPLETE CARE CORPORATION and Professional Business Owners Association, Inc., Appellees.

No. 2D00–5250.

District Court of Appeal of Florida, Second District.

June 7, 2002.

Employee brought action against employer's landlord and its principals after he was injured when garage door on storage unit malfunctioned and as part of settlement, landlord and its principals assigned to employee all legal and equitable rights of action, claims, and interest, including indemnity and contribution that landlord and principals may have had against employer and its insurer, and employee brought action against employer and insurer asserting claims for declaratory relief, contractual indemnity, common law indemnity, contribution, and equitable subrogation. The Circuit Court, Pinellas County, Frank Quesada, J., dismissed all counts except for those seeking declaratory relief and damages based on contractual indemnification, on which summary judgment was granted for employer and insurer. Employee appealed. The District Court of Appeal, Northcutt, J., held that: (1) employee could not assert claims of equitable subrogation against employer and its insurer; (2) record did not show any legal relationship between employer and landlord which would render landlord vicariously, constructively, derivatively, or technically liable to employee because of some negligence or fault on employer's part, which precluded imposition of common law indemnity on employer; (3) employee's allegations that employer's landlord was passively rather than actively negligent, were not equivalent of pleading vicarious liability; (4) genuine issue of material fact as to whether landlord was not legally or factually responsible for employee's injuries sustained while attempting to repair garage door precluded summary judgment on contractual indemnification claim against employer; and (5) employer's liability insurance contract, which provided that insurance did not cover liability assumed under contract, precluded imposition of any liability on insurer for employer's liability to employee, as assignee of employer's landlord, under contractual indemnity theory.

Affirmed in part and reversed in part.

1. Subrogation ⚷1

Equitable subrogation is generally appropriate when the following five factors

Caution
As of: May 02, 2009

Raymond E. RODRIGUEZ, et al. v. PRINCE GEORGE'S COUNTY, Maryland, et al.

No. 1295, September Term, 1988

Court of Special Appeals of Maryland

79 Md. App. 537; 558 A.2d 742; 1989 Md. App. LEXIS 120

June 7, 1989

PRIOR HISTORY: [***1] APPEAL FROM THE Circuit Court for Prince George's County, David G. Ross, Judge.

DISPOSITION: JUDGMENT REVERSED; CASE REMANDED TO CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY WITH INSTRUCTIONS TO VACATE ORDER OF DISTRICT COUNCIL AND REMAND TO DISTRICT COUNCIL FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION; COSTS TO BE PAID BY APPELLEES.

CASE SUMMARY:

PROCEDURAL POSTURE: Defendant county council approved, subject to certain specified conditions, an applicant's plan for the rezoning of a 186.2-acre tract of land within the county. Plaintiffs plan opponents challenged the plan approval. The Circuit Court for Prince George's County (Maryland) affirmed the county council's action, and the plan opponents sought review.

OVERVIEW: The plan opponents claimed that the county council failed to make the required detailed findings of facts and conclusions, that its action was in violation of the existing area master plans, and that its action was not based upon substantial evidence. The plan opponents also claimed that approval of the plan as amended constituted an unlawful conditional zoning. The court agreed, and reversed and remanded the lower court's judgment. The court found that both *Md. Ann. Code art. 28, §8-123* and Prince George's County, Md., Code § 27-141 required plan approval to be based upon specific written findings of basic facts and conclusions. The court held that the county council's blanket adoption of the county planning board's recommendations did not comply with the clear requirements of these provisions. The court also found that Prince George's County, Md., Code § 27-195(c)(2) prohibited conditional zoning, but that the plan amendment clearly violated this proscription. Although the court upheld the right of a plan applicant to amend its plan, the court held that this right of amendment could not be exercised in such a manner as to violate the prohibition against conditional zoning.

OUTCOME: In an action that challenged a county council's approval of a rezoning plan, the court reversed the lower court's judgment that affirmed the approval of the plan, and remanded the case for further proceedings.

LexisNexis(R) Headnotes

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Environmental Law > Zoning & Land Use > Comprehensive & General Plans
Governments > Public Improvements > Community Redevelopment
[HN1] Prince George's County, Md., Code § 27-195(b) provides, in part, that: (1) Prior to the approval of the application and the Basic Plan, the applicant shall demonstrate to the satisfaction of the District Council that the entire development meets the following criteria: (A) The proposed Basic Plan shall either conform to: (i) The specific recommendation of a General Plan map, Area Master Plan map, or urban renewal plan map; including the principles and guidelines of the plan text which address the design and physical development of the property, the public facilities necessary to serve the proposed development, and the impact which the development may have on the environment and surrounding properties; or (ii) The principles and guidelines described in the plan (including the text) with respect to land use, the number of dwelling units, intensity of nonresidential buildings, and the location of land uses. (B) The economic analysis submitted for a proposed retail commercial use shall adequately justify a use of the size and scope shown on the Basic Plan.

Governments > Public Improvements > Bridges & Roads
Governments > Public Improvements > Community Redevelopment
Transportation Law > Public Transportation
[HN2] Prince George's County, Md., Code § 27-195(b) provides in part as follows: (C) Transportation facilities (including public streets and public transit) which are existing, under construction, or for which construction funds are contained in either the first six (6) years of the adopted County Capital Improvement Program or the first five (5) years of the adopted State Highway Administration Construction Program shall be adequate to carry anticipated traffic. The uses proposed shall not generate traffic which would lower the level of service anticipated by the land use and circulation systems shown on approved General or Area Master Plans, or urban renewal plans; (D) Other existing or planned private and public facilities which are existing, under construction, or for which construction funds are contained in the first six (6) years of the adopted County Capital Improvement Program (such as schools, recreation areas, water and sewerage systems, libraries, and fire stations) shall be adequate for the uses proposed; (E) Environmental relationships reflect compatibility between the proposed development and surrounding land uses, so as to promote the health, safety, and welfare of the present and future inhabitants of the Regional District; and CDZ applications filed after October 31, 1978.

Environmental Law > Zoning & Land Use > Comprehensive & General Plans
Governments > Local Governments > Administrative Boards
[HN3] Prince George's County, Md., Code § 27-195(b) provides, in part, as follows: (2) Notwithstanding Subparagraphs (C) and (D), above, where the application anticipates a construction schedule of more than six (6) years (§ 27-179), public facilities (existing or scheduled for construction within the first six (6) years) shall be adequate to serve the development proposed to occur within the first six (6) years. The Council shall also find that public facilities probably will be adequately supplied for the remainder of the project. In considering the probability of future public facilities construction the Council may consider such things as existing plans for construction, budgetary constraints on providing public facilities, the public interest and public need for the particular development, the relationship of the development to public transportation, or any other matter that indicates that public a [sic] private funds will likely be expended for the necessary facilities.

Environmental Law > Zoning & Land Use > Comprehensive & General Plans
[HN4] Prince George's County, Md., Code § 27-195(c)(1) authorizes the District Council, in approving a zoning map amendment, to impose reasonable requirements and safeguards (in the form of conditions) which it finds are necessary to either: (A) Protect surrounding properties from the adverse effects which might accrue from the Zoning Map Amendment; or (B) Further enhance the coordinated, harmonious, and systematic development of the Regional District. Prince George's County, Md., Code § 27-195(c)(2), however, provides that in no case shall the conditions waive or lessen the requirements of, or prohibit uses allowed in, the approved zone.

Environmental Law > Zoning & Land Use > Comprehensive & General Plans

Real Property Law > Zoning & Land Use > Ordinances
Real Property Law > Zoning & Land Use > Special Permits & Variances
[HN5] *Md. Ann. Code art. 28, § 8-123* states: In Prince George's County, no application for a map amendment or special exception, which is contested, may be granted or denied except upon written findings of basic facts and written conclusions. Prince George's County, Md., Code § 27-141 requires a final decision of the Council in any zoning matter to be supported by specific written findings of basic facts and conclusions.

Environmental Law > Zoning & Land Use > Conditional Use Permits & Variances
Real Property Law > Zoning & Land Use > Zoning Methods
[HN6] Conditional zoning is a zoning reclassification subject to conditions not generally applicable to land similarly zoned. It occurs when an area of land is rezoned from one classification to another, and such change is not outright but subject to some type of conditions.

Environmental Law > Zoning & Land Use > Statutory & Equitable Limits
Real Property Law > Zoning & Land Use > Special Permits & Variances
Real Property Law > Zoning & Land Use > Zoning Methods
[HN7] Conditional zoning is inconsistent with the principle that, while zoning regulations may vary from one district or classification to another, within a district or classification they should be uniform. Conditional zoning tends to destroy that uniformity; it subjects some land within a district or classification to restrictions that are not applicable to other land within the same district or classification and thus tends to create unique mini-districts not provided for in the general zoning ordinance.

Contracts Law > Types of Contracts > Covenants
Environmental Law > Zoning & Land Use > Comprehensive & General Plans
Environmental Law > Zoning & Land Use > Conditional Use Permits & Variances
[HN8] Although there appears to be no impediment to an applicant entering into private covenants with other parties to lessen their opposition to an application, or to garner their support for it, such offerings cannot be made to the legislative body authorized to grant or deny the application.

COUNSEL: Gary Alexander (Alexander & Cleaver, P.A., on the brief), all of Fort Washington, Maryland, for appellants.

Russell W. Shipley (Meyers, Billingsley, Shipley, Curry, Rodbell & Rosenbaum, P.A., on the brief), all of Riverdale, Maryland, for appellee, Ammendale.

Joyce Birkel Hope, Associate County Attorney (Michael P. Whalen, County Attorney, on the brief), both of Upper Marlboro, Maryland, for appellees, Prince George's County, Maryland, and the County Council.

JUDGES: Gilbert, C.J., and Wilner, and Karwacki, JJ.

OPINION BY: WILNER

OPINION

[*539] [**743] This appeal concerns the rezoning of a 186.2-acre tract of land in Prince George's County. The rezoning was approved by the County Council, sitting as the District Council, subject to certain specified conditions, and that action was affirmed by the Circuit Court for Prince George's County.

The property in question lies in the Beltsville area; [***2] it fronts on the west side of U.S. Route 1, about three miles north of the Capital Beltway. Known as the Ammendale Normal Institute, the property was used for many years by a religious order for the training of novitiates, but that use has ceased, and the buildings, some of which are included in the National Register of Historic Places, have fallen into disrepair. For purposes of this case, the property consists of three parcels: a 56.1-acre parcel fronting on U.S. Route 1; a 26.1-acre parcel, which forms the center part of the tract

and contains most or all of the buildings; and a 104-acre parcel that was once used for sand and gravel mining and is largely undeveloped.

The first of these parcels was placed in the E-I-A (Employment -- Institutional Areas) zone in 1976; the other two parcels have R-R (Rural -- Residential) zoning. In December, 1985, an application was made to place the entire tract in the E-I-A zone. With the application was a Basic Plan proposing the development of 2.7 million square feet of institutional, service, office, and commercial facilities. Construction would take place in two stages, over a period of from six to 10 years.

(I) *The E-I-A Zone -- Approval* [***3] *Process*

The E-I-A zone is a comprehensive design zone provided for in § 27-499 of the Prince George's County Code. The essential purpose of the zone seems to be to "[p]rovide for a mix of employment, institutional, retail, and office uses in a manner which will retain the dominant employment and institutional character of the area."@ § 27-499(a)(4).

[*540] Because the E-I-A zone is a comprehensive design zone, full approval of the development occurs in three stages:

First: approval by the District Council of a Basic Plan showing the kinds and amounts of proposed land uses as part of and as a precondition to approval of a zoning map amendment authorizing those land uses;

Second: approval by the Planning Board of a Comprehensive Design Plan showing the amounts and locations of the land uses and circulation systems and indicating the general schedule of development; and

Third: approval by the Planning Board of Specific Design Plans for each portion of the development to be constructed within a particular time period.

We are concerned here with the first of these three stages.

Section 27-499 sets out a number of standards or conditions which a Basic Plan must meet to qualify the [***4] property for E-I-A zoning. They are supplemented by other standards or conditions specified in § 27-195, dealing with map amendment approval of comprehensive design zones. [HN1] Section 27-195(b) provides, in that regard, that:

"(1) Prior to the approval of the application and the Basic Plan, the applicant shall demonstrate to the satisfaction of the District Council that the entire development meets the following criteria:

(A) The proposed Basic Plan shall either conform to:

(i) The specific recommendation of a General Plan map, Area Master Plan map, or urban renewal plan map; including the principles and guidelines of the plan text which address the design and physical development of the property, the public facilities necessary to serve the proposed development, and the impact which the development may have on the environment and surrounding properties; or

(ii) The principles and guidelines described in the plan (including the text) with respect to land use, the number [*541] of dwelling units, intensity of nonresidential buildings, and the location of land uses.

[**744] (B) The economic analysis submitted for a proposed retail commercial use shall adequately justify a use of the size [***5] and scope shown on the Basic Plan;

[HN2] (C) Transportation facilities (including public streets and public transit) which are existing, under construction, or for which construction funds are contained in either the first six (6) years of the adopted County Capital Improvement Program or the first five (5) years of the adopted State Highway Administration Construction Program shall be adequate to carry anticipated traffic. The uses proposed shall not generate traffic which would lower the level of service anticipated by the land use and circulation systems shown on approved General or Area Master Plans, or urban renewal plans;

(D) Other existing or planned private and public facilities which are existing, under construction, or for which construction funds are contained in the first six (6) years of the adopted County Capital Improvement Program (such as schools, recreation areas, water and sewerage systems, libraries, and fire stations) shall be adequate for the uses proposed;

(E) Environmental relationships reflect compatibility between the proposed development and surrounding land uses, so as to promote the health, safety, and welfare of the present and future inhabitants of the Regional [***6] District; and CDZ applications filed after October 31, 1978.

[HN3] (2) Notwithstanding Subparagraphs (C) and (D), above, where the application anticipates a construction schedule of more than six (6) years (Section 27-179), public facilities (existing or scheduled for construction within the first six (6) years) shall be adequate to serve the development proposed to occur within the first six (6) years. The Council shall also find that public facilities probably will be adequately supplied for the remainder of the project. In considering the probability of future public facilities construction the Council may consider such things as [*542] existing plans for construction, budgetary constraints on providing public facilities, the public interest and public need for the particular development, the relationship of the development to public transportation, or any other matter that indicates that public a [sic] private funds will likely be expended for the necessary facilities."

[HN4] Section 27-195(c)(1) authorizes the District Council, in approving a zoning map amendment, to

"impose reasonable requirements and safeguards (in the form of conditions) which it finds are necessary to either: [***7]

(A) Protect surrounding properties from the adverse effects which might accrue from the Zoning Map Amendment; or

(B) Further enhance the coordinated, harmonious, and systematic development of the Regional District."

Section 27-195(c)(2), however, provides that "[i]n no case shall the conditions waive or lessen the requirements of, or prohibit uses allowed in, the approved zone."

Finally, both State and county law require the District Council, in approving (or denying) a zoning map amendment over protest, to make specific findings of fact, in writing. [HN5] *Md.Ann.Code art. 28, § 8-123* states: "In Prince George's County, no application for a map amendment or special exception, which is contested, may be granted or denied except upon written findings of basic facts and written conclusions."@ Similarly, § 27-141 of the County Code requires a final decision of the Council in any zoning matter to be "supported by specific written findings of basic facts and conclusions."

(2) *Procedural Background*

The instant application was first considered by the Technical Staff of the Maryland-National Capital Park and Planning Commission. In a report filed May 12, 1986, the Staff recommended that [***8] the application be denied. Among its findings of fact, the Staff stated:

"7. The subject property is affected by two Master Plans: the Adopted and Approved Master Plan for [*543] Fairland-Beltsville and Vicinity (1968) and the Northwestern Area Plan (1975).

[**745] 8. The Adopted and Approved Fairland-Beltsville Master Plan proposed R-90/R-80 one-family detached residential zone with a recreation center proposed for the center of the area.

9. The Northwestern Area Plan designates E-I-A zoning for the 56.1+/- acres adjacent to U.S. Route 1, public/quasi-public use for the Ammendale Normal Institute and suburban residential for the northwest portion of the subject property.

10. The Approved General Plan for Prince George's County (1982) identifies the eastern portion of the site as a 'Major Employment Area.'

11. Prior to approval of the Basic Plan, it must be demonstrated to the District Council that the proposed development is entirely compatible with this existing and proposed development of the surrounding area.

12. Both the Northwestern Area Plan and the Approved General Plan sets guidelines and policies for employment areas."

The "Determinations" of the Staff were as follows: [***9]

"1. The Basic Plan does not take the full development of the employment areas into account in forecasting the affect [sic] of the proposed use on roads and surrounding residential areas.

2. The proposed use would significantly increase the flow of traffic through neighboring residential areas.

3. The roads which will be in place in the vicinity of the proposed use will not be able to handle the amount of traffic which would be attracted to such use.

4. Transportation Systems Management techniques may make some additional E-I-A Zone development feasible.

5. With the addition of automatic fire extinguishing systems, the existing and programmed public facilities will be adequate.

[*544] 6. The proposed development does not conform to guidelines set forth in the Northwestern Area Plan relating to traffic impact of employment areas on residential neighborhoods.

7. The proposed E-I-A Zone development is not consistent with the recommendations of the Fairland-Beltsville Master Plan for suburban residential development in the R-80/R-90 Zones."

In the concluding paragraphs of its Report, the Staff opined that the road improvements proposed by the applicant or planned by the State [***10] Highway Administration "are not enough to adequately serve the proposed addition of 2,168,000 square feet of institutional, office and commercial floor space."@ It was "unsure of how much additional traffic can be accommodated by the roads in the area," and it expressed concern about the diversion of traffic "through the residential areas west and south of the subject property" which "would have a negative impact on these residential areas."

The Planning Board reached a different conclusion. In a Resolution adopted November 13, 1986, it recommended approval of the application, subject to nine conditions relating principally to road improvements and the preservation of trees and historic buildings. It made no detailed findings of fact; indeed, aside from the conditions, the Resolution says no more than that

"[T]he Planning Board disagreed with the analysis and recommendation of the Technical Staff based on the following determinations:

1. The public/quasi-public use of the subject property has been abandoned. The Northwestern Area Plan's recommendation for a public/quasi-public use for a portion of the subject property is therefore no longer appropriate.

2. The proposed business [***11] park is compatible with existing and proposed development in the surrounding area.

[*545] 3. Without proper controls, the traffic generated by the proposed use would exceed planned road capacities and result in unacceptable levels of service on roads in the area.

4. The proposed business park should be approved in phases which take into [**746] account future road improvements and the ability of area roads to accommodate additional traffic.

5. With the addition of automatic fire extinguishing systems in all buildings, the existing and programmed public facilities will be adequate."

The next stage in the process was a hearing before a Zoning Hearing Examiner. He arrived at a third recommendation -- that the Council retain the E-I-A zoning for the 56.1-acre parcel, rezone the middle 26.1 acres to E-I-A, and retain the residential zoning on the balance (104 acres). The Examiner expressed two concerns over the rezoning of the 104 acres. First, he pointed out that the area was in a suburban community and was designed to remain residential in the two Master Plans to which it is subject. Second, he concluded that, even without this rezoning, by reason of other approved developments in [***12] the immediate vicinity, there was going to be "a major congestion problem at U.S. Rt. 1 and Powder Mill Road for a period of at least six years," and that, without some "mitigating affects [sic]", he could not find that "transportation facilities will be adequate to carry anticipated traffic."

The District Council, of course, had before it all of these reports and recommendations when it met, in April, 1987, to consider the matter. The arguments made to the Council focused on three considerations: compatibility of the proposed development with the neighboring residential communities; the traffic problems likely to be caused or exacerbated by the development; and, to a lesser extent, the apparent statutory requirement that the proposed land uses be consistent with existing master plans. After listening to argument, the Council initially continued the hearing, without making a decision, for 30 days, to allow the two sides an [*546] opportunity to try to resolve their differences through the development of "covenants" that would limit the uses to which the property could be put.

On June 4, 1987 -- four days before the District Council's scheduled reconvening on the matter -- the [***13] applicant informed the Council that it had met with the protestants to explore the possibility of entering into covenants "to exclude undesirable E-I-A uses" and that the protestants were "not willing to enter into any covenants whatsoever with the applicant."@ It therefore proposed "to fulfill the District Council's intentions" by voluntarily amending its Basic Plan to exclude certain uses otherwise expressly permitted in the E-I-A zone. Attached to its letter as an appendix was a proposed revision of the Basic Plan eliminating 15 categories of use. Aware of the strictures set forth in § 27-195(c)(2), the applicant hastened to assure the council that

> "this is not an offer on the applicant's part to have the Council conditionally zone the property, nor the proffer of additional evidence, but simply a designation by our Basic Plan that we are binding ourselves to limit or lessen that which would be otherwise permissible to the E-I-A zone. In this manner, it is hoped that the Council's April 27, 1987 wishes are fulfilled without any violations of the Prince George's County Zoning Ordinance. Further, this letter is intended to be in response to the dictate of the Council's motion [***14] of April 27, 1987."

This amendment was apparently filed pursuant to § 27-181 of the county code, dealing with requests to amend an application. In relevant part, that section allows an applicant to request an amendment to an application at any time if the amendment concerns "an error, omission of fact, or other factual change not mentioned below in this Section. . . ."@ The two changes "mentioned below" were amendments that change the total area or configuration of the property and those changing the requested zoning classification, for both of which special conditions apply.

[*547] When the District Council reconvened on June 8, it regarded the Basic Plan as having been amended as requested by the applicant. After some further discussion, a motion was made to approve the application, as amended, subject to the conditions specified by the Planning Board. That motion failed. Several additional conditions [**747] were then proposed and approved, the two major ones being to require the development to proceed over a 10-year period, limited to 20 acres/year, and to preclude nearly all development within the 100-year flood plain without further approval by the Council. With those additional [***15] conditions, a motion to approve the application was adopted.

The written decision of the Council, embodied in the Zoning Ordinance adopted by it, recited, in skeletal fashion, the procedural history of the application. The heart of the decision was in three "WHEREAS" clauses and in the 11 conditions imposed. There were no specific findings of fact stated in the ordinance. All that was said in that regard was:

> "WHEREAS, having reviewed the record in this case, the District Council has determined that the subject property should be rezoned to the E-I-A Zone; and
>
> WHEREAS, in order to protect adjacent properties and the surrounding neighborhood, the rezoning herein is granted with conditions; and
>
> WHEREAS, as the basis for this action, the District Council adopts the recommendations of the Planning Board as its findings and conclusions in this case.

NOW, THEREFORE, BE IT ORDAINED AND ENACTED: [that the application is approved subject to the enumerated conditions]."

The applicant subsequently agreed formally to the conditions imposed by the Council, whereupon the Council adopted a final Resolution incorporating those conditions.

In the circuit court, the opponents complained, as [***16] they complain here, that the District Council failed to make detailed findings of basic facts and conclusions as required [*548] by law, that its action was in violation of the existing area master plans, that its action was not based upon substantial evidence that the proposed land uses were compatible with existing uses in the surrounding areas, and that the approval by the Council of the Basic Plan *as amended* -- i.e., with some 15 permitted uses deleted -- constituted an unlawful conditional zoning. The court rejected these arguments, concluding that (1) by adopting the Planning Board's recommendations as its own findings, the Council "ma[d]e the basis of their decision sufficiently clear," (2) there was sufficient evidence in the record to make the Council's decision fairly debatable, and (3) the Council's action did not constitute an unlawful conditional zoning.

(3) *Summary of Our Conclusions*

We think that the court (and the Council) erred in at least two respects. We do not believe that the District Council's blanket adoption of the Planning Board's recommendations sufficed to comply with the clear requirements of art. 28, *§ 8-123* of the State Code or § 27-141 of [***17] the County Code. Nor do we believe that the clear proscription of § 27-195(c)(2) can be circumvented by the artifice of simply amending the Basic Plan to exclude uses that the Council finds, or might find, objectionable but which are expressly permitted in the E-I-A zone.

(4) *Statement of Findings*

In *Montgomery v. Bd. of Co. Comm'rs, 256 Md. 597, 261 A.2d 447 (1970)*, the Court was faced with a circumstance almost identical to that now before us. The District Council for Prince George's County approved a zoning map change, adopting as its findings the recommendations of the Technical Staff of the Planning Board. The Technical Staff Report, however, made no specific findings as to the definition of the neighborhood, what changes had occurred since the last comprehensive rezoning, or whether any such changes resulted in a change in the character of the neighborhood. It simply concluded that the new zone was in conformance with the area plan and that a proposed arterial highway, when completed, should alleviate any traffic problems.

[*549] The Court of Appeals, citing the statutory requirement that the District Council make "the necessary findings [***18] and conclusions and . . . express them in writing," concluded that the Council had failed to make those findings and thus remanded the case "for compliance with the mandatory [**748] requirement of the statute."@ *256 Md. at 603, 261 A.2d 447*. In that regard, it noted, also at 603, *261 A.2d 447*:

> "At the argument, counsel for the District Council indicated that the practice of the District Council in ruling on rezoning applications in which it agreed with the recommendations of the Planning Board or of the Technical Staff, as the case might be, was to adopt the findings in the report or recommendations relied upon rather than to make specific findings in the order of the District Council, itself. *Although this is not a practice to be encouraged, we are not prepared to rule, as a matter of law, that the District Council may not, in a specific case, comply with the statutory requirement to make written findings of basic facts and conclusions by incorporating into its order specific findings of basic facts and conclusions of either the Planning Board or of the Technical Staff by specific reference to those findings.* However, in the [***19] instant case it is clear that neither the Planning Board nor the Technical Staff made any such findings of the necessary basic facts or conclusions."

(Emphasis added.)

Although the issues here are not "change" or "mistake," as they were in *Montgomery*, the same principle applies. If, despite the Court's editorial comment, the Council wishes to continue the practice of incorporating or adopting by reference the findings of others as its own findings and conclusions, it must at least make certain that the findings it proposes to adopt comply with the statutory requirements of specificity. Here, as in *Montgomery*, they do not; and therein lies the problem.

As we observed, §§ 27-195(b)(1) and 27-499 set forth certain requirements that a Basic Plan must meet in order [*550] to qualify the property for E-I-A zoning. Among those requirements are that (1) the Basic Plan conform either to the specific recommendations of the existing area plans or to the "principles and guidelines" described in those plans, (2) transportation facilities, existing, under construction, or funded for construction within a 5-6 year period, be adequate, (3) the proposed uses not generate traffic [***20] that would lower the level of service anticipated in existing area plans, and (4) there be compatibility between the proposed development and surrounding land uses.

Whether these or other required conditions are met depends on a host of subsidiary findings. It is not permissible for the Council, or any administrative body, simply to parrot general statutory requirements or rest on broad conclusory statements. As stated in *Turner v. Hammond, 270 Md. 41, 56, 310 A.2d 543 (1973)*, "citizens are entitled to something more than boiler-plate resolution."@ *See also Redden v. Montgomery County, 270 Md. 668, 685, 313 A.2d 481 (1974)*, and cases cited therein; *Ocean Hideaway Condo. v. Boardwalk Plaza, 68 Md.App. 650, 515 A.2d 485 (1986).*

We have quoted in full the "determinations" of the Planning Board that the District Council adopted as its findings and conclusions. They do not suffice -- they do not even begin to suffice -- as "specific written findings of basic facts and conclusions."@ To the extent that they even address the statutory requirements for an E-I-A zone, they are wholly conclusory [***21] and take no account whatever of the specific concerns and issues raised by the parties, the Technical Staff, or the Zoning Hearing Examiner. The area plans appear to call for the land within the 104-acre parcel to remain residential; if the myriad of uses permitted in the E-I-A zone are consistent with those plans or the "principles" of those plans, as §§ 27-499 and 27-195(b) seem to require, the Council has not informed us, or anyone else, how that is so. If, unlike the technical staff or the zoning hearing examiner, the Council believed that, with the conditions [*551] imposed by it, existing or anticipated traffic and transportation facilities will be adequate to handle the increased traffic from the proposed development, it has not explained the basis upon which it reached that conclusion. In short, the District Council is going to have to do a better job of it.

[**749] Whether the evidence in the record suffices to support a rezoning of the tract, or any part of the tract, depends, of course, on the specific findings of fact and conclusions underlying the zoning decision. Until those findings are made and clearly articulated, therefore, we cannot properly address that issue. [***22] *Compare Floyd v. County Council of P.G. Co., 55 Md.App. 246, 461 A.2d 76 (1983).*

(5) *Conditional Zoning*

[HN6] "Conditional zoning," we said in *Bd. of Co. Comm'rs v. H. Manny Holtz, Inc., 65 Md.App. 574, 579, 501 A.2d 489 (1985)* (quoting in part from Miller, *The Current Status of Conditional Zoning*, Institute on Planning, Zoning & Eminent Domain 122 (1974)), "is a zoning reclassification subject to conditions not generally applicable to land similarly zoned. '[W]hen an area of land is rezoned from one classification to another, and such change is not outright but subject to some type of conditions, then we are confronted with a conditional zoning problem.'"

The early view of most courts was that conditional (or, as it is sometimes called, "contract") zoning was unlawful *per se*. As noted in *Baylis v. City of Baltimore, 219 Md. 164, 170, 148 A.2d 429 (1959)*, there seemed to be three chief reasons for this view:

> "that rezoning based on offers or agreements with the owners disrupts the basic plan, and thus is subversive of the public policy reflected in the overall legislation, that [***23] the resulting 'contract' is nugatory because a municipality is not able to make agreements which inhibit its police powers, and that restrictions in a particular zone should not be left to extrinsic evidence."

[*552] *See also* 1 P. Rohan, *Zoning and Land Use Controls § 5.02[1]* (1989); 2 A. and D. Rathkopf, *The Law of Zoning and Planning* § 27.05 (1989).

For some or all of these reasons, Maryland very clearly adopted this jaundiced view of conditional zoning, first in *Wakefield v. Kraft, 202 Md. 136, 96 A.2d 27 (1953)* and later in *Baylis*; and, while a number of commentators have urged a relaxation of this approach in favor of the flexibility allowed by conditional zoning, so far Maryland has continued to find the practice objectionable, at least in the absence of clear statutory authorization. In *Mont. Co. v. Nat'l Capital Realty, 267 Md. 364, 373, 297 A.2d 675 (1972)*, the Court declared that "[t]he invalidity of conditional zoning in Maryland is not seriously open to question."@ *See also City of Baltimore v. Crane, 277 Md. 198, 205-06, 352 A.2d 786 (1976)*; *Bd. of Co. Comm'rs v. H. Manny Holtz, supra, 65 Md.App. 574, 501 A.2d 489.* [***24]

This general proscription against conditional zoning may, of course, be relaxed by statute, and, indeed, it has been to some extent. *See, for example, Md.Ann.Code art. 66B, § 4.01(b)*, applicable to non-charter counties. Section 27-195(c)(1) of the Prince George's County Code constitutes a similar kind of relaxation; it permits a limited scope of conditional zoning -- generally of the type permitted by art. 66B, *§ 4.01(b)*. But § 27-195(c)(2) makes explicit what, in *H. Manny Holtz* we found implicit in *§ 4.01* -- that this limited authority does *not* allow conditions that prohibit specific uses otherwise permitted in the approved zone.

Section 27-195(c)(2) seemingly addresses one of the concerns about conditional zoning not clearly articulated in *Baylis*, but which we alluded to in *H. Manny Holtz* -- that [HN7] it is inconsistent with the principle that, while zoning regulations may vary from one district or classification to another, within a district or classification they should be uniform. Conditional zoning tends to destroy that uniformity; it subjects some land within a district or classification to restrictions that are not applicable to other land within the same [***25] district or classification and thus tends to create [*553] unique mini-districts not provided for in the general zoning ordinance.

To some extent, of course, this dis-uniformity may be achieved in other ways -- through variances, special exceptions, and, increasingly, through floating or general development zones, such as the E-I-A zone at issue here, and the site plan review process that governs development in those [**750] zones. But, in terms of *use* restriction, those appear to be the only methods authorized; permitted uses cannot be excluded by contract with the zoning authority as part of the basic rezoning.

The extent to which this specific prohibition can be circumvented by private agreement is very limited. [HN8] Although there appears to be no impediment to an applicant entering into private covenants with other parties to lessen their opposition to an application, or to garner their support for it, such offerings cannot be made to the legislative body authorized to grant or deny the application. This was made clear in *Mont. Co. v. Nat'l Capital Realty, supra, 267 Md. 364, 297 A.2d 675*. There too the applicant, faced with substantial opposition, [***26] offered to enter into certain covenants restricting the use of the property to those shown on an attached site plan, contingent on approval of the application. The Court saw that for the obvious subterfuge that it was. At 373, *297 A.2d 675*, it stated:

> "We think it clear that the covenants, coupled with the site plan attached thereto, if adopted as a basis for the requested reclassification, would have produced a form of conditional zoning. . . . Had the Council then granted the application on the strength of the covenants, . . . it would have committed what we believe would have been a classic illustration of conditional zoning."

The form here was slightly different -- an amendment to the Basic Plan -- but the effect was precisely the same. The applicant was offering a deal to the District Council: in order to induce the Council to approve its application for reclassification, the applicant would agree in advance to [*554] exclude from the scope of the approval certain uses expressly permitted in the approved zone. Whatever the general right of the applicant to amend the Basic Plan may be, that right cannot be exercised in such manner as to [***27] violate the clear restrictions of § 27-195(c)(2). We think that what occurred here was no different in either purpose or effect from what was done, and condemned, in *Nat'l Capital Realty*. Quite apart from the District Council's failure to articulate specific findings and conclusions, its action was invalid for this reason as well.

(6) *Conclusion*

As we indicated briefly above, it may well be that the evidence of record can support a decision to reclassify all or part of the land to an E-I-A zone. But such a decision must be made without regard to improper conditions and the Council will have to comply with the requirements of *Md.Ann.Code art. 28, § 8-123* and Prince George's County Code, § 27-141.

JUDGMENT REVERSED; CASE REMANDED TO CIRCUIT COURT FOR PRINCE GEORGE'S COUNTY WITH INSTRUCTIONS TO VACATE ORDER OF DISTRICT COUNCIL AND REMAND TO DISTRICT COUNCIL FOR FURTHER PROCEEDINGS IN ACCORDANCE WITH THIS OPINION; COSTS TO BE PAID BY APPELLEES.

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consequential and inconsequential violations. Thus, the common council has indicated an intent that the housing code be enforced administratively and not by terms implied in a lease. Saunders v. First National Realty Corp., *supra.*

Other indicia of this intent are the enforcement procedures of sec. 75–1 through 75–18. Sec. 75–2 provides that the commissioner of health "shall make inspections to determine the condition of dwellings * * *" within the city of Milwaukee. Sec. 75–3 sets forth the method of enforcement which includes service of written notice by the commissioner of health whenever there has been a violation; hearings before the commissioner which can be requested by "[a]ny person affected by any notice which has been issued in connection with the enforcement of any provision of this chapter * * *"; empowering the commissioner of health, after a hearing, to sustain, modify or withdraw the notice; review by the circuit court by certiorari; and the power of the commissioner to issue subpoenas. In addition, sec. 75–18 sets forth penalties, including imprisonment, for the violation of any order of the commissioner of health based on the provisions of sections 75–1 through 75–18.

These ordinances implement a method of enforcement based entirely upon orders issued by the commissioner of health. Holding that the housing code is implied in lease agreements would have more than a complementary effect—it would circumvent the existing enforcement procedures. Instead of the commissioner issuing an order to initiate enforcement, a tenant would withhold rent and the case would then be taken into court by the landlord for ejectment, nonpayment of rent, or both. Orders would be forthcoming, not from a commissioner but from a judge, and judicial definition of terms in the housing code would supplant administrative regulation.

Some states recognize rent withholding in considering the problems of substandard housing; however, those states have done so by legislation.[4] Neither the legislature nor the common council of Milwaukee has adopted any legislation from which this court can infer an intent that rent withholding under an oral month-to-month lease agreement be utilized as a means of enforcing the housing code.

We are of the opinion that the defendant does not have an affirmative defense based upon alleged violations of the Milwaukee Housing Code; and there was, therefore, no prejudicial error committed by the trial court in refusing to admit evidence based upon that contention.

Judgment affirmed.

STATE ex rel. Joseph ZUPANCIC, Respondent,

v.

Mathias F. SCHIMENZ, Inspector of Buildings of the City of Milwaukee, et al., Appellants,

Sampson Enterprises, Inc., Defendant.

No. 51.

Supreme Court of Wisconsin.

March 3, 1970.

Landowner's proceeding for mandamus to compel city and its building inspector to grant building permit to construct car wash.

4. *For example, see*: New York Real Property Actions Law, McKinney Consol.Laws, cc. 81, 769 et seq.; Cal.Civ.Code sec. 1942; N.Dak.Century Code sec. 47–16–13. *See also* Peters v. Kelly (1968), 98 N.J.Super. 441, 237 A.2d 635, which discusses a City of Newark ordinance enacted pursuant to N.J.S.A. 40:48–2.12a et seq. which, *inter alia*, empowers a director, with the approval of the municipal council, to apply for the appointment of a rent receiver for the purpose of collecting the rents and applying the same to required repairs.

The city sought by counterclaim to enforce a declaration of restrictions and prayed for an injunction. The Circuit Court, Milwaukee County, Robert M. Curley, J., dismissed the counterclaim and granted a writ requiring issuance of the permit. The city appealed. The Supreme Court, Hallows, C. J., held that a declaration of restrictions arising out of negotiations and an agreement between homeowners and developers was not an illegal contract to which the city was a party merely because only the city could enforce restrictions; at most, the city was a third-party beneficiary protecting the public interest, and that the purchase of the land was subject to the recorded restrictions and the purchaser accordingly was not entitled to a building permit merely because, after the permit was issued and before it was revoked, he made a $20,000 down payment on equipment.

Reversed with directions to deny writ and grant injunction enjoining construction of building in violation of restrictions.

1. Municipal Corporations 🔑591

Municipality may not surrender its governmental powers and functions or thus inhibit exercise of its police or legislative powers.

2. Zoning 🔑1, 160

Contract made by zoning authority to zone or rezone or not to zone is illegal and ordinance is void.

3. Zoning 🔑160

When city itself makes agreement with landowner to rezone, this is contract zoning and contract is invalid, but if agreement is made by others than city to conform property in way or manner which makes it acceptable for requested rezoning and city is not committed to rezone, it is not contract zoning in true sense and is not vitiated if otherwise valid.

4. Zoning 🔑160

"Conditional zoning" properly understood involves only adopted zoning ordinance which provides either that rezoning becomes effective immediately with automatic repealer if specified conditions are not met within set time limit or that zoning becomes effective only upon conditions being met within time limit.

See publication Words and Phrases for other judicial constructions and definitions.

5. Zoning 🔑157, 160, 162

Landowners may make contract which may legitimately be recognized by zoning authorities as motivation for rezoning, but such zoning must meet test of all valid zoning, i. e., must be for safety, welfare and health of community, and should not constitute spot zoning. W.S.A. 62.23(7).

6. Zoning 🔑35

Spot zoning is not per se illegal.

7. Zoning 🔑162

Where rezoning was in public interest and not solely for benefit of developer, it was not illegal spot zoning.

8. Zoning 🔑35

"Spot zoning" is usually understood to be zoning by which small area situated in larger zone is purportedly devoted to use inconsistent with use to which larger area is restricted.

See publication Words and Phrases for other judicial constructions and definitions.

9. Zoning 🔑63

Uniformity provision of zoning statutes did not require district of any minimum size and did not require absolute uniformity with other similar districts but only uniformity within each district, and required reasonable uniformity rather than identical similarity. W.S.A. 62.23(7) (b).

10. Municipal Corporations ⟹43

Declaration of restrictions arising out of negotiations and agreement between homeowners and developers was not illegal contract to which city was party merely because only city could enforce restrictions; at most, city was third-party beneficiary protecting public interest.

11. Zoning ⟹63

Flexibility in zoning may be attained by use of floating zones or overlay districts in zoning ordinances.

12. Covenants ⟹103(3)

Where deed restrictions which prevented parcel owner from building car wash were of record when he purchased parcel, both owner and building inspector had constructive knowledge of deed restrictions but there was no waiver of enforcement of restrictions by issuance of permit to construct car wash where inspector had no authority or intent to waive enforcement.

13. Covenants ⟹103(3)

Building inspector had no authority to waive enforcement of deed restrictions which city had power to enforce.

14. Municipal Corporations ⟹621

Purchase of land was subject to recorded restrictions and where city had power to enforce same, purchaser was not entitled to building permit for violative use merely because, after permit for car wash was issued and before it was revoked, he made $20,000 down payment on equipment.

The respondent Joseph Zupancic sought a writ of mandamus to require the appellants City of Milwaukee and its building inspector Mathias F. Schimenz to grant him a building permit to construct a car wash in the River Bend Shopping Center in the city of Milwaukee. The city defended on the ground a declaration of restrictions prohibited the use of the property for a car wash and on other grounds. It also sought in its counterclaim to enforce the restrictions and prayed for an injunction. After a hearing, the trial court dismissed the counterclaim and granted a peremptory writ requiring a building permit to be issued. The city appeals.

John J. Fleming, City Atty., Wallace E. Zdun, John F. Cook, Asst. City Attys., Milwaukee, of counsel, for appellants.

Peregrine, Schimenz, Marcuvitz & Cameron, Hugh R. Braun, Milwaukee, for respondent.

HALLOWS, Chief Justice.

The basic issue before the trial court and on this appeal is whether a declaration of restrictions limiting the use of the land involved was a part of a contract to rezone the property and therefore was invalid.

On May 11, 1955, the common council of the city of Milwaukee approved a plat of the River Bend Shopping Center and provided that any future division of the lots would be subject to its approval. Part of this area was zoned "neighborhood shopping" and part "local business." In 1961 the shopping-center developers desired a change of zoning from neighborhood shopping to local business for a parcel of land 210 by 200 feet in order to sell it for use as a bowling alley. The request for zoning was referred to the city plan commission of Milwaukee which held hearings thereon. The home owners to the south of this area were opposed to the change in zoning but not to a bowling alley. When these objections developed, the matter was laid over pending negotiations between the home owners and the developers.

Out of these negotiations arose an agreement that the developers would limit the use to a bowling alley of the land to be rezoned. A declaration of restrictions was drafted which provided that although the parcel was zoned local business, the only local business use permitted "shall be a bowling alley enterprise housed in a building not to

exceed 42,000 square feet in area and to include a restaurant and cocktail lounge." Any other use of the land was limited to uses permitted under the then neighborhood-shopping zoning. The declaration also provided a buffer planting strip, certain structural requirements, the placement of air-conditioning equipment, and a fence to prevent pedestrian access to the shopping center from Honey Creek Drive on the south. The declaration stated the restrictions were for the benefit of the city of Milwaukee, were to be enforced by the city by injunction, were to run with the land, and were binding until January 1, 1982, a period of about 20 years.

At the meeting before the city plan commission, the attorney for neighbors expressing concern about the validity of the restrictions asked that the declaration be submitted to the city attorney for his opinion. And, at the conclusion of the meeting, the city plan commission recommended the passage of the rezoning ordinance which changed the zoning from neighborhood shopping to local business. Two days later the declaration of restrictions was executed and on the following day the staff report of the commission recommending passage was sent to the committee on streets-zoning of the common council. On August 2nd the declaration of restrictions was recorded and one week later on August 9th the rezoning ordinance became effective.

A few weeks later on August 27th the common council by resolution divided a plated lot to create the desired parcel for the bowling alley. The resolution provided that compliance with the restrictions was a condition of the division which created from the rezoned 210-by-200-foot area the parcel sold for the bowling alley and a surplus parcel of land approximately 190 feet north and south and 42 feet wide east and west. This smaller piece rezoned local business and restricted by the declaration became, with the land to the west zoned neighborhood shopping, Parcel G which had a frontage on the north of 107 odd feet and a depth varying from 175 to 190 feet to the south.

On January 1st, 1968, the respondent and two others made an offer to purchase Parcel G which offer was accepted. The sale was conditioned upon the respondent's obtaining a permit to build a car wash on the east 42 feet of Parcel G zoned local business which permitted a car wash. The offer to purchase was subject to deed restrictions of record. At the time, however, the respondent did not know of the deed restriction which would not permit a car wash; and seller did not remember it.

On February 2d, 1968, the respondent applied to the appellant building inspector for a building permit to use the east 42 feet of Parcel G for a car wash and on February 21st the permit was issued. Two days later the respondent entered into a $66,000 contract to buy car-wash equipment and made a down payment of $20,000. About a week later on March 4th the building permit was revoked because the alderman of the ward wanted the common council to restudy the zoning of this small piece of land. On October 18th, 1968, the common council rezoned the east 42 feet of Parcel G from local business back to neighborhood shopping upon the recommendation of the city plan commission. On November 27, 1968, the petition for a writ of mandamus in the circuit court was filed.

The city argues the declaration of restrictions is valid because: (1) It is not an incident of a contract for zoning or a condition of rezoning, and (2) this type of contract relating to zoning is not illegal as a matter of law. The city urges that for a declaration of restrictions to be an incident of zoning the municipal body which passes the zoning ordinance must be a party to the contract to zone and here the common council of Milwaukee only acted upon the recommendations of the planning commission. Zupancic argues the declaration is part of an illegal zoning contract and if valid, the city waived its rights to enforce the restriction.

[1, 2] A contract made by a zoning authority to zone or rezone or not to zone is illegal and the ordinance is void because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers. 62 C.J.S. Municipal Corporations § 139, p. 281; Baylis v. City of Baltimore (1959), 219 Md. 164, 148 A.2d 429; Midtown Properties, Inc. v. Township of Madison (1961), 68 N.J.Super. 197, 172 A.2d 40, affirmed 78 N.J.Super. 471, 189 A.2d 226. See also Trager, Contract Zoning (1963), 23 Md.L.Rev. 121; Comment, The Use and Abuse of Contract Zoning (1965), 12 UCLA L.Rev. 897. In Houston Petroleum Co. v. Automotive Products Credit Association (1952), 9 N.J. 122, 87 A.2d 319, the owner made an agreement with the city to restrict the use of his land if the city rezoned it so long as the rezoning was effective. The court held the agreement void because it violated public policy. In *Baylis* the court held an ordinance invalid which rezoned a parcel from residential to commercial use on the condition the agreement between the owner and the city restricting the parcel to a funeral-home use was executed and recorded so as to run with the land. Contract zoning is illegal not because of the result but because of the method.

In the instant case, there is no agreement with the city. Neither its common council nor the city plan commission agreed to rezone. The facts give rise to an agreement only between the developers and the home owners respecting the use of the property if it was rezoned by the city. The rezoning *per se* did not require the conditions demanded by the home owners. True, the developers and the home owners expected favorable action by the city plan commission but this was based on two factors: (1) No objection to the rezoning under the circumstances by the home owners, and (2) the proposed rezoning was good-land use and consistent with the developing character of the neighborhood.

When a zoning authority does not make an agreement to zone but is motivated to zone by agreements as to use of the land made by others or by voluntary restrictions running with the land although suggested by the authority, the zoning ordinance in some jurisdictions is valid and not considered to be contract or conditional zoning. The leading case for this view is Church v. Town of Islip (1960), 8 N.Y.2d 254, 203 N.Y.S.2d 866, 168 N.E.2d 680. While this case has been criticized, it has in its home state been followed and expanded. Point Lookout Civic Ass'n et al. v. Town of Hempstead (1960), 12 A.D.2d 505, 207 N.Y.S.2d 121; Longdowd Corp. v. Straight Improvement Co. (1963), 39 Misc.2d 1005, 242 N.Y.S.2d 260; Matter of City of New York (Rosedale Avenue) (1963), 40 Misc.2d 1076, 243 N.Y.S.2d 814; see also Walus v. Millington (1966), 49 Misc.2d 104, 266 N.Y.S.2d 833.

The virtue of allowing private agreements to underlie zoning is the flexibility and control of the development given to a municipality to meet the ever-increasing demands for rezoning in a rapidly changing area. A quite similar case sustaining the validity of such zoning is Sylvania Electric Products, Inc. v. City of Newton (1962), 344 Mass. 428, 183 N.E.2d 118, wherein the court although recognizing the close connection existing between voluntarily imposed restrictions and a rezoning ordinance held the rezoning was a legislative act without conditions and valid.

The instant facts find almost their counterpart in Bucholz v. City of Omaha (1963), 174 Neb. 862, 120 N.W.2d 270. The city of Omaha rezoned land from residential use to a commercial use so the owner could develop a shopping center. After the rezoning, the city approved a protective covenant limiting the use to which the property could be put. This agreement was sustained although the court intimated it was willing to strike down contract zoning when the evidence showed a bargain

between the applicants and the city. In the view of the court the rezoning was not the result of an agreement but of assurances on the part of the landowner that he would restrict his land use if the property were rezoned. In Maryland a valid distinction is made between cases where the contract is made between the developer and the zoning authority and cases where the contract is made between the developer and a city plan committee or a body which recommends zoning but does not have the authority to zone. City of Greenbelt v. Bresler (1967), 248 Md. 210, 236 A.2d 1; Pressman v. City of Baltimore (1960), 222 Md. 330, 160 A.2d 379; Town of Somerset v. County Council of Montgomery County (1962), 229 Md. 42, 181 A.2d 671.

[3, 4] We hold that when a city itself makes an agreement with a landowner to rezone the contract is invalid; this is contract zoning. However, when the agreement is made by others than the city to conform the property in a way or manner which makes it acceptable for the requested rezoning and the city is not committed to rezone, it is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid. This latter situation is sometimes confused with conditional zoning. But conditional zoning properly understood involves only an adopted zoning ordinance which provides either: (1) The rezoning becomes effective immediately with an automatic repealer if specified conditions are not met within a set time limit, or (2) the zoning becomes effective only upon the conditions being met within the time limit. See Schaffer, Vol. 11, The Practical Lawyer, No. 5, p. 43, Contract and Conditional Rezoning; 5 McQuillin, Municipal Corporations, sec. 15.41. But see, 1 Anderson, American Law of Zoning (1968), secs. 8.20, 8.21.

Some courts take the view advanced by Zupancic that the facts in the instant case give rise to a *quid pro quo* for rezoning although no express contract with the zoning authorities can be proved. This "implied contract" arises from the fact the connection between rezoning and the recording of restrictions at or soon after the rezoning which condition the lands for rezoning and motivate the enacting authorities is sufficient to render the rezoning and contract illegal. This view rests on a "but for" theory of a bargain.

Rathkopf, in his work on zoning and planning, states:

> "Most courts take a practical view of such situation and hold that the execution and filing of such assumption of additional restrictions were a *quid pro quo* for the rezoning, *i. e.*, zoning by contract. The general rule in these jurisdictions in which the validity of such covenants has been litigated is that they are illegal. The basis of such rule is that the rezoning of a particular parcel of land upon conditions not imposed by the zoning ordinance generally is the particular district into which the land has been rezoned is prima facie evidence of "spot zoning" in its most maleficent aspect, is not in accordance with a comprehensive plan and is beyond the power of the municipality.
>
> Legislative bodies must rezone in accordance with a comprehensive plan, and in amending the ordinance so as to confer upon a particular parcel a particular district designation, it may not curtail or limit the uses and structures placed or to be placed upon the lands so rezoned differently from those permitted upon other lands in the same district. Consequently, where there has been a concatinated rezoning and filing of a 'declaration of restrictions' the general view (where the question has been litigated) is that both the zoning amendment and the restrictive covenant are invalid for the reasons expressed above." Rathkopf, The Law of Zoning and Planning, 3rd Ed., Vol. 3, Ch. 74-9, Deed Covenants and Restrictions—Effect of Zoning Ordinance.

While this view of invalidity is taken by the courts in New Jersey,[1] Maryland,[2] Michigan,[3] and Florida,[4] we think this is a too rigid view. At the other extreme we find State ex rel. Myhre v. City of Spokane (1967), 70 Wash.2d 207, 422 P.2d 790, 796, taking the view "a zoning ordinance and a concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for a change and that they are clearly arbitrary and unreasonable, and have no substantial relation to the public health, safety, morals, and general welfare, or if the city is using the concomitant agreement for bargaining and sale to the highest bidder or solely for the benefit of private speculators." See also Hudson Oil Co. of Mo. v. City of Wichita (1964), 193 Kan. 623, 396 P.2d 271.

[5–8] We think landowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning but such zoning must meet the test of all valid zoning, *i. e.,* must be for the safety, welfare, health of the community, sec. 62.23(7), Stats., and it should not constitute spot zoning. Spot zoning per se is not illegal and we do not consider the rezoning in this case to be illegal spot zoning because it was in the public interest and not solely for the benefit of the developer. See Boerschinger v. Elkay Enterprises, Inc. (1966), 32 Wis.2d 168, 145 N.W. 2d 108; Cushman v. Racine (1967), 39 Wis.2d 303, 159 N.W.2d 67. Besides, spot zoning is usually understood to be zoning "by which a small area situated in a larger zone is purportedly devoted to a use inconsistent with the use to which the larger area is restricted." Higbee v. Chicago, B. & Q. R. Co. (1940), 235 Wis. 91, 292 N.W. 320, 128 A.L.R. 734. The record does not show how the shopping-center area is zoned except that part is neighborhood shopping and part local business. Without proof we cannot say a bowling alley-restaurant-cocktail lounge complex is inconsistent with a Red Owl Store, a gas filling station, and a Marc's Big Boy Restaurant in the shopping center.

[9] Zupancic's argument that the zoning violates sec. 62.23(7) (b), Stats., is also without merit. This section does not require a district of any minimum size. The uniformity provision does not require absolute uniformity with other similar districts but only uniformity within each district. This requires reasonable uniformity, not identical similarity.

[10] In recognizing the legality of what was done here, we caution that the procedure might well lead to an agreement with the zoning authority which might be fatal. We do not consider the declaration of restrictions, which only the city can enforce, makes the city a party to the contract; at most, the city is a third-party beneficiary protecting the public interest. Where the imposition of conditions on land development is desirable, it might better be done by uniform ordinances providing for special uses, special exceptions and overlaid districts. As stated in Cutler, Zoning Law and Practice in Wisconsin, p. 27, sec. 8: "Conditions imposed in such cases have a sounder legal basis because guidelines for their imposition are spelled out in the ordinance."

[11] The instant case is not in effect much different than the cases of gasoline filling stations where the ordinance requires special permission for a permit to be granted upon the meeting of certain standards established by a licensing or permit agency. See J & N Corp. v. Green Bay (1965), 28 Wis.2d 583, 137 N.W.2d 434. This technique of authorizing in the zoning ordinance the plan commission or govern-

1. Houston Petroleum Co. v. Automotive Products Credit Ass'n, Inc. (1952), 9 N.J. 122, 87 A.2d 319.

2. Baylis v. City of Baltimore (1959), 219 Md. 164, 148 A.2d 429.

3. Sandenburgh v. Michigamme Oil Co. (1930), 249 Mich. 372, 228 N.W. 707.

4. Hartnett v. Austin (1956), Fla., 93 So. 2d 86.

ing body to grant "special uses and conditional uses" on definite standards from the automatic permissive uses listed in the zoning ordinance is preferable to the method used in the instant case. The boundary areas of zones generally present problems. The technique used in the instant case is an attempt to soften or taper the periphery between differing automatic uses. Flexibility might also be attained by the use of floating zones or overlay districts in zoning ordinances. See *Cutler, supra; Anderson, supra,* secs. 5.14–5.16; also State ex rel. American Oil Co. v. Bessent (1965), 27 Wis.2d 537, 135 N.W.2d 317.

[12, 13] Zupancic argues the city has waived its right to enforce the restrictions on the use of the parcel because it granted a building permit and he has changed his position relying thereon. At the time the permit was granted the deed restrictions prohibited Zupancic from building a car wash. These restrictions were not waived by the building inspector's granting a building permit in the first instance. The inspector had no authority or intention to waive enforcement of restrictions to confine the use to a bowling alley or uses permitted by neighborhood shopping for 20 years.

[14] It is claimed the building inspector should have known and he had constructive knowledge of the deed restrictions; but it is likewise true that the respondent should have known and had constructive knowledge of the deed restrictions. His purchase of the land was subject to recorded restrictions. Bump v. Dahl (1965), 26 Wis.2d 607, 133 N.W.2d 295. Zupancic was no more misled by the building inspector's action than by his own ignorance and negligence in not ascertaining what restrictions were on the land. He has made no improvements on the land and is not obligated to go through with the purchase if a building permit is denied him. It is true he made a $20,000 down payment on equipment but we do not think under the circumstances that calls for the issuance of the building permit.

Judgment reversed, with directions to deny the peremptory writ and grant an injunction enjoining Zupancic from constructing any building in violation of the terms of the declaration of restrictions.

AMERY MOTOR CO., Inc., et al., Plaintiffs,

v.

Warren W. COREY et al., Defendants and Third-Party Plaintiffs-Appellants,

Indianhead Truck Line, Inc., Defendant,

UNLIMITED OPPORTUNITIES, INC., Third-Party Defendant-Appellants,

AGRICULTURAL INS. CO. et al., Third-Party Defendant-Respondents.

Supreme Court of Wisconsin.

March 6, 1970.

Personal injury and property damage actions arising from an explosion and fire at a gasoline bulk plant. Owner-lessees of bulk plant brought a third-party action against insurers of gasoline transporter alleging that they were additional insureds under policies. The Circuit Court, Polk County, Lewis J. Charles, J., entered judgment for insurers, and owner-lessees appealed. The Supreme Court, Hallows, C. J., held that neither act of owner-lessees of bulk plant in furnishing a key to unlock pipes to tanks when no employee of plant was present nor act of furnishing defective tanks and storage equipment which led to gasoline explosion while truck belonging to gasoline transporter was being unloaded constituted a "use of truck during unloading operation" so as to make owner-lessees additional insureds under transporter's liability policy.

Affirmed.

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its product to the plaintiff, in effect has resulted in the appropriation of plaintiff's market for such product in violation of the principles of fair dealing which the statute was intended to prevent.

[4] In support of this theory plaintiff attempts to read into the statute the explanatory statement of the purpose of the legislation which was appended to the bill by the sponsor thereof at the time of its introduction in the Legislature. This statement related that the purpose of the bill was: "* * * to insure an equitable basis for competition between all licensed wholesalers of alcoholic beverages in New Jersey and to prevent any monopolistic freezing out of one wholesaler by another by preventing the sale of certain products to him." It is well settled, however, that such a statement, not being in the nature of a preamble to a statute, is "not to be considered an index of legislative intent in judicial exposition of the enactment." Raymond v. Township of Teaneck, 118 N.J.L. 109, 191 A. 480, 481, (E. & A. 1936); Flagg v. Johansen, 124 N.J.L. 456, 459, 12 A.2d 374 (Sup.Ct. 1940); Keyport & M. P. Steamboat Co. v. Farmers Transportation Co., 18 N.J.Eq. 13, 24 (Ch. 1866), affirmed 18 N.J.Eq. at page 511 (E. & A. 1866); cf. Bass v. Allen Home Improvement Co., 8 N.J. 219, 84 A.2d 720 (1951).

[5, 6] In any event, it is the legislative intent which ultimately controls and we find nothing in the act, nor for that matter in the aforesaid statement, revealing an intent to give to the Director the broad sweep of power for which the plaintiff contends. The plaintiff, according to his interpretation of the statute, would have the Director pass upon purported equitable, contractual and ethical obligations of the distiller to sell its product to various wholesalers and thus confer upon the Director a duty and power to regulate the distribution of the product far beyond the scope of the terms of the statute itself.

[7] What, then, is the scope of the Director's power? We think the answer is to be found in the construction of the statute contended for by the defendant, and adopted by the Director in the instant case, namely, that what is prohibited by this legislation is an act of arbitrary discrimination between wholesalers by a distiller in the sale of a nationally advertised product and that in order to grant the relief provided for, the Director not only must find that the complaining wholesaler or distributor is able to pay for the product ordered but that the distiller's refusal to sell to him is discriminatory and arbitrary, and the inquiry must be limited solely to such considerations.

[8] Has there been such discrimination here within the intendment of the statute? We think not. We see no evidence anywhere in the statute of an intention to prevent a distiller, importer or rectifier from selling its own product directly to retailers if its business policy so dictates, provided it takes out a wholesale license pursuant to R.S. 33:1-2, 9, 11, N.J.S.A. In the instant case Park & Tilford took out such a license, not because it desired to be an independent wholesaler, but because it could not otherwise, as a distiller, sell its own product directly to retail liquor dealers.

[9, 10] Nor do we find any purpose in the statute to prohibit such a producer from acting as the *exclusive* distributor or wholesaler of its own products. If a contrary purpose were intended it should have been clearly expressed and not left to mere conjecture. "We are enjoined to interpret and enforce the legislative will as written, and not according to some supposed unexpressed intention." Camden v. Local Government Board, 127 N.J.L. 175, 178, 21 A.2d 292, 294 (Sup.Ct. 1941); Burnson v. Evans, 137 N.J.L. 511, 514, 60 A.2d 891 (Sup.Ct. 1948).

[11] The apparent scope of the statute in question is to be found in section 1 thereof which bars "discrimination in the sale of alcoholic liquors by distillers, * * * of nationally advertised brands" thereof "to duly licensed wholesalers of alcoholic liquors * * *." Thus it is still open to the distiller to sell directly to retail dealers if licensed so to do. It may, of course, sell indirectly through the medium of duly licensed wholesalers, if

it so chooses, but in the latter event it may not discriminate between such wholesalers.

In this view it does not matter that here the plaintiff, Hoffman, had developed a market in the area before the distiller took over; that was a matter for contractual protection and involves legal or equitable remedies which, under the plain intent of the statute, the Director was without authority to apply.

[12, 13] Therefore, on the record before us, there was no discrimination within the intendment of the statute. The defendant, Park & Tilford, made a policy decision to resume its former practice of selling its product directly to retailers and eliminating entirely the use of distributors or wholesalers in the northern part of the State. Accordingly, it terminated the distributorship which it had given to the plaintiff in Hudson County on a trial basis and at the same time summarily terminated all other distributorships which it had created in the northern part of New Jersey. The fact that the distiller, Park & Tilford, still operates through wholesalers in the southern and western parts of the State, whose authorizations are limited to such areas, does not make its action with respect to the crowded northern counties, where retailers are closer together and more easily reached, an arbitrary or unfair discrimination against its former distributors in such counties whose authorizations had been confined thereto.

[14] As the Director properly observed, we are not concerned here with possible remedies, if any, the plaintiff may have relating to fair trade practices or breach of contract, our inquiry being limited solely to the applicability of the statute in question. The arrangement between the parties hereto was on a trial basis and if the plaintiff desired a more substantial agreement to protect his initial investment he should have contracted therefor.

These conclusions render it unnecessary to consider the questions raised by the defendant with respect to the constitutionality of the aforesaid supplemental statute.

The order of the Director of the Division of Alcoholic Beverage Control dismissing the plaintiff's petition (complaint) is accordingly affirmed.

For affirmance: Chief Justice VANDERBILT, and Justices CASE, HEHER, OLIPHANT, WACHENFELD, BURLING and ACKERSON—7.

For reversal: None.

8 N.J. 386

V. F. ZAHODIAKIN ENGINEERING CORP v. ZONING BOARD OF ADJUSTMENT OF CITY OF SUMMIT et al.

No. A-55.

Supreme Court of New Jersey.

Argued Nov. 26, 1951.

Decided Jan. 21, 1952.

Proceeding by V. F. Zahodiakin Engineering Corporation against Zoning Board of Adjustment of the City of Summit and another, in lieu of certiorari, to review a denial of a continuance of a zoning variance theretofore granted to plaintiff. The Superior Court, Law Division, 14 N.J.Super. 537, 82 A.2d 493, entered an adverse judgment, the plaintiff appealed to the Superior Court, Appellate Division, and the case was certified on motion of the Supreme Court. The Supreme Court, Heher, J., held that the action of the zoning board of adjustment in granting the exception on conditions was coram non judice and void.

Judgment affirmed.

1. Municipal Corporations ⟹621.14

Function of statutory variance from zoning ordinance is relief against unnecessary and unjust invasion of right of private property which under special conditions and singular circumstances would ensue from burden of general rule. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

2. Municipal Corporations ⟹621.40

Power to authorize statutory variance from general regulation of zoning ordinance is power to vary application of general regulation to serve statutory policy to avoid unjust and unnecessary invasion of

right of private property. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

3. Municipal Corporations ⚬=621.14

Whatever duration of variance from zoning ordinance, whether for definite or an indefinite period, variance must ex necessitate be grounded in policy of statute. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

4. Municipal Corporations ⚬=621.23

Variant use of property under zoning ordinance does not derive validity from mere time limitation.

5. Municipal Corporations ⚬=621.40

Where zoning board of adjustment made no pretense of adherence to statutory principle in granting variance, but intended to provide measure of relief outside of statute itself and in direct conflict with statutory terms, action of quasi judicial board of adjustment constituted excess of jurisdiction. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

6. Municipal Corporations ⚬=601(3)

Zoning is exercise of police power to serve common good and general welfare.

7. Constitutional Law ⚬=50

Legislative function may not be surrendered or curtailed by bargain or its exercise controlled by considerations which enter into law of contracts.

8. Municipal Corporations ⚬=601(9), 621.21

Use restriction placed on property under zoning regulation must have general application and power to grant variance may not be exerted to serve private interest merely and requirement that use restriction have general application to property of zoned district may not be subverted to that end.

9. Municipal Corporations ⚬=621.40

It was not within authority of zoning board of adjustment to vest in landowner by contract special privilege or exemption on condition to use premises in violation of general use restriction under zoning regulations binding upon all other landowners within zone. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

10. Municipal Corporations ⚬=621.40

Purported contract between zoning board of adjustment and landowner granting landowner special privilege or exemption on condition to use premises under variance to general rule as to use restrictions binding upon all other landowners within zone was ultra vires and all proceedings to effectuate contract were coram non judice and void. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

11. Municipal Corporations ⚬=621.40

Where zoning board of adjustment contracted to permit variance on condition, which action effectuated contractual undertaking for private benefit in disregard of zoning ordinance, and special hardship from unique circumstances within principle of statute permitting variance was not determined, and considerations outside statute controlled, proceedings of board did not constitute judicial inquiry and adjudication within frame of statute. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

12. Certiorari ⚬=14

Certiorari affords means of containing statutory tribunals within their jurisdiction.

13. Municipal Corporations ⚬=621.48, 621.59

Where zoning board of adjustment lacked jurisdiction to enter into contract granting special exception on condition to zoning regulations and action of board did not constitute inquiry and adjudication within statutory limits, resolution of board purporting to authorize exception was utterly void and subject to collateral attack at any time as well as direct review within time prescribed by law. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

14. Municipal Corporations ⚬=621.12

Expenditure of moneys by landowner to render lands suitable for prohibited use does not operate to validate void grant by zoning board allegedly permitting such use.

15. Municipal Corporations ⚬=621.13

Where zoning board of adjustment granted exception on certain conditions to terms of zoning ordinance and action of board was coram non judice and void and landowner was presumed to know of invalidity of exception when he expended money to make lands suitable for prohibited use, want of fundamental power by board to grant variance could not be indirectly supplied by application of doctrine of estoppel in pais as elements of estoppel were wanting.

16. Municipal Corporations ⚬=621.13

Governmental zoning power may not be forfeited by action of local officers in disregard of statute and zoning ordinance. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

17. Municipal Corporations ⚬=621.12

Landowner, who contracted with zoning board of adjustment for special exemption on condition from zoning regulation, would be presumed to have known of invalidity of exception and to have acted at his peril. L. 1949, c. 242, § 1; R.S. 40:55-39, subd. c, N.J.S.A.

18. Municipal Corporations ⚬=621.25

Where landowner, who obtained special exception on condition from zoning regulations, agreed that in event of sale or transfer of lands to other than certain named parties or discontinuance of permitted use subject to renewal by board of adjustment, exception should be automatically terminated, and landowner discontinued use, merely because refusal of extension of exception would prevent advantageous sale by landowner, refusal of extension was not arbitrary exercise of discretion by board.

Stanley W. Greenfield, Elizabeth, argued the cause for appellant.

Fred A. Lorentz, Newark, argued the cause for respondent (Peter C. Triolo, Summit, attorney).

The opinion of the court was delivered by

HEHER, J.

The plaintiff landowner complains of the judgment of the Superior Court, in a civil proceeding at law in lieu of *certiorari* pursuant to Rule 3:81-2 of this court, adjudging as *ultra vires* and void two resolutions of the governing body of the City of Summit adopted June 16, 1942 and July 7, 1942 on the recommendation of the local board of adjustment, purporting to grant on certain terms and conditions an "exception" to the terms of the local zoning ordinance for the use of part of plaintiff's lands and the buildings thereon, remodeled or reconstructed as therein particularized, for the "production, finishing and assembling" of "small mechanical precision devices and instruments" and the associated laboratory for research and experimental purposes, and affirming the action of the local board of adjustment taken February 20, 1951 refusing a continuance of the exception for this industrial use on the grounds (a) that such use "would be substantially detrimental to the public good and would impair the intent and purpose" of the local "zone plan and zoning ordinance," and (b) there was no showing of undue hardship.

The case is here by certification on our own motion of an appeal taken by plaintiff to the Appellate Division of the Superior Court.

The *locus* comprises in excess of 15 acres of land situate at the southwest corner of the Morris and Essex Turnpike and River Road in the City of Summit, bounded on the west by the Passaic River, in an "A-10 Residential Zone" delineated by the local zoning ordinance for single-family dwellings. The application for the exception was made by plaintiff, but title to the lands was not taken until June 25, 1942, presumably under a contract of sale whose consummation was conditioned upon the prior allowance of a variance or exception in the terms indicated. The exception was conditioned thus: "In the event of the bankruptcy or judicial determination of insolvency of the grantee, or the sale or transfer of the premises to any person other than the present stockholders of the grantee, their personal representatives, heirs at law and next of kin, legatees and devisees or a transferee by operation of law," or "in the event that use of the premises for the laboratory and business activities of the grantee as described above or such future laboratory and business activities as may be necessarily incidental thereto is discontinued,

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the right to use the premises for the non-residential purposes set forth in this paragraph shall terminate; provided, however, that such use may be continued thereafter to the extent, in the manner and for the period authorized by" the local board of adjustment "in its discretion, reasonably exercised, and may be continued without such authorization if the premises are at that time situated in a district designated by" the zoning ordinance "as a business or industrial district." There were requirements that the plaintiff corporation or the "occupant of the premises," as the case may be, submit to the local board of adjustment written bi-annual reports "describing the nature of its business and industrial operations on" the premises "and certifying * * * that the foregoing restrictions and limitations are being adhered to," and also that the deed of conveyance to the plaintiff corporation thereafter to be made contain the foregoing conditions as covenants and agreements by the grantee, for itself, its successors and assigns, "and for the benefit of the grantor, the City of Summit, New Jersey, the owners of residential properties abutting the premises and neighboring residential properties, situated in the area of Summit, New Jersey, known as the 'Canoe Brook Parkway' area, their heirs, personal representatives, successors and assigns;" also these further conditions: that for a period of 20 years from the date of the delivery of the deed of conveyance to the plaintiff corporation, except as provided in the granted exception, no building then on the premises or thereafter erected thereon shall be used for any purpose other than as a detached one-family private residence or as a garage used in connection with such residence; and that in case of subdivision the lots and buildings shall meet the *minima* as to size and floor area therein prescribed, and no building or structure shall be erected on the premises "within 200 feet easterly of the east bank of the Passaic River" without the written approval of the board of adjustment. The board of adjustment also recommended that no building permit be issued to plaintiff until there was filed with the city clerk a certified copy of a deed of conveyance of the lands to plaintiff "embodying the foregoing covenants and restrictions," and that it be required that the property "be landscaped and maintained as a park, as agreed by" plaintiff. The governing body, by resolution adopted June 16, 1942, approved the recommendation of an exception to plaintiff thus made "subject to limitations, restrictions and agreements" as therein set down. The resolution of July 7 ensuing approved an amendment recommended by the board of adjustment to provide for the incorporation of the foregoing terms and conditions in the deed of conveyance as "covenants and restrictions," and for the landscaping and maintenance of the "property * * * in such a way as to give it the appearance of a private park," in keeping with plaintiff's undertaking. The conveyance to plaintiff was conditioned accordingly.

The gravamen of the complaint is that, in reliance upon the "variance" so provided, plaintiff acquired title to the lands, and thereafter, in 1943, under permits issued by the local authority, erected a brick building thereon "especially designed for its laboratory, industrial and manufacturing purposes" and a building providing facilities for its employees, and has since made such use of the premises, and the refusal of a continuance of the variance would defeat an advantageous sale of the lands presently made by plaintiff conditioned upon its continuance and in the circumstances is capricious, arbitrary and unreasonable. One of the conditions attached to the variance is in part a restraint upon alienation; and its excision is prayed on that account. The City of Summit was given leave to intervene as a party defendant. The board of adjustment and the city each filed an answer and counterclaim praying that the resolution of the board of adjustment purporting to grant the variance in question and the approving resolutions of the governing body be adjudged null and void as excesses of power, and, at all events, that the variance be adjudged terminated by reason of the discontinuance on January 1, 1950, of plaintiff's "industrial and business activities" on the premises, and

for violations of the conditions in certain particulars which need not be stated. The cessation of the permitted variant use is established by the proofs. Indeed, that seems to be conceded. Plaintiff had more than 200 employees in the prosecution of the enterprise at the time of the grant of the variance, but only three or four in May, 1950 and thereafter. Manufacturing was discontinued.

The mere recital of the circumstances demonstrates the vice of the purported exception cited by the landowner. The action thus taken was *coram non judice* and void. The local authority did not undertake to grant a variance from the terms of the ordinance grounded in the statutory consideration of "unnecessary hardship," or an exception according to a standard set by the ordinance in keeping with the statutory policy (e. g. Schnell v. Township Committee of Ocean, 120 N.J.L. 194, 198 A. 759 (Sup.Ct. 1938)), but rather to confer an exception *extra* the statute and the ordinance to serve the interests of the land owner in matters foreign to the principle and policy of zoning as declared by the statute and invoked by the ordinance. The action constituted a special exemption from the operation of the zoning regulation for a limited period pursuant to an agreement made between plaintiff and the local authority prior to the conveyance of the lands under the cited contract providing for a transfer of the title only in the event of the grant of a variance permitting the forbidden use. There was no finding of undue hardship. Indeed, the action under review was not professed to be an exercise of the statutory power to authorize a variance from the general regulation where, due to "special conditions a literal enforcement of the zoning ordinance would result in unnecessary hardship." R.S. 40:55-39, c,[1] N.J.S.A.

[1-5] The function of the statutory variance is relief against the unnecessary and unjust invasion of the right of private property which under the special conditions and singular circumstances would ensue from the burden of the general rule. The power is to vary in such circumstances the application of the general regulation to serve the statutory policy. Brandon v. Montclair, 124 N.J.L. 135, 11 A.2d 304 (Sup.Ct. 1940), affirmed 125 N.J.L. 367, 15 A.2d 598 (E. & A. 1940); Potts v. Board of Adjustment of Princeton, 133 N.J.L. 230, 43 A.2d 850 (Sup.Ct. 1945). Whatever the duration of the variance, whether for a definite or an indefinite period, it must *ex necessitate* be grounded in the policy of the statute. It is axiomatic that a variant does not derive validity from a mere time limitation. Lynch v. Hillsdale, 136 N.J.L. 129, 54 A.2d 723 (Sup.Ct. 1947), affirmed 137 N.J.L. 280, 59 A.2d 622 (E. & A. 1948); Berdan v. City of Paterson, 1 N. J. 199, 62 A.2d 680 (1949). Where, as here, there is no pretense of adherence to the statutory principle, but a design to provide a measure of relief outside of the statute itself and in direct conflict with its terms, the action of the *quasi*-judicial agency constitutes an excess of jurisdiction.

[6-10] Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts. The use restriction must needs have general application. The power may not be exerted to serve private interests merely, nor may the principle be subverted to that end. Brandon v. Montclair, supra; Appley v. Township Committee of the Township of Bernards, 128 N.J.L. 195, 24 A.2d 805 (Sup.Ct. 1942), affirmed 129 N.J.L. 73, 28 A.2d 177 (E. & A. 1942); Collins v. Board of Adjustment of Margate City, 3 N.J. 200, 69 A.2d 708 (1949); Speakman v. Mayor and Council of North Plainfield, 8 N.J. 250, 84 A.2d 715 (1951). It was not within the province of the local authority here to vest in the landowner by contract a special privilege or exemption to use its premises in

1. The present provision is designed to relieve against "peculiar and exceptional practical difficulties" and "exceptional and undue hardship". L.1949, c. 242, p. 779.

violation of the general rule binding upon all other landowners within the zone. Lynch v. Hillsdale, cited supra; Beckman v. Township of Teaneck, 6 N.J. 530, 79 A. 2d 301 (1951). The purported contract was *ultra vires* and all proceedings to effectuate it were *coram non judice* and utterly void. Bauer v. City of Newark, 7 N.J. 426, 81 A. 2d 727 (1951).

[11, 12] Here, the action taken was not a mere irregular exercise of the *quasi*-judicial function residing in the local authority. The proceeding was wholly beyond the statute. It was not designed to advance the statutory policy, but to effectuate a contractual undertaking for private benefit in disregard of it. It constituted an arrogation of authority in defiance of the statute and the ordinance. Special hardship from unique circumstances within the principle of the statute and the ordinance was concededly not a point of inquiry. Considerations *dehors* the statute controlled. There was no pretense of the exercise of the statutory function. Whim and caprice rather than the reason and spirit of the statute determined the course taken. There was a deliberate breach of jurisdiction. The proceeding did not constitute a judicial inquiry and adjudication within the frame of the statute. Compare Hendey v. Ackerman, 103 N.J.L. 305, 136 A. 733 (Sup.Ct. 1927); Petersen v. Falzarano, 6 N.J. 447, 79 A.2d 50 (1951). *Certiorari* affords the means of containing statutory tribunals within their jurisdiction.

[13-17] Thus, for want of jurisdiction of the subject matter, the resolution purporting to authorize the exception was utterly void and subject to collateral attack at any time as well as a direct review within the time prescribed by law. It is a corollary to this that the expenditure of moneys to render the lands suitable for the prohibited use does not operate to validate the void grant. The want of fundamental power cannot be indirectly supplied by the application of the doctrine of estoppel *in pais*. The elements of estoppel are wanting. The governmental zoning power may not be forfeited by the action of local officers in disregard of the statute and the ordinance. The public has an interest in zoning that cannot thus be set at naught. The plaintiff landowner is presumed to have known of the invalidity of the exception and to have acted at his peril.

[18] Even under the purported exception, the landowner cannot complain on this score. As we have seen, it was agreed that in the event of the sale or transfer of the lands other than to a stockholder of the plaintiff corporation, or the legal representatives of a stockholder, or a transfer by operation of law, or the discontinuance of the permitted use on the lands, the exception should automatically terminate, subject to renewal by the board of adjustment "to the extent, in the manner and for the period authorized" by the board "in its discretion, reasonably exercised." In the circumstances, the refusal of an extension of the exception cannot be said to be an arbitrary exercise of discretion. The proviso, related to the contextual design eventually to restore the residential character of the area, contemplated a temporary rather than an indefinite continuance during the subsistence of the general rule; and it would seem, according to the letter, that once an extension was granted, however short the period, the power would be exhausted. And the use itself was also made subject to modification. There is no basis, not even the slightest, for branding the action as capricious. It is of no moment that the lands will bring a substantially greater price if the non-conforming use be continued. The landowner was well aware of the limitations of the exception. It did not improve the lands on the faith of a promise by the municipality to prolong the exception in the event of a sale. Quite the contrary. The plant was organized to supply the Navy with mechanical devices and instruments during World War II Presumably, the business was capitalized on the basis of this limited user—so long as plaintiff retained ownership and devoted the lands to the stated use.

It suffices to add that the application for a continuance of the variance was grounded, not in the statutory principle of unnecessary hardship, but rather in the agreement embodied in the original resolution and the covenants and conditions of the subsequent deed of conveyance.

The judgment is affirmed.

For affirmance: Chief Justice VANDERBILT and Justices CASE, HEHER, OLIPHANT, WACHENFELD, BURLING and ACKERSON—7.

For reversal: None.

17 N.J.Super. 395

SCHLICHTING v. WINTER et al.

No. C–136.

Superior Court of New Jersey
Chancery Division.

Jan. 8, 1952.

Charles H. Schlichting brought action against Myrtle E. Winter and George P. Winter to enjoin alleged violation of restrictive covenant. The Superior Court, Chancery Division, Grimshaw, J. S. C., held that violation by plaintiff of the very covenant which he sought to have enforced against defendants, was sufficient ground for denying relief sought by plaintiff.

Complaint dismissed.

1. Injunction ⟹109

The violation by plaintiff of the very restrictive covenant which he sought to have enforced against defendants, was of itself sufficient ground for denying injunctive relief to enjoin defendants from violating the restrictive covenant.

2. Covenants ⟹51(2)

Restrictive covenant against erection of a building within 35 feet of front or street line of realty, did not apply to line of street at side of corner lot in addition to line of street on which the lot fronted.

3. Injunction ⟹62(1)

Equity will not aid one person to restrict another person in uses to which he may lawfully put his realty, unless the right to such aid is clear.

4. Injunction ⟹58

Where right of a complainant to relief by enforcement of a restrictive covenant is doubtful, an injunction to restrain violation of covenant will be denied.

Joseph H. Gaudielle, Hackensack, for plaintiff.

Sidney Cohn, Palisades Park, for defendants.

GRIMSHAW, J. S. C.

This matter was before me on an application for an interlocutory injunction. In the memorandum filed at that time 15 N.J.Super. 600, 83 A.2d 807, most of the essential facts of the controversy were set forth. I found that the plaintiff had failed to establish the existence of a neighborhood scheme of development and that his right to relief was based upon his position as a subsequent grantee from the common grantor.

[1] At the final hearing it appeared that the plaintiff Schlichting had violated the very covenant which he seeks to have enforced against the defendants. This of itself is sufficient ground for denying the relief which he seeks. DeGray v. Monmouth Beach Club House Co., 50 N.J.Eq. 329, 24 A. 388 (Ch. 1892); Roberts v. Scull, 58 N.J.Eq. 396, 43 A. 583 (Ch. 1899).

[2] There is, however, a further point which requires comment at this time. In the memorandum filed in connection with the application for an interlocutory injunction, on the authority of Waters v. Collins, 70 A. 984 (Ch. 1895), affirmed without opinion by the Court of Errors and Appeals, I held that a restriction against the erection of a building within 35 feet of the front or street line of the property, included, in the case of a corner lot, the line of the street at the side of the lot as well as the line of the street on which the lot fronted. After further consideration, I am now of the opinion that that conclusion was erroneous. Were it not for the fact that the defendants' lot is on a corner, there would be no difficulty. Defendants' lot fronts on Broad Avenue and, under the restriction in her deed, she is required to

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What they need, if they are to prevail, is for us to rewrite the contract so that the town will agree to exempt the subject land from any subsequent zoning legislation changing a multi-family dwelling from a permissible to a conditionally permissible use in any and all R-3 residential zones in the town. But nothing either in the record before us or in plaintiffs' arguments suggests that the addition of such a provision is "indispensable to effectuate the intention of the parties," 4 Williston Contracts § 610B at 533 (3d ed. 1961); accord, Adkins v. Adams, 152 F.2d 489, 492 (7th Cir. 1945); Marini v. Ireland, 56 N.J. 130, 143, 265 A.2d 526, 533 (1970), or that it was omitted by reason of sheer inadvertence or because it was so obvious as to need no expression. And without that kind of showing we are unwarranted in imposing a contractual obligation upon the town by implication. Refinery Employees' Union v. Continental Oil Co., 160 F.Supp. 723, 731 (W.D.La. 1958); Lippman v. Sears, Roebuck & Co., 44 Cal.2d 136, 280 P.2d 775 (1955); Bromer v. Florida Power & Light Co., 45 So.2d 658 (Fla.1950); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117, 130, 207 A.2d 522, 531 (1965).

This is not to say that in an appropriate case we might not read into a contract a provision which, although not expressed within the four corners of the document, was nonetheless obviously contemplated by the parties when they made their bargain and is necessary to carry their intentions into effect. In that situation, and subject to the parol evidence strictures described in Golden Gate Corp. v. Barrington College, 98 R.I. 35, 199 A.2d 586 (1964), it is sometimes permissible to remedy an inadvertent and clearly apparent omission by reading into an otherwise integrated written contract what must have been intended if the writing is to reflect the entire agreement of the parties. Myron v. Union R.R., 19 R.I. 125, 32 A. 165 (1895). But that is impermissible in this case.

The conclusion we reach makes it unnecessary for us to consider plaintiffs' further contentions that the February 1970 amendment to the Westerly zoning ordinance impaired the obligations of their contract in violation of art. 1, sec. 10 of the Federal Constitution, or that the town should be estopped from contesting the validity of what under our decision is a nonexistent provision of the May 1968 agreement.

The plaintiffs' appeal is denied and dismissed and the judgment appealed from is affirmed.

Roberts, Ch. J., did not participate.

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ANNOTATION

VALIDITY, CONSTRUCTION, AND EFFECT OF AGREEMENT TO REZONE, OR AMENDMENT TO ZONING ORDINANCE, CREATING SPECIAL RESTRICTIONS OR CONDITIONS NOT APPLICABLE TO OTHER PROPERTY SIMILARLY ZONED

by

James D. Lawlor, J.D.

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§ 2. Background, summary, and comment:
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 [a] Held valid
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 [a] Held valid
 [b] Held invalid
§ 5. Conditional rezoning authorized by ordinance
§ 6. Reversion provisions

TOTAL CLIENT-SERVICE LIBRARY® REFERENCES:

AM JUR 2d, Zoning (1st ed §§ 169–175)

25 AM JUR PL AND PR FORMS (Rev ed), Zoning and Planning, Forms 41, 42

20 AM JUR LEGAL FORMS 2d, Zoning and Planning § 268:37

16 AM JUR TRIALS 99, Relief From Zoning Ordinance

ALR DIGESTS, Zoning §§ 7, 12

ALR QUICK INDEX, Zoning

Consult POCKET PART in this volume for later cases

adopted ordinance as permissible upon stated criteria after approval by the local governing body. Such amendments may be adopted only if development at the proposed location is essential or especially appropriate in view of the available alternatives within or without the jurisdiction, or the development is development of regional benefit, or could have been granted a special permit, or there was a mistake in the original ordinance in regard to the property.[47] The result of these provisions, taken together, would seem to be to make small-area rezoning, or rezoning at the request of the developer generally, more difficult to obtain.

II. Agreements

A. Validity

§ 3. Contracting away governmental powers

[a] Held valid

In the following case, an agreement between property owners and a city in which the property owners agreed to dedicate portions of their lands for a street system in return for the city's rezoning their property for commercial use was held valid, the court stating that an agreement concomitant to a rezoning should be held invalid only if it could be shown that there was no valid reason for a change.

In Redmond v Kezner (1973) 10 **Wash** App 332, 517 P2d 625, the court held valid an agreement between several property owners and the city in which the property owners agreed that in order to facilitate commercial development of their land, which was at the time zoned agricultural, a street system would be required for the internal circulation of traffic, and that to facilitate the establishment of such a street system they would deed and dedicate such portion or portions of their property as necessary for the establishment of such streets, to the city for street and highway purposes when requested to do so, provided that the area was rezoned to medium commercial uses, the court affirming a decree ordering a defendant landowner to specifically perform his agreement to convey certain of his property for street purposes to the city. The court said that the findings of fact of the lower court showed that the property owners, including the defendant, were desirous of rezoning their unimproved property from agricultural to medium commercial, a rezoning consistent with the comprehensive plan previously adopted by the city, and that the city, after the signing but prior to the filing of the rezoning petition by the landowners, insisted that as a condition of rezoning, the owners agree to the city's proposed street system plan and further agree, upon the city's request, to deed and dedicate certain of their lands to the city to help put the plan into effect. The agreement in form did not expressly require the city to rezone, however, nor provide as to how and when the street improvements would be installed and at whose expense. The agreement, including the owner's obligations as set forth therein, was, however, expressly conditioned upon the area being rezoned. The court declared that the agreement concomitant with the rezoning in the case before it was one to neutralize any possible negative impact of the proposed use of the property, rather than one seeking to extract some collateral benefit from the property owner. As such, the court declared that an amendment to a zoning ordinance and a concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for a change and that they were clearly arbitrary and unreasonable, or if the city was using the concomitant agreement for bargaining and sale to the highest bidder.[48]

47. Model Land Development Code, Proposed Official Draft No. 1, § 2-312.

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[b] Held invalid

In the following cases, agreements to rezone property were held invalid as attempts to illegally contract away the zoning authority's governmental powers.

An agreement to rezone conditioned upon the landowner's acquiescence in certain restrictive covenants was held invalid and thus unenforceable in Houston Petroleum Co. v Automotive Products Credit Ass'n (1952) 9 **NJ** 122, 87 A2d 319, the court reversing an intermediate appellate decision and reinstating the trial court's judgment dismissing a complaint seeking to enforce the restrictive covenant by injunction. The common grantor of both plaintiff and defendant had entered into an agreement with the city in 1947, whereby in return for the city's reclassifying the premises from a zoning classification unstated in the agreement to a light industrial district, the grantor would make the land subject to covenants and restrictions, including a 75-foot setback from the highway, and a provision that the setback area be seeded and suitably planted, excepting such part of the area, not to exceed 50 percent, as should be constructed for driveways and parking space. The agreement also provided that the covenants and restrictions were to continue in effect so long as the premises remained so zoned or until 1977, provided that the covenants might be released or modified at any time by an agreement between the city and the owner or owners of all or portions of the premises. Subsequently, an owner of the tract agreed with the city to modify the agreement as to 300 feet of the frontage on the state highway so as to relieve that portion of the trac[t of th]e setback and seeding and plant[ing re]strictions. Still later, the release[d por]tion of the tract plus another portion subject to the restrictions was conveyed to the petroleum company, while an unreleased portion of the tract was conveyed to the credit association. Nevertheless, a building permit was issued to the association for the construction of a gasoline service station in conformity with plans showing that the credit association intended to seed and plant less than 10 percent of the land area in the setback area, and to pave the balance of the setback area, in violation of the covenants and restrictions of record. Among other objections to the complaint seeking injunction, the credit association asserted that the covenants were unenforceable [becau]se they were an illegal contract [with th]e city. The court noted at the o[utset] of its discussion that it was clear from the evidence introduced at the trial that the rezoning was effected on consideration of the making of the agreement for restrictive covenants. The court pointed out that it had previously held that the zoning power may not be exerted to serve private interests merely, nor may the principle be subverted to that end, so tha[t] a purported contract so made wa[s]

48. Here, the court is applying the reasoning of State ex rel. Myhre v Spokane (1967) 70 **Wash** 2d 207, 422 P2d 790, infra § 12[a].

ultra vires and all proceedings to effectuate it were utterly void. A municipality cannot act as an individual does, the court said. It must proceed in conformity with the statutes, or in the absence of statute, agreeably to the common law, by ordinance or resolution or motion, the court explained. Contracts thus have no place in a zoning plan, the court said, and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations. The court pointed out that the covenants in question not only were imposed on the land for the purpose of obtaining its rezoning, but were themselves limited in duration to the period of time during which the premises remained zoned for light industry, so that they seemed related not to the benefit of individual portions of the tract, but to zoning for the entire tract. In addition, the court noted that the recorded agreement provided for release or modification of the covenants at any time by an agreement to which the city was made a necessary party, a provision again referable to zoning. Thus, it could be concluded, the court said, that the covenants in themselves exhibited a plan in contravention of the public policy incorporated in the constitutional and statutory provisions relating to zoning. Such a contract, the court concluded, being violative of the public policy of the state, was illegal and void, and thus unenforceable.

An agreement providing for rezoning and subdivision of property in return for the developer's agreement to certain conditions was held invalid in Midtown Properties, Inc. v Madison (1961) 68 NJ Super 197, 172 A2d 40, affd 78 NJ Super 471, 189 A2d 226, the court denying a motion to specifically enforce a previously entered consent judgment embodying the terms of the contract. The land in question comprised about 1,475 acres of land in the township, which comprised about 40.2 square miles. Previously, the landowner had applied to the planning board for subdivision of its entire tract, which application was approved by the planning board and the township committee upon compliance with certain conditions pertaining to sewage, roads, and in addition, that the developer furnish land and certain school facilities to the town. Subsequently, the township changed its ordinance governing lot sizes to increase the size of lots in the area in which the developer's lands were located, and final approval of some 129 lots was denied on the ground that the developer had failed to meet the conditions concerning the furnishing of school facilities and sewage requirements. The developer filed suit to compel final approval of the lots in question, but this action was not tried, the developer and the town instead entering into a written contract setting forth the terms under which the developer could proceed with his development. This contract became the basis on which a consent judgment was entered, and in reliance upon which the developer spent approximately $200,000 to redesign its development, mostly in engineering fees. At that point, when the development plat was filed for final approval, the planning board and the township committee refused to grant final approval on the ground that the consent judgment was illegal and void. The contract between the town and the developer bound the developer either to pay certain moneys or to erect a certain number of schoolrooms for the board of education, not to erect more than 1,350 homes in one year, and to donate to the township two

locations for the erection of firehouses, police stations, and first aid squads. In return, the town agreed that the terms of the contract were to constitute the approved subdivision plan, and that the township would adopt in the future the necessary ordinances to implement and conform to the contract and legalize the authorized uses, that the township would designate certain areas within the tract as residential, certain areas for garden apartments, certain areas for light and heavy industry, and certain areas for commercial uses, that the procedure for obtaining final approval for the plat was that set forth in the contract, the developer being required only to comply with existing township ordinances and planning board regulations, that the town would not pass any regulations or ordinances in any way changing the terms of the contract, nor would it change the building code requirements, that to the extent that the contract was in conflict with any statute, rule, ordinance, or regulation, the contract would govern, that the town would be bound by the contract for a period of 7 years, and would not amend or change any of its ordinances or regulations in that period of time, and that the contract would take the place of the statutory tentative approval. The court declared that the agreement was illegal and void on its face, as an intent to do by contract what could only be done by following statutory procedure. The court castigated the agreement as the prostitution of the zoning power delegated to the township officials for the special benefit of the developer. The evil which the court discerned in the contract it summarized as follows: the township, having adopted a master plan, could only amend it in accordance with law, and not by a contract which destroyed the master plan and resulted in haphazard or piecemeal zoning; the township surrendered its inherent power, right, and duty to keep its zoning and planning ordinances mutable by making necessary amendments or changes for the benefit of the public; the township cast aside the statutory and ardinance requirements applicable to all persons, in order to make a special deal with the plaintiff; the parties to the contract attempted to create special zoning benefits for the developer contrary to law and the public good; and the contract recited that the township had passed appropriate resolutions authorizing the making of a contract when in fact no such resolution had been adopted. The court observed that the zoning power is an exercise of police power which the state has granted to all municipalities, but which must be exercised in a reasonable manner and not arbitrarily, discriminatorily, or capriciously. Furthermore, the court said that the zoning power must be exercised so as to secure the public health, safety, morals, and welfare. In exercising the power delegated to a municipality, it must act within such delegated power and cannot go beyond it, the court noted. So, the court said, where the statute sets forth the procedure to be followed, no governing body or subdivision thereof has the power to adopt any other method of procedure. The contract in question was an attempt to subdivide the developer's property, to rezone it, and to bargain away the township's delegated legislative function contrary to law, the court declared. Such a contract, in attempting to give the developer special benefits and privileges, was ultra vires, void, and contrary to public policy, the court said. If the contract and the consent judgment were to be

held valid, the court would be putting its stamp of approval upon what was obviously an unauthorized and illegal exercise of the township's zoning power, permitting special rules to be established for the developer as against all other developers, and allowing the parties to circumvent the state law as well as the township's own ordinances and regulations. In conclusion, the court declared that it was well established that while a public body may make contracts, it can only do so within its expressed or implied powers, and that those who deal with a municipality are charged with notice of the limitations imposed by law upon the exercise of that power.

An agreement by a city to rezone property in consideration of a portion of the land so rezoned being restricted to park purposes, with the city having an option to demand conveyance of the strip at any time for a 50-year period after the rezoning, was held invalid. In Knoxville v Ambrister (1953) 196 **Tenn** 1, 263 SW2d 528, the court affirmed an order sustaining a demurrer to the city's bill for a decree requiring the landowner to convey the land in question to it. An exchange of letters between an attorney for the previous landowner and the city indicated that as an inducement in having the city council rezone the land in question to a zone permitting multiple-unit apartment buildings, the landowner would maintain a portion of the land for a period of 50 years as a grassed plot or lawn area for recreational purposes, and the landowner further agreed that upon demand of the city within that 50-year period, the land could be conveyed to the city for park or recreational purposes for the use of the public. The city immediately thereafter amended the zoning ordinance in accordance with the landowner's proposal, and 5 years later demanded conveyance of the property to it for park purposes, as provided in the agreement preceding the rezoning. The current owner of the land resisted, on the ground that the agreement procuring the rezoning was an illegal one, and hence unenforceable, and the court agreed. The court summarized the exchange of letters between the landowner and the city as an offer to dedicate at a future date certain property in the city to public park purposes, or to convey it to the city for such purposes on condition that the city amend its zoning ordinance, a police measure, so as to meet the wishes of the offeror. Upon receipt of this offer the city council did amend its zoning ordinance so as to meet those wishes, the court continued, saying that there seemed to be no escape from the conclusion that the exchange of letters constituted a contract made for the purpose of unduly controlling or affecting official conduct, and as such was plainly opposed to public policy. Such agreements, the court said, strike at the very foundations of government and tend to destroy that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society. Such an agreement, the court said, being illegal as against public policy, would not be enforced at the instance of the city, which was a party to it.

Where the builder of an apartment developer entered into an agreement with a city's board of zoning appeals, that if the board would rezone the property to permit the construction of apartments, the developer would covenant to leave a buffer zone of vacant property 200 feet wide between the apartment development and the nearest property owner, such

covenant to run with the land and bind subsequent owners not bo build apartments on the buffer strip, and the developer's successors in title, apparently ignorant of the covenant, despite having conducted a professional title search, made application to the board to reduce the buffer strip to 100 feet to permit the construction of additional apartments, and, a new board having subsequently taken office, the board was also ignorant of the existence of the covenant, and permitted an amendment reducing the buffer zone from 200 feet to 100 feet, it was held that both the covenant and the ordinance passed in consideration of it were void and unenforceable, in Haymon v Chattanooga (1973, **Tenn** App) 513 SW2d 185, the court affirming an order dismissing an action seeking to enjoin the city from enforcing a stop work order against construction of more apartments on the land in question. The court recited the facts, including the fact that the successor in title to the original developer apparently had at least constructive notice of the covenant, since it was duly recorded, and that he was advised by the building inspector that there might be such a covenant in existence, but nevertheless proceeded to have plans drawn and lay foundations for new apartments in the former buffer zone, at a cost of approximately $35,000 at the point that the city became aware of the existing covenant and revoked the building permit issued pursuant to the amended zoning ordinance. The court said that it agreed with the opinion of the trial court that the city had placed itself in the untenable position of, on the one hand, finding that the property should be rezoned to allow further construction, and on the other, attempting to enforce a covenant which was in derogation of the city's zoning ordinance. The city could not maintain conflicting positions, the court said, that is, on the one hand, covenanting with private parties to maintain certain zoning on the property, and on the other hand, subsequently and within the time covenanted, enacting an ordinance contrary to the covenant. Contracts made for the purpose of unduly controlling or affecting official conduct in the exercise of legislative, administrative, and judicial functions were plainly opposed to public policy, the court declared. The court noted that the consensus among other jurisdictions which had considered the question was that contracts entered into in consideration of concessions made or to be made favoring the applicant were frowned upon as being against public policy, which dictated that zoning was an instrument of public authority to be used only for the common welfare of all the people.

In State ex rel. Zupancic v Schimenz (1970) 46 **Wis** 2d 22, 174 NW2d 533, an agreement between the city itself and a landowner to rezone would be invalid, it was held, the court, however, reversing a judgment granting a writ to require issuance of a building permit for land covered by a declaration of restrictions executed prior to rezoning, on other grounds.[49] In essence, the court declared that while the agreement before it, being an agreement between a developer and neighboring landowners, made enforceable by the city by injunction, was enforceable because the agreement itself did not directly involve the city, a contract made by a zoning authority to zone or rezone or not to zone would be

49. § 4 [a], infra.

illegal, and the ordinance void, because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers. Contract zoning is illegal, the court declared, not because of the result, but because of the method.

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See Griffin v County of Marin (1958) 157 **Cal** App 2d 507, 321 P2d 148, where, in an action by the landowners against the county to have an amendment to the zoning ordinance rezoning their property from light industrial to single-family residence zone declared invalid, it was held that the trial court properly refused to admit evidence to the effect that when the landowners purchased the property and the board of supervisors rezoned it, the landowners had represented that they intended to use the property for a woodworking furniture shop and that they would reside on the premises and would use it for no other purpose, the court affirming the trial court's decision declaring the ordinance to be invalid as arbitrary and discriminatory. The court declared that the police power to zone property may not be limited by private agreement, nor could the board of supervisors properly show that the ordinance rezoning the property to light industrial was conditioned upon a secret agreement with the property owner, since such an agreement would be illegal and against public policy. Recognition of the county's defense of unclean hands, based on the landowner's apparent effort to change the use under such circumstances, would result in the enforcement of an illegal agreement, and for those reasons, the court concluded, the evidence was properly excluded.

§ 4. Agreements with governmental bodies, persons, or organizations not possessing final zoning authority

[a] Held valid

In the following cases, agreements between landowners and government bodies or organizations not having final zoning authority, restricting the use of land proposed for rezoning, were held valid as not involving an impermissible contract by the governmental body having the final authority in zoning matters.

A set of agreements between a city and a developer, whereby the city agreed to recommend rezoning to the county zoning authorities, in return for the developer's agreement to limit the development density of the rezoned land, as well as an agreement to donate a 3.33-acre lot to the city for use as a park and recreational area, were held valid in Greenbelt v Bresler (1967) 248 **Md** 210, 236 A2d 1, the court, however, affirming a lower court order that the city was estopped from seeking injunctive relief under the contract because it had failed to institute proceedings within the 30-day period after receiving notice of breach provided for in the contract. The owner of a 50-acre tract of land, as an inducement to obtaining a favorable recommendation from the city to the county zoning authority on his application to have the land rezoned from rural residential planned community zone to medium density garden apartment zone, agreed to limit the number of dwelling units to seven per acre for the entire tract, thus limiting the permissible number of dwelling units in the tract from 817 to 353, and also agreed, by another instrument, to donate a lot containing 3.33 acres to the city for exclusive use as a park and recreational area, and to deliver a deed conveying the property within 2 years. This

agreement was expressly conditioned upon the granting of the requested rezoning. In due course, the rezoning was obtained, and the agreement to convey was recorded, although the 3-acre tract of land was not conveyed to the city. Three years later, the owner applied for and received a building permit from the county for construction of an eight-story apartment house containing 178 units on a 9-acre parcel. Although the building conformed to the zoning reclassification, it violated the density covenant of the declaration of covenants filed by the owner, and notice of such was sent by the owner by registered letter to the city manager. Some 3 months after the notice was filed, the city sued to enjoin construction of the apartment house. In addition to pleading the city's failure to meet the notice requirements of the contract, the owner also contended that if the declaration of covenants was to be construed as additional consideration for the agreement entered into with the city, it would be invalid as contrary to public policy. The court pointed out that the applicable state statute provided that in Montgomery County and Prince George's County, before the district council of either county may reclassify the zoning within any municipality, the proposed change must be referred to the governing body of the municipality for its recommendation, but the statute also provided that in Prince George's County, such a recommendation was of an advisory nature only and not binding on the district council. The rule that zoning by contract, or upon condition, or by agreement, acquires no validity when involving a municipality, applies to contracts with the deciding authority, that is, the agency having final control over the granting or denial of the requested zoning reclassification, the court continued. The court said that there was a significant distinction between those cases where the contract is made between the developer and the zoning authority, and those cases involving a contract entered into in good faith between the developer and a municipality which does not have control over the classification and whose authority is limited to recommendation. The court also said that in one other Maryland case[50] the contract, though made on behalf of the city by the planning commission, was approved as to form and legal sufficiency by the acting city solicitor and purported to be made with the mayor and city council, the deciding authority. In the case before it, the court continued, the district council of the county, the deciding agency, was in no manner a party to the contract. In the instant case, the court concluded, the contract being a valid one, the city should be bound by its provisions. The court pointed out that for the same reasons the agreement by the landowner to donate land to the city for park purposes in return for the city's promise to recommend rezoning was valid and enforceable.

An agreement between a municipality and a developer whereby the developer would subject part of its land to a scenic and conservation easement in return for the town's agreement to recommend rezoning was held valid in Funger v Somerset (1968) 249 **Md** 311, 239 A2d 748, the court reversing an order dismissing the developer's counterclaim for rescission of the contract on the basis that the town by its actions had made it impossible for the developer to build. In addition to

50. Pressman v Baltimore (1960) 222 **Md** 330, 160 A2d 379, infra § 4[b].

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the scenic and conservation easement, the developer agreed, in consideration of the town recommending high-rise residential zoning for 18 acres of the developer's 30-acre tract, to limit the development of the tract for a period of 20 years till the density permitted on a tract of 16 acres, to donate to the town 2 acres of parkland immediately, and 8 additional acres in annual increments of 2 acres each, and to grant an option to the town to purchase an additional 2-acre tract. Inter alia, the court declared that this agreement between the developer and the township was valid and not contract zoning, the court referring to the reasoning in Greenbelt v Bresler (1967) 248 **Md** 210, 236 A2d 1, supra, as support for its declaration.

In State ex rel. Zupancic v Schimenz (1970) 46 **Wis** 2d 22, 174 NW2d 533, an agreement between a developer and neighboring homeowners restricting the use of business-zoned land to a particular use, and providing for enforcement of the restrictions by the city, was held valid, the court reversing a judgment granting a writ requiring issuance of a building permit for a use on the land not permitted by the declaration of restrictions. In 1955, the city's common council approved a plat for a shopping center and provided that any future division of the lots would be subject to its approval. Part of the area was zoned "neighborhood shopping" and part "local business." In 1961, the shopping center developers desired to change a parcel of land from neighborhood shopping to the local business zone in order to sell it for use as a bowling alley, but it was found that the neighboring homeowners were opposed to the change in zoning but not to the bowling alley. The developer and the neighbors then negotiated an agreement that the developer would limit the use of the rezoned land to a bowling alley, and a declaration of restrictions was drafted providing that although the parcel was zoned local business, the only use permitted would be a bowling alley, and any other use of the land was to be limited to uses permitted under existing neighborhood shopping zoning. The declaration also provided for a buffer planting strip, certain structural requirements, the placement of air-conditioning equipment, and a fence to prevent pedestrian access to the shopping center from the housing development to the south, and then stated that the restrictions were for the benefit of the city, were to run with the land, were binding for a 20-year period, and were to be enforced by the city by injunction. Subsequently to the execution of the declaration of restrictions, the property was rezoned. Later still, the common council divided a platted lot to create the desired parcel for the bowling alley, creating from the rezoned 210-by-200-foot area the parcel sold for the bowling alley and a surplus parcel of land approximately 190 by 42 feet, which was also rezoned local business, and restricted by the declaration. In 1968, this smaller parcel was sold to a person who desired to build a carwash on the parcel. While the offer to purchase was subject to deed restrictions of record, and was conditional upon the buyer's obtaining a permit to build a carwash, the buyer apparently did not realize that the deed restriction would not permit a carwash, and the seller did not remember it. A building permit was duly issued, and the buyer paid a $20,000 down payment on a $66,000 contract to buy carwash equipment, whereupon the building permit was

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revoked, and the common council then rezoned the 42-foot-wide parcel back from local business to neighborhood shopping. A writ of mandamus was then filed to require the issuance of a building permit, and the city sought by counterclaim to enforce the declaration of restrictions by injunction. In answer to the charge by the carwash owner that the declaration of restrictions was an illegal zoning contract, the court acknowledged that a contract made by a zoning authority to zone or rezone or not to zone would be illegal and the ordinance enacted pursuant thereto void, because a municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers. However, in the instant case, there was no agreement with the city, the court declared. Neither the common council nor the city planning commission agreed to rezone, the court observed, and said that the facts gave rise to an agreement only between the developer and the homeowners respecting the use of the property if it was rezoned by the city. The rezoning per se did not require the conditions demanded by the homeowners, the court noted. True, the court continued, the developers and the homeowners expected favorable action by the city planning commission, but this expectation was based on two factors: first, no objection to the rezoning under the circumstances by the homeowners, and second, the proposed rezoning being good land use and consistent with the developing character of the neighborhood. When a zoning authority does not make an agreement to zone but is motivated to zone by agreements as to use of the land made by others, or by voluntary restrictions running with the land although suggested by the authority, the zoning ordinance in other jurisdictions has been held valid and not considered to be contract or conditional zoning, the court observed. The virtue of allowing private agreements to underlie zoning, the court said, is the flexibility and control of the development given to a municipality to meet the ever-increasing demands for rezoning in a rapidly changing area. When an agreement is made by persons other than the city to conform the property in a way or manner which makes it acceptable for requested zoning and the city is not committed to rezoning, such an agreement is not contract zoning in the true sense and does not vitiate the zoning if it is otherwise valid, the court declared. The court said that it was a too rigid view to consider that situations like the case before it give rise to a quid pro quo for rezoning, even though no express contract with the zoning authorities can be proved. On the other hand, the court said that it found too extreme a view in the other direction the contention that a zoning ordinance and its concomitant agreement should be declared invalid only if it can be shown that there was no valid reason for a change and that the change was clearly arbitrary and unreasonable and had no substantial relation to the public health, safety, morals, and general welfare, or if the city was using the agreement for bargaining and sale to the highest bidder, or solely for the benefit of private speculators. The court declared that landowners may make a contract which may legitimately be recognized by the zoning authorities as a motivation for rezoning, but such zoning must meet the test of all valid zoning, that it, must be for the safety, welfare, and health of the community, and should not constitute spot zoning.

[b] Held invalid

In the following case, conditions imposed by the city's planning commission in order to recommend rezoning of the land from residential to commercial use were held invalid, the court taking the position that imposition of such conditions was beyond the commission's power.

In Pressman v Baltimore (1960) 222 **Md** 330, 160 A2d 379, conditions imposed by the city planning commission in recommending the rezoning of certain land from residential to commercial use were held invalid, the court, however, affirming the dismissal of an action seeking to declare the ordinance rezoning the property invalid. The land in question had been strip-zoned to a depth of 150 feet for commercial use, with the remainder zoned as residential, and the landowner sought to have the residential part of his lots rezoned commercial, to permit the building of a regional shopping center and its attendant parking areas. The proposed rezoning ordinance was referred to the planning commission, which conditioned its approval upon an agreement being entered into between the developer of the property and the city providing that if it were subsequently determined that the project could not be carried out as substantially proposed and the city took action to repeal the rezoning ordinance so that the property would revert to its existing use, the developer would not interpose any objection to the passage of the repeal ordinance, and that the developer also agreed to lay out and develop the property as a shopping center in accordance with plans approved by the planning commission. The court said that no matter how moderate, reasonable, or even desirable these conditions might be, it found no authority for their imposition by the planning commission. The state's enabling act authorized a zoning board to approve buildings, and uses limited as to location under such rules and regulations as might be provided by local ordinance, but no such authorization extended to the planning commission, nor does the city zoning ordinance undertake to confer power to impose such conditions, in a case like the one before the court, upon the planning commission even if it could do so, the court declared. Thus, the court concluded, the planning commission sought to impose conditions that it was not authorized to exact and were therefore invalid.[51]

§ 5. Conditional rezoning authorized by ordinance

An agreement requiring the landowner requesting rezoning to conform to certain conditions was held valid in the following case, where the county's zoning ordinance provided that the board of supervisors could impose conditions on the zoning reclassification of property where it found that conditions must be imposed so as not to create problems inimical to the public health, safety, and general welfare.

An agreement concomitant with a requested rezoning requiring the landowner requesting rezoning to conform to certain conditions was held valid in Scrutton v County of Sacramento (1969) 275 **Cal** App 2d 412, 79 Cal Rptr 872, the court, however, reversing on other grounds a summary judgment for the county denying the landowner's petition for a declaratory judgment declaring the agreement invalid. The county's zoning ordinance provided that the board of supervisors could impose conditions on the zoning reclassification of property where it found that the conditions must be imposed so as not to create problems inimical to the public health, safety, and general welfare of the county. When the landowner petitioned for the rezoning from agricultural to multiple-family residential uses of her property fronting on a boulevard and bounded on one side by a partially improved street, the board decided to exact, as conditions precedent to the rezoning, an agreement from the landowner requiring her to dedicate a 10-foot right of way for widening and improving the boulevard on which her property fronted, and to dedicate a 27-foot strip on the side of her property to form the west half of the partially improved street bounding the property on that side, as well as to pay for the improvements to that street. The contract also provided that any failure on the part of the landowner to comply with the conditions imposed would cause the property's reversion to agricultural zoning. The landowner objected to the provision that she be required to pave the street bordering the side of her property at her own expense, and attacked the county's action as invalid contract zoning by which the county, in exchange for the landowner's covenants, would bargain away a portion of its future power over zoning. While agreeing that the police power to zone and rezone may not be restricted by contract, the court said that the phrase "contract zoning" in itself had no legal significance, and simply referred to a reclassification of land use in which the landowner agreed to perform conditions not imposed on other land in the same classification. The court noted that all contracts are made with reference to possible exercises of the police power and with the possibility of its exercise as an implied term thereof. Here, the court noted, the county itself did not become party to an express contract, though the court granted that when the zoning agency exacts a concomitant contract from the landowner, it holds out an implied or moral assurance that it will not quickly reverse or alter its decision. In a sense, the court continued, this assurance tends to freeze the property's status, but the suspension of continuing police power is theoretical rather than real. The court noted that approval of the landowner's application in the first instance represented spot zoning of an individual parcel, which, however, was valid where long-term changes in the neighborhood created conditions compatible with the proposed new use. Thus, the very basis for the action, neighborhood change, provided the reclassification with a practical assurance of stability, the court declared. The investments made on the strength of rezoning had precisely the same protection against later arbitrary action as any other property investment, the court said, noting that a zoning ordinance may not immediately suppress or force removal of an otherwise lawful business or use, all such uses being shielded from arbitrariness and all being vulnerable to reasonable exercises of the police power. Since the contract zoning pro-

51. The court went on to point out, however, that the city council, the legislative body, was not bound by the recommendations of the planning commission, and did not undertake or attempt to incorporate the invalid conditions in its rezoning ordinance, not even referring to them. Thus, the court concluded that while the conditions imposed by the planning commission were invalid, the invalid conditions did not affect the validity of the rezoning ordinance itself. See Pressman v Baltimore (1960) 222 **Md** 330, 160 A2d 379, infra § 20.

cedure pursued entailed neither a formal nor a practical surrender of the police power, the court concluded that it was valid.

§ 6. Reversion provisions

In the following case, the inclusion of a provision in an agreement by a landowner to certain conditions to be imposed concomitant with requested rezoning, that upon breach of any of the conditions imposed, the zoning would revert from the requested zoning to the former zone, rendered the agreement invalid.

In Scrutton v County of Sacramento (1969) 275 **Cal** App 2d 412, 79 Cal Rptr 872, the provision in a proposed agreement by a landowner to certain conditions to be imposed concomitant with a requested rezoning, that the breach of any of the conditions would result in the reversion of the zoning from the requested multiple-family residence zone to the former agricultural zoning, was held improper, the court reversing a summary judgment denying the landowner's petition for a declaratory judgment declaring the agreement invalid. The county's zoning ordinance provided that the board of supervisors might impose conditions on a zoning reclassification where it found that such conditions must be imposed so as not to create problems inimical to the public health, safety, and general welfare, and the board, pursuant to its usual procedures, offered the landowner seeking rezoning of her property from agricultural to multiple-family use a proposed contract requiring her to dedicate portions of her property for public ways and pay for the improvement thereof, as conditions upon which the rezoning would depend, and also providing that breach of the conditions would cause the property to revert to agricultural zoning. The court pointed out that such an automatic reversion would amount to a second rezoning in violation of the procedural directions of state law demanding that rezoning be accomplished through notice, hearings, and planning commission inquiry. Even if procedural directions were followed, the court continued, the reversion would violate substantive limitations upon the supervisors' legislative power. The board has power to rezone an individual parcel when changed community conditions have rendered the former classification unsuitable and the new one is consistent with the public interest, the court observed. Although courts do not ordinarily inquire into legislative motivation, the court said, in this case the proceedings on their face would characterize the reversion ordinance as a forfeiture rather than a legislative decision on land use. An ordinance so conceived, the court concluded, is not a valid exercise of the zoning power.

B. Construction and effect

§ 7. Relationship between conditions imposed and use of land

In the following case, it was held that conditions exacted from a landowner in return for rezoning of her property required that the conditions exacted be related in some way to the use proposed by the landowner, the exaction of conditions unrelated to the proposed use being said to be an improper exercise of the zoning power.

The exaction of a condition from a landowner seeking rezoning of her property which did not show a relationship between the condition exacted and the use proposed by the landowner was improper, it was held in Scrutton v County of Sacramento

(1969) 275 **Cal** App 2d 412, 79 Cal Rptr 872, the court reversing a summary judgment denying the landowner a declaratory judgment declaring the conditions imposed on her requested rezoning invalid. The landowner sought to have the property in question, which fronted on an arterial boulevard and was bounded on one side by a partially improved street, rezoned from agricultural to multiple-family residential use, to permit the erection of apartment buildings. As a condition to the requested rezoning, the county board of supervisors offered the landowner a contract whereby she would oblige herself to dedicate rights of way along the two streets, as well as bearing the cost of improving one of the streets, to which latter proposal she objected. The contract also contained a provision that failure to abide by the covenants contained therein would cause the property's reversion to agricultural zoning. The court noted that while the police power permitted the imposition of reasonable conditions upon a proposal for rezoning, just as in connection with the approval of subdivisions, building permits, and variances, not all conditions are valid. Generally speaking, the court said, conditions imposed on the grant of land-use applications are valid if reasonably conceived to fulfil public needs emanating from the landowner's proposed use. Two kinds of need have been found to exist, the court pointed out: the community's need for protection against potentially deleterious effects from the landowner's proposal, and the community's need for facilities to meet public service demands created by the proposal. Decisions invalidating the exaction of conditions rely upon theories of constitutional invasion, the court observed, but their springboard is the lack of relationship between the exaction and the proposed use. This relationship, the court continued, presents a factual inquiry for the trial court, which can seldom, if ever, be resolved without taking evidence. In the case before it, the court said that the landowner's claim of arbitrary imposition required that kind of inquiry by the trial court, and in addition the county's affidavits supporting its motion for summary judgment fell short of showing that the proposed apartment project would generate traffic or other conditions reasonably necessitating improving the street adjoining her property at her expense. Rather, the court said, the affidavit sought to demonstrate that the landowner's dedication of land to the proposed street and her expenditure for paving it would benefit her proposed development. While acknowledging that some courts have justified such exactions not only for the fulfilment of public needs caused by the proposed development, but also for the benefit to the landowner financially, the court declared that standing alone, the landowner's economic benefit supplied inadequate underpinning for the exaction. The police power formed the exaction's constitutional foundation, the court continued, and that power is aimed at public need rather than private profit. The landowner should be free to reject the paternalism which forces him into an exaction conceived for his personal benefit, the court declared. Rather, the court concluded, the fulfilment of public needs emanating from the proposed land use is the sine qua non of the exaction's reasonableness.

§ 8. Specific performance

In the following case, a city was held entitled to specific performance of a contract whereby a landowner

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The wording in zoning ordinances must be clear and unambiguous so that persons of ordinary intellect need not guess at its meaning.[1] When an ordinance is challenged as unconstitutionally vague, a court's inquiry turns not on whether the ordinance could have provided more specific guidance to applicants by defining every term in the ordinance, but on whether the ordinance contains sufficient qualitative standards to guide an applicant and limit a zoning board's discretion.[2] A failure to define a term in a zoning ordinance does not render the ordinance unconstitutionally vague.[3]

When exercising discretion, a local zoning board must be guided by standards which are specific in order to prevent an ordinance from being invalid and arbitrary.[4] So, subdivision regulations upon which a local zoning commission, acting administratively, should rule must contain known and fixed standards applying to all cases of a like nature.[5]

In determining whether a zoning ordinance is void for vagueness, on the grounds that it has been arbitrarily enforced, a court will not engage in speculation to find instances in which the statute might be arbitrarily applied, but will rather consider only a history of actual alleged arbitrary enforcement, and will find unconstitutionality only if the language of the statute is so conflicting and confused that arbitrary enforcement is inevitable.[6]

A site-review standard that is too vague is void.[7]

§ 41 Contract zoning

Research References

West's Key Number Digest, Zoning and Planning ⊜41, 43

Validity, construction, and effect of agreement to rezone, or amendment to zoning ordinance, creating special restrictions or conditions not applicable to other property similarly zoned, 70 A.L.R. 3d 125

A local government is generally prohibited from contracting away the exercise of the zoning power or obligating itself by an advance contract to provide a particular zoning.[1] A contract made by the zoning authorities to

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[Section 40]

[1]State, Tp. of Pennsauken v. Schad, 160 N.J. 156, 733 A.2d 1159 (1999).

The use of the terms "structurally unsound" and "dilapidated" in a zoning ordinance requiring the removal of nonconforming billboards that become structurally unsound or dilapidated was not impermissibly vague or ambiguous. Ex parte City of Orange Beach Bd. of Adjustment, 2001 WL 1591304 (Ala. 2001).

[2]Britton v. Town of York, 673 A.2d 1322 (Me. 1996).

Developers are entitled to know with reasonable clarity what they must do under state or local land use control laws to obtain the permits or approvals they seek. Kosalka v. Town of Georgetown, 2000 ME 106, 752 A.2d 183 (Me. 2000).

[3]Britton v. Town of York, 673 A.2d 1322 (Me. 1996).

[4]Peterson Outdoor Advertising v. City of Myrtle Beach, 327 S.C. 230, 489 S.E.2d 630 (1997).

[5]Harris v. Zoning Com'n of Town of New Milford, 259 Conn. 402, 788 A.2d 1239 (2002).

[6]Lazy Mountain Land Club v. Matanuska-Susitna Borough Bd. of Adjustment & Appeals, 904 P.2d 373 (Alaska 1995).

[7]Bragdon v. Town of Vassalboro, 2001 ME 137, 780 A.2d 299 (Me. 2001).

[Section 41]

[1]Montgomery County v. Revere Nat. Corp., Inc., 341 Md. 366, 671 A.2d 1 (1996).

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zone or rezone for the benefit of a private landowner is generally illegal[2] and is denounced as "contract zoning"[3] and as an ultra vires bargaining away of police power.[4]

◆ **Practice Guide:** In order to sustain a claim of zoning by contract there must be a clear indication of an agreement binding upon the parties and a bargaining away of legislative power by the village board.[5]

It does not follow, however, that all agreements between municipalities and private landowners concerning zoning matters are necessarily invalid.[6] Zoning amendments enacted pursuant to a contract to purchase planned low-income housing under the "turnkey" program of the Department of Housing and Urban Development is not contract zoning.[7]

B. PRESUMPTIONS AND BURDEN OF PROOF

Research References

West's Digest References

Zoning and Planning ⚷27, 38, 672, 681, 683

Annotation References

A.L.R. Digest: Zoning and Land Controls § 28
A.L.R. Index: Presumptions and Burden of Proof; Zoning

Trial Strategy References

Zoning: Proof of Inverse Condemnation from Excessive Land Use Regulation, 31 Am. Jur. Proof of Facts 3d 563
Zoning—Circumstances Warranting Expansion of a Nonconforming Use, 26 Am. Jur. Proof of Facts 3d 467
Zoning—Circumstances Warranting Relief from Zoning Ordinance, 25 Am. Jur. Proof of Facts 3d 541
Zoning—Invalidity of Single-Family Zoning Ordinance, 24 Am. Jur. Proof of Facts 3d 543

§ 42 Presumption of constitutionality

Research References

West's Key Number Digest, Zoning and Planning ⚷27, 38, 672, 681, 683

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[2]Haymon v. City of Chattanooga, 513 S.W.2d 185 (Tenn. Ct. App. 1973); State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

[3]Ford Leasing Development Co. v. Board of County Com'rs of Jefferson County, 186 Colo. 418, 528 P.2d 237 (1974).

[4]Ford Leasing Development Co. v. Board of County Com'rs of Jefferson County, 186 Colo. 418, 528 P.2d 237 (1974); Suski v. Mayor and Com'rs of Borough of Beach Haven, 132 N.J. Super. 158, 333 A.2d 25 (App. Div. 1975).

[5]Century Circuit, Inc. v. Ott, 65 Misc. 2d 250, 317 N.Y.S.2d 468 (Sup 1970), judgment aff'd, 37 A.D.2d 1044, 327 N.Y.S.2d 829 (2d Dep't 1971).

[6]Funger v. Mayor and Council of Town of Somerset, 249 Md. 311, 239 A.2d 748 (1968).

A settlement agreement between a county and a billboard company, allowing the billboard company to maintain its existing billboards for 10 years after which the county would be able to fully implement a total zoning ban against the billboards, was not an invalid attempt to obligate the district council by an advance contract for a particular zoning, as the agreement contemplated no action whatsoever by the district council. Montgomery County v. Revere Nat. Corp., Inc., 341 Md. 366, 671 A.2d 1 (1996).

[7]Marino v. Town of Ramapo, 68 Misc. 2d 44, 326 N.Y.S.2d 162 (Sup 1971).

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§ 9.21. Contract zoning.

Where a zoning amendment authorizes a particular use only if the landowner enters into a covenant to restrict the use in certain ways, or where a zoning amendment is adopted only after the owner of the affected land executes and files a covenant restricting the use of such land, an attack on the validity of the measure may be based on the contention that it constitutes zoning by contract. Persons who think themselves aggrieved by the amendment may argue that the municipal legislative authority has contracted away a portion of its police power, without authority and in violation of constitutional rights.

It is clear that if conditional zoning of the kind described above is "contract zoning" in the sense that the municipality has bargained away a portion of its zoning power, such zoning is unlawful except in the unusual situation where a statute authorizes agreements between governmental units. The power to regulate land use through zoning ordinances is vested in municipal legislatures, and its use is limited by the enabling acts. Except for the intergovernmental transactions which will be considered later, these acts do not expressly or impliedly authorize the bargaining away of the police power or any segment of it.[80]

Before the cases dealing with the contract zoning problem are

80. "The power to regulate land use through zoning ordinances is vested in municipal legislatures and they cannot bargain away this power." Davis v Pima County, 121 Ariz 343, 590 P2d 459 (1978, App), cert den 442 US 942, 61 L Ed 2d 312, 99 S Ct 2885, citing Anderson, American Law of Zoning (2nd ed) § 9.21.

Municipality has no authority to enter into a private contract with a property owner for amendment of a zoning ordinance subject to various covenants and restrictions in a collateral deed or agreement when such agreement results in the contracting away of police powers. There is no contracting away of police powers, however, where a party seeks a variance and not a change in the ordinance. J. C. Vereen & Sons, Inc. v Miami, 397 So 2d 979 (1981, Fla App D3).

An agreement between a city and a developer to limit the city's power to impose conditions on a development in order to further the health, safety and welfare of the community is invalid and unenforceable. Miller v Port Angeles, 38 Wash App 904, 691 P2d 229 (1984), review den 103 Wash2d 1024 (1985).

See also Bartsch v Planning & Zoning Com., 6 Conn App 686, 506 A2d 1093 (1986) (conditional zoning invalid); Board of County Comrs. v Manny Holtz, Inc., 65 Md App 574, 501 A2d 489 (1985). But cf. People's Counsel for Baltimore County v Mockard, 73 Md App 340, 533 A2d 1344 (1987) (and cases cited therein). And see Chrismon v Guilford County, 322 NC 611, 370 SE2d 579 (1988) (distinguishing illegal contract zoning from rezoning with conditions); Benton v City of Chat-

area of the [proposed] development. This evidence of reasonableness presented by the Board was sufficient to rebut [the] contention that the Board effectively imposed a proffer requirement on [the] rezoning application." *Id. at 354.*

§ 9:21 Contract zoning

n. 80.

Add to note 80:

United States: See League of Residential Neighborhood Advocates v. City of Los Angeles, 498 F.3d 1052 (9th Cir. 2007). An application for a conditional use permit and variances by an Orthodox Jewish congregation to operate a synagogue in a residential district was denied following neighbors' objections. Subsequent to the filing of a lawsuit by the congregation, RLUIPA was enacted. Because the city was concerned about the force of RLUIPA and further litigation, the city entered into a settlement agreement with the congregation allowing it to operate the synagogue under certain conditions. Neighbors brought the current lawsuit, alleging that the city violated state law, provisions of the city code, and their right to due process by entering into a settlement agreement without providing notice and a hearing to the affected community. The Ninth Circuit Court of Appeals agreed that the city violated state law by failing to provide notice and an opportunity to be heard. The court also found that the city had bargained away its right to exercise its police power over the property.

n. 84.

Add to note 84:

Massachusetts: An otherwise valid rezoning that allowed a utility to build a power plant was not invalidated by the fact that the utility had offered to donate $8 million to the town if the rezoning was approved. Durand v. IDC Bellingham, LLC, 440 Mass. 45, 793 N.E.2d 359 (2003). The Supreme Judicial Court of Massachusetts held that a "voluntary offer of public benefits, is not, standing alone, an adequate ground on which to set aside an otherwise valid legislative act." *793 N.E.2d at 368.* The court rejected the argument asserted by neighboring landowners that the rezoning was invalid because it was "contract zoning." The court stated that "labels such as 'contract zoning' may not be helpful or determinative in resolving the validity of a zoning enactment." *793 N.E.2d at 367.* The court found that proper procedures had been followed, and the rezoning was not arbitrary or irrational. "In general, there is no reason to invalidate a legislative act on the basis of an 'extraneous consideration,' because we defer to legislative findings and choices without regard to motive. We . . . find no persuasive authority for the proposition that an otherwise valid zoning enactment is invalid if it is in any way prompted or encouraged by a public benefit voluntarily offered." *793 N.E.2d at 369.*

D. USE RESTRICTIONS

1. RESIDENTIAL DISTRICTS

§ 9:26 Residential districts, generally—Exclusion of commercial uses

n. 62.

Add to note 62:

Michigan: See also Soupal v. Shady View, Inc., 469 Mich. 458, 672 N.W.2d 171 (2003). A zoning ordinance did not allow property zoned for single-family use to be used by a multiple-family association for the operation of a marina containing 20 boat slips. Furthermore, the court concluded that because the use of the property as a marina was in violation of the zoning ordinance, it was a nuisance per se.

483 (1998). The Supreme Court of Pennsylvania
e taking does not result from a zoning ordinance
valid." The case involved an ordinance which had
cause of its exclusion of quarrying as a permitted
uccessfully challenged the ordinance now argued
as unconstitutional it automatically effected a
to taking of the landowner's property. The state
oncluded that an exclusionary zoning ordinance
king. "Here, the property was zoned residential.
ved Miller of the use of quarrying, other viable
more, the court found that the U.S. Supreme
glish case was inapplicable for several reasons:

nglish . . . Miller was not denied all use of its prop-
nied the use of quarrying. Second, *First English* did
n unconstitutional zoning ordinance. The landowners
the ordinance but merely sought damages pursuant
glish does not support the conclusion reached by the
nvalid zoning ordinance effects a per se temporary
rt erroneously confused the legal concepts applicable
validity issues. Finally, the decision in *First English*
cts presented.

unications Enterprises, L.P. v. Zoning Hearing
33 Envtl. L. Rep. 20218 (3d Cir. 2003), cert.
in which a zoning board denied a variance
unications tower in a residential area. The
he Third Circuit Court of Appeals that the
usionary and unlawful under Pennsylvania
nance was neither facially nor de facto
the zoning board, it did not totally ban
zoning board had twice granted vari-
the business district of the township.
urden of showing that no telecom-
tower in the township. The Third
that was based on the relatively
ated, "The relevant inquiry is
of showing that the need of
served. [Citations omitted.]
serve the needs of their
" *331 F.3d at 394.*
hat a township cannot
n and then refuse to
122, 729 N.W.2d

agricultural
within
2001, de-
missible

The Court of Appeals of Michigan held that the township's zoning plan was facially exclusionary because the township acknowledged that the heavy industrial use was permissible but still failed to designate any property for that use. Further, the court found that the township's action in amending its zoning ordinance to designate property as heavy industrial did not defeat the plaintiffs' claim of exclusionary zoning. Rather, the court found that such action showed that the township recognized the need for heavy industrial zoning.

n. 24.

Add to note 24:

Michigan: But cf. Adams Outdoor Advertising, Inc. v. City of Holland, 463 Mich. 675, 625 N.W.2d 377 (2001). A city zoning ordinance prohibiting billboards and advertising signs did not constitute unlawful exclusionary zoning under the Michigan City and Village Zoning Act. Although the ordinance prohibited new billboards and signs, and the expansion of existing billboards and signs, it expressly permitted billboard owners to maintain and repair existing signs as nonconforming uses. The court therefore held that even though the ordinance limited the number of billboards within the city, it was not a total prohibition on billboards. Under the Michigan statute, anything less than a complete citywide prohibition on a land use does not constitute exclusionary zoning.

§ 9:20 Conditional zoning

n. 58.

Add to note 58:

Virginia: It was unlawful for a county board of supervisors to condition rezoning upon a proffer of a cash payment by the developer. Under Virginia' conditional zoning statutes, "a county is not empowered to require a specifie proffer as a condition precedent to a rezoning. The statute clearly states tha proffers of conditions by a zoning applicant must be made *voluntarily.*" Th court therefore concluded that the board had improperly denied the rezoning a ter the developer refused to pay the fee "recommended" by the board "to hel defray costs of capital facilities related to new development." Board of Sup'rs Powhatan County v. Reed's Landing Corp., 250 Va. 397, 463 S.E.2d 668 (1995

A Virginia party unsuccessfully challenged the refusal of a county board supervisors to rezone his property from agricultural to residential. Gregory Board of Sup'rs of Chesterfield County, 257 Va. 530, 514 S.E.2d 350 (1999). Tl applicant unsuccessfully claimed that the board had impermissibly required cash proffer as a condition for the requested rezoning. "The Board responded this evidence of unreasonableness with evidence that cash proffers were n required as a condition precedent to a rezoning, and that the rezoning request . . . would adversely impact public health, safety, and welfare in the area of t [proposed] development. This evidence of reasonableness presented by the Boa was sufficient to rebut [the] contention that the Board effectively imposed proffer requirement on [the] rezoning application." *Id. at 354.*

n. 62.

Add to note 62:

Virginia: A Virginia party unsuccessfully challenged the refusal of a cour board of supervisors to rezone his property from agricultural to residenti Gregory v. Board of Sup'rs of Chesterfield County, 257 Va. 530, 514 S.E.2d 3 (1999). The applicant unsuccessfully claimed that the board had impermissi required a cash proffer as a condition for the requested rezoning. "The Boa responded to this evidence of unreasonableness with evidence that cash proff were not required as a condition precedent to a rezoning, and that the rezon requested . . . would adversely impact public health, safety, and welfare in

rized to issue building permits, or an administrative board may be given jurisdiction to hear and decide applications for exceptions. In either case, the determination commonly is one of fact; rarely is the matter committed to the discretion of an officer or board. Consequently, the exception is a device which, in its most common form, gives relief to a property owner who is disadvantaged by a zoning restriction, without affording protection to land adjacent to the excepted use.

Exceptions pose an administrative problem which is considered in later sections.[47] The device is briefly noted here, because it is a method of relieving the imperfections which necessarily result from the kind of Euclidian zoning ordinance which is used in some degree by all municipalities.

§ 9.20. Conditional zoning.

A zoning amendment which permits a use of particular property in a zoning district subject to restrictions other than those applicable to all land similarly classified is sometimes referred to as conditional zoning. Such regulations assume a variety of forms. Where a landowner requests that his property be rezoned to allow a use not permitted under existing restrictions, he may be advised that his land will be reclassified if he first executes and files a covenant which limits the use of his parcel in specific ways not common to other property similarly classified. When this has been accomplished, the land is rezoned without overt reference to the covenant. Nevertheless, the zoning amendment enacted only after the covenant was made is sometimes described as conditional zoning.[48]

Less common, but occasionally used, is the amendment of a zoning ordinance to permit certain uses on condition that the landowner covenant to use the land subject to certain conditions not generally applicable to other land in the same district, or in districts of the same class.[49]

47. See Chapter 21 in Volume 3.

48. "Conditional zoning" involves only adopted zoning ordinances which provide either that rezoning becomes effective immediately with an automatic repealer if the specified conditions are not met, or that the zoning becomes effective only upon conditions being met within a certain time. State ex rel. Zupancic v Schimenz, 46 Wis 2d 22, 174 NW2d 533 (1970); citing Anderson, American Law of Zoning (1st ed) §§ 8.20, 8.21.

49. Where the official public minutes of the board of commissioners shows that the board rezoned certain prop-

Finally, land may be reclassified subject to conditions not applicable to other property in the same or similar districts.[50]

As noted briefly in an earlier section,[51] conditional zoning is a device employed to bring some flexibility to an otherwise rigid system of land-use control.[52] The need for flexibility in general is too obvious to require extended comment, but two situations illustrate more clearly than most that some flexibility in the imposition of land-use controls can be of critical importance. Zon-

erty "pursuant with stipulations presented by" the then owner and applicant for rezoning, which stipulations were incorporated in the minutes, this amounted to a conditional rezoning. Ervin Co. v Brown, 228 Ga 14, 183 SE2d 743 (1971).

50. Conditional zoning is a phrase used to describe a zoning change granted to an owner subject to conditions generally not applicable to land similarly zoned. Scrutton v County of Sacramento, 275 Cal App 2d 412, 79 Cal Rptr 872 (1969, 3d Dist); citing Anderson, American Law of Zoning (1st ed). Where zoning ordinance provides that auto service stations may be permitted in district if their location conforms to the objectives of the master plan, planning commission has considerable discretion in determining whether proposed use subserves the master plan's basic objectives, and a city does not abuse its discretion by adopting zone classifications with specific standards and requirements even though applicant met minimum standards of the basic zoning ordinance. Van Sicklen v Browne, 15 Cal App 3d 122, 92 Cal Rptr 786 (1971 1st Dist).

A zoning ordinance is valid that permits a car rental subagency to operate at hotels with 100 or more guest rooms, under the condition that none of the cars be stored at the hotel unless under hire, and that while parked there no servicing or repairs be made. Miami Beach v Eason, 194 So 2d 652 (1967, Fla App D3).

Where a zone change was conditioned to permit commercial development of the property only if the entire parcel were developed, the planning board properly denied approval of a plan to construct a free standing restaurant. Dowd v Dowley, 126 Misc 2d 741, 483 NYS2d 884 (1984).

See generally. Land Use—Goffinet v County of Christian ((Ill) 357 NE2d 442): New Flexibility In Illinois Zoning Law, 8 Loyola U L J (Chicago) 642 (1977); Strine, Use of Condition in Land-Use Control, 67 Dick L Rev p 109 (1963); Trager, Contract Zoning, 23 Maryland L Rev p 121 (1963); Comment, The Use and Abuse of Contract Zoning, 12 UCLA L Rev p 897 (1965); Comment, Zoning Amendments and Variances Subject to Conditions, 12 Syracuse L Rev p 230 (1960).

51. See § 9.17, supra.

52. Templeton v County Council of Prince George's County, 21 Md App 636, 321 A2d 778 (1974), adhered to 23 Md App 596, 329 A2d 428; citing Anderson, American Law of Zoning (1st ed) § 8.20.

See generally, Discretionary Land Use Controls, 1971 Planning, Zoning and Eminent Dom Inst 1 (1971); Status of Conditional Rezoning in Illinois—An Argument to Sustain a Flexible Zoning Tool. 63 Illinois BJ 132 (1974).

ing presumes the division of a community into fixed districts marked out by boundaries. Uses are permitted in designated districts because they are thought to be compatible with other uses permitted in such district. Unavoidably, districts with unlike restrictions abut one another. Given this kind of arrangement, it follows that land on the periphery of a highly restricted zone will feel the impact of uses maintained in an adjacent and less restricted zone. More importantly, the effect of incompatible adjacent use will fall more heavily upon some property in the highly restricted district than it does upon other land in the same district. This unequal hardship finally results in pressure for reclassification of land lying on the borderline of a district. If reclassification is permitted without special attention to the impact upon land abutting the new boundary, the process of hardship, petition, and relief begins again. Conditional zoning is a method of giving special attention to such potential impact.[53]

The second situation in which a flexible, tailor-made restriction is of singular importance is one in which space is needed in a particular district for a use not permitted there, and presumably incompatible with the uses which are allowed. As indicated in other places, this end may be served through the administrative devices of special permits,[54] exceptions,[55] or variances.[56] In addition, it may be accomplished legislatively through use of the floating zone,[57] or by conditional zoning. Where the latter method is employed, serious legal difficulties may be encountered. These are discussed in the remainder of this section, and in the next. Miscellaneous objections to conditional zoning, including the propriety of certain conditions, the effect of the uniformity requirement, and the spot zoning challenge, are reviewed below. Objections to conditional zoning on the ground that it constitutes "contract zoning" are discussed in § 9.21, infra.

In general, zoning enabling acts do not specifically authorize zoning subject to conditions.[58] In most states, if such authority exists, it must be inferred from the general delegation of zoning

53. Conditions imposed are designed to protect adjacent land from the loss of use value which might occur if the newly authorized use were permitted without restraint of any kind. Templeton v County Council of Prince George's County, 21 Md App 636, 321 A2d 778 (1974), adhered to 23 Md App 596, 329 A2d 428.

54. See § 9.18, supra.

55. See § 9.19, supra.

56. See Chapter 20 in Volume 2.

57. See Chapter 11 in Volume 2.

58. In some states, there may be

power. One writer has observed that while the enabling statutes do not contain language authorizing the imposition of conditions, neither do they expressly negate such authority.[59]

In Church v Islip,[60] the New York Court of Appeals reviewed an ordinance which permitted certain land to be used for business purposes on the following conditions:

1. The buildings shall not total more than 25% of the area.

2. An anchor post fence, or equal, six feet high, is to be erected five feet within the boundary line of the property.

3. Live shrubbery, three feet high either within or outside of the fence is to be planted, and allowed to grow to the height of the fence.

4. The above must be performed or put in operation before carrying on any retail business on the property.

Authority to impose conditions was inferred from the authority to reclassify land without such conditions. Reclassification subject to certain restrictions was regarded as an exercise of a lesser amount of power contained in the larger delegation of power to reclassify without such limitations upon use. More recently, the same court observed: "The standards for judging the validity of conditional zoning are no different from the standards used to judge whether unconditional zoning is illegal. If modification to a less restrictive zoning classification is warranted, then a fortiori conditions imposed by a local legislature to minimize conflicts among districts should not in and of themselves violate any prohibition against spot zoning."[61]

express statutory authority for rezoning with conditions under certain circumstances. See Ziegler, Rathkopf's The Law of Zoning & Planning at Chapter 29A.

59. Strine, Use of Condition in Land-Use Control, 67 Dick L Rev p 109 (1963).

60. Church v Islip, 8 NY2d 254, 203 NYS2d 866, 168 NE2d 680 (1960).

61. Collard v Flower Hill, 52 NY2d 594, 439 NYS2d 326, 421 NE2d 818 (1981), later proceeding (2d Dept) 99 App Div 2d 687, 471 NYS2d 731, app den 62 NY2d 606, 472 NE2d 327, later proceeding (ED NY) 604 F Supp 1318, affd (CA2 NY) 759 F2d 205, cert den (US) 88 L Ed 2d 72, 106 S Ct 88.

"Conditional zoning is a means of achieving some degree of flexibility in land use control by minimizing the potentially deleterious effect of a zone change on neighboring properties; reasonably conceived conditions harmonize the landowner's need for rezoning with the public interest and certainly fall within the spirit of the enabling legislation." Collard v Flower Hill, 52 NY2d 594, 439 NYS2d 326, 421 NE2d 818 (1981), later proceeding (2d Dept) 99 App Div 2d 687, 471 NYS2d 731, app den 62 NY2d 606, 472

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The conditions generally imposed are those designed to protect adjacent land from the loss of use value which might occur if the newly permitted use were permitted without restraint of any kind. Undoubtedly, conditions which are imposed must be reasonably related to some legitimate objective of zoning.[62]

Conditions have been approved which prohibited outdoor storage,[63] required offstreet parking and limited hours of operation,[64]

NE2d 327, later proceeding (ED NY) 604 F Supp 1318, affd (CA2 NY) 759 F2d 205, cert den (US) 88 L Ed 2d 72, 106 S Ct 88.

A municipality has the power to attach reasonable conditions to its zoning reclassifications. D'Angelo v Di Bernardo, 106 Misc 2d 735, 435 NYS2d 206 (1980); citing Anderson, New York Zoning Law and Practice (2nd ed) § 8.13.

See also Chrismon v Guilford County, 322 NC 611, 370 SE2d 579 (1988) (holding that conditional zoning, "when carried out properly," is an approved practice in North Carolina).

See generally Trager, Contract Zoning, 23 Maryland L Rev p 121 (1963).

62. In Georgia, conditional zoning will be sustained where the conditions are designed to protect the neighborhood from the impact of the zoning amendment. Warshaw v Atlanta, 250 Ga 535, 299 SE2d 552 (1983).

Rezoning of property was valid conditional rezoning and not invalid contract rezoning where the rezoning was based on several conditions which were imposed to protect neighboring property owners from the effects of the zoning change. Johnson v Glenn, 246 Ga 685, 273 SE2d 1 (1980).

The party challenging the conditional zoning has the burden of overcoming the presumption of its validity. Dekalb County v Graham, 251 Ga 423, 306 SE2d 270 (1983).

The grant of a special use permit within an agricultural district, pursuant to a statute that authorizes the exercise of discretion to condition a special use permit with protective restrictions, may be characterized as "conditional zoning". Generally, such conditional actions will be upheld when they are imposed for protection or benefit of neighbors and ameliorate the effects of zoning change. Perry v Planning Com. of County of Hawaii, 62 Hawaii 666, 619 P2d 95 (1980).

Rezoning a residential area to a business use, on the condition that the area rezoned be used exclusively for the business use named in the application, constituted a rezoning without regard to public health, safety and welfare and was invalid. Oury v Greany, 107 RI 427, 267 A2d 700 (1970).

The conditional standards applicable to auto wrecking yards and referring to construction of a sight-obscuring fence did not authorize the expansion of the wrecking yard by construction of a new building to house the disassembly operation. Bartz v Board of Adjustment, 5 Wash App 497, 487 P2d 782 (1971), revd on other grounds 80 Wash 2d 209, 492 P2d 1374.

63. Cohalan v Lechtrecker, 84 App Div 2d 775, 443 NYS2d 892 (1981, 2d Dept), affd 56 NY2d 861, 453 NYS2d 427, 438 NE2d 1142.

64. Warshaw v Atlanta, 250 Ga 535, 299 SE2d 552 (1983).

and required road improvements.[65] Some courts have subjected conditional zoning to special scrutiny.[66] Conditions which restricted access[67] and required the dedication of land have been held invalid.[68] A challenge to conditional zoning may not be mounted by a landowner who has benefited from the condition.[69]

Conditional zoning is vulnerable to the objection that it offends the requirement that all zoning regulations "shall be uniform for each class or kind of building throughout each district."[70] It is reasoned by exponents of this position that property subject to conditions is treated differently than other property in the same district, or in districts with the same designation.[71] Judicial construction of the uniformity requirement is reviewed in another place,[72] but it should be observed here that this attack is rarely mounted where conditional zoning is in issue, and that it has not been notably successful.[73]

Conditional zoning ordinances have been held invalid where the performance or nonperformance of the landowner might

65. Cross v Hall County, 238 Ga 709, 235 SE2d 379 (1977).

66. Nolan v Taylorville, 95 Ill App 3d 1099, 51 Ill Dec 479, 420 NE2d 1037 (1981, 5th Dist).

67. Wood Bros. Homes, Inc. v Colorado Springs, 42 Colo App 15, 592 P2d 1336 (1978).

68. Board of Supervisors v Rowe, 216 Va 128, 216 SE2d 199 (1975).

Conditions requiring an easement or dedication of land may raise special constitutional issues under the Fifth and Fourteenth Amendments. See Chapter 3A, supra.

69. As long as conditional zoning is otherwise valid, neighbors of the zoned property cannot successfully attack the conditions that have been imposed for their own welfare. Cross v Hall County, 238 Ga 709, 235 SE2d 379 (1977).

See also Cedar Rapids v McConnell-Stevely-Anderson, 423 NW2d 17 (1988, Iowa) (property owner who had requested, and benefitted from, ordinance was estopped from challenging its validity).

70. Standard State Zoning Enabling Act § 2 (1926); see generally, Anderson & Roswig, Planning, Zoning & Subdivision: A Summary of Statutory Law in the 50 States, Chart No 4 p 194 (1966).

71. See generally Comment, Zoning Amendments and Variances Subject to Conditions, 12 Syracuse L Rev p 230 (1960).

72. See § 5.25, supra in Volume 1.

73. See, for example, Church v Islip, 8 NY2d 254, 203 NYS2d 866, 168 NE2d 680 (1960).

Uniformity provisions apply to a legislative enactment but do not serve to invalidate a condition arising from a consensual agreement to refrain from the use or sale of alcoholic beverages on a particular premises even where similar restrictions are not applied within the same zoning district. J-Marion Co. v County of Sacramento, 76 Cal App 3d 517, 142 Cal Rptr 723 (1977, 3d Dist).

result in a reclassification of the land by force of private conduct. Such an automatic reversion feature was disapproved by a California court.[74] A New York court reached the same conclusion where the ordinance rezoned land on condition "that the grade of the entire parcel shall be brought down to approximately the grade of Brush Hollow Road in accordance with grades and specificiations approved by the Town Engineer."[75] But reverter provisions have been sustained in Pennsylvania,[76] Illinois,[77] and Maryland.[78]

Conditional zoning measures ordinarily apply to small parcels. Accordingly, it is frequently asserted in litigation involving conditional zoning that the amendment is not in accordance with a comprehensive plan, and that it is invalid as spot zoning. The bulk of Chapter 5 is devoted to this problem, so it will not be reviewed here.[79]

But see Bartsch v Planning & Zoning Com., 6 Conn App 686, 506 A2d 1093 (1986) (conditional zoning invalid); Board of County Comrs. v Manny Holtz, Inc., 65 Md App 574, 501 A2d 489 (1985). And cf. People's Counsel for Baltimore County v Mockard, 73 Md App 340, 533 A2d 1344 (1987) (and cases cited therein).

74. The automatic reversion feature in a conditional zoning grant was void as it would amount to a second rezoning and would violate the procedural directions of the state law. Scrutton v County of Sacramento, 275 Cal App 2d 412, 79 Cal Rptr 872 (1969, 3d Dist); citing Anderson, American Law of Zoning (1st ed).

75. Levine v Oyster Bay, 46 Misc 2d 106, 259 NYS2d 247 (1964).

76. When a township Zoning Administrator cancels approval of a zone change, for failure to build the proposed use within 6 months of the approval, the parcel reverts to the zoning status it had prior to the grant of zoning approval. A trial court cannot extend the time period. Inn Management Services, Inc. v Upper St. Clair, 52 Pa Cmwlth 46, 415 A2d 915 (1980).

77. "Rezoning land from agricultural to heavy industrial classification on condition that it be used for synthetic gas production plant and that upon removal the rezoning should revert to agricultural use was valid conditional zoning." Where shift to industrial use was recognized in comprehensive plan and such use of the 236-acre tract would not decrease the value of adjacent land and would benefit the public, the rezoning was not invalid spot zoning. Goffinet v County of Christian, 30 Ill App 3d 1089, 333 NE2d 731 (1975, 5th Dist), affd 65 Ill 2d 40, 2 Ill Dec 275, 357 NE2d 442 (1976).

78. A provision in an ordinance whereby land would revert to prior classification if time requirements as to site plans, building permits, and actual construction were not met was not conditional zoning since the provision applied to all land, not specific property. Colwell v Howard County, 31 Md App 8, 354 A2d 210 (1976).

79. See generally Comment, 12 Syracuse L Rev pp 230, 240 (1960).

examined, it should be noted that municipal action which is properly taken may limit municipal power to adopt and enforce police power regulations. For example, in some jurisdictions, approval of a subdivision plat at the request of a landowner results in the temporary suspension of municipal authority to impose more stringent minimum lot area requirements upon the land covered by the approved plat.[81] While this is not land-use control by contract, it contains as many features of agreement with a landowner as are present in some conditional zoning transactions. Perhaps more closely allied to contracts is a sale of municipal land for a known purpose. It has been held that a municipality may not perfect the sale or lease and then proceed to prohibit the purpose for which the land was, to the knowledge of the municipality, purchased and sold.[82] Similarly, a municipality may not receive a grant of land in return for restrictive covenants on such land and then authorize use inconsistent with the covenants.[83] While these decisions are not directly relevant to the contract zoning issue, they suggest that municipal police power is not totally insulated from the effect of municipal conduct.

The courts of a growing number of states have upheld zoning ordinances which were either preceded by the filing of a covenant restricting use, or were followed by such a covenant. In Massachusetts, a zoning amendment was adopted after the owner of the rezoned land had filed a covenant, and had given the municipality a 30-year option to purchase a tract which was to remain as a park to provide a buffer between the new uses and

tanooga, ____, slip op (1988, Tenn App) (same).

Annotation: Validity, construction, and effect of agreement to rezone, or amendment to zoning ordinance creating special restrictions or conditions not applicable to other property similarly zoned. 70 ALR3d 125.

81. See Anderson, New York Zoning Law and Practice (3rd ed) § 21.21.

82. Where a town leased island property for use as a hotel, marina, and yacht club, including the maintenance of gasoline facilities, it was without power to prohibit the reconstruction of gasoline pumps destroyed by a hurricane. To prohibit the lessee from maintaining gasoline facilities would be to impair the obligation of a contract. Wa-Wa-Yanda, Inc. v Dickerson, 18 App Div 2d 251, 239 NYS2d 473 (1963, 2d Dept).

83. Palisades Properties, Inc. v Brunetti, 44 NJ 117, 207 A2d 522 (1965). But compare American Land Co. v Keene, 41 F2d 484 (1930, CA1 NH). A written agreement whereby a town promised to recommend to a county council the rezoning of about 18 acres to permit the construction of apartments, in consideration of a builder's promise to donate a prescribed scenic easement, to limit development for 20 years, and to donate certain park land, is not contract zoning. Funger v Somerset, 249 Md 311, 239 A2d 748 (1968).

nearby land. The court fixed its attention on the ordinance and found it to be untainted by the remainder of the transaction.[84] The same result was reached by the Supreme Court of Nebraska where the owner-applicant, at the direction of the legislative body, filed a covenant before his land was reclassified.[85] An Ohio court approved an ordinance which rezoned certain land on condition that a restrictive covenant against strip mining be filed.[86] A California court described "contract zoning" as a phrase having no legal significance but simply referring to a reclassification of land in which the owner agrees to certain conditions not imposed on other land of the same classification.[87]

In New York, conditional zoning has been upheld,[88] and the courts have declined to admit proof of the connection between the filing of the covenant and the enactment of a zoning amendment affecting the same property.[89] In fact, New York has upheld a zoning ordinance which was preceded by the filing of a declaration of restrictions which could not be amended without the concurrence of the town board, the court saying that the restrictions were voluntary and that the zoning regulations were not conditioned upon the declaration.[90] Further, a lower New York court has held that zoning amendments enacted pursuant to a

84. Sylvania Electric Products, Inc. v Newton, 344 Mass 428, 183 NE2d 118 (1962).

85. Bucholz v Omaha, 174 Neb 862, 120 NW2d 270 (1963).

86. Johnson v Griffiths, 74 Ohio L Abs 482, 141 NE2d 774 (1955, App, Mahoning Co), app dismd for want of debat q 164 Ohio St 393, 58 Ohio Ops 188, 131 NE2d 397.

87. Scrutton v County of Sacramento, 275 Cal App 2d 412, 79 Cal Rptr 872 (1969, 3d Dist), citing Anderson, American Law of Zoning (1st ed).

But cf. Delucchi v County of Santa Cruz, 179 Cal App 3d 814, 225 Cal Rptr 43 (1986), cert den and app dismd 479 US 803, 107 S Ct 46 (1986) (if agreement between landowner and county to preserve agricultural land were interpreted to prevent application of future land use restrictions, the agreement would constitute illegal contract zoning).

88. Church v Islip, 8 NY2d 254, 203 NYS2d 866, 168 NE2d 680 (1960), discussed in Court of Appeals, 1959 Term—Zoning, 10 Buffalo L Rev p 245 (1960–61).

89. Point Lookout Civic Asso., Inc. v Hempstead, 22 Misc 2d 757, 200 NYS2d 925 (1960), affd (2d Dept) 12 App Div 2d 505, 207 NYS2d 121, affd 9 NY2d 961, 217 NYS2d 227, 176 NE2d 203.

90. Schachter v Burns, 24 Misc 2d 60, 203 NYS2d 499 (1960). Where a zoning ordinance was enacted after a landowner had signed an agreement that in the event of condemnation his claim would be limited to the residential value of the land, although the amended ordinance permitted commercial use, the court held that the

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contract to purchase planned low-income housing under the "turnkey" program of the Department of Housing and Urban Development was not contract zoning at all.[91] In Maryland, the courts have upheld a zoning amendment which was preceded by the filing of a covenant restricting use, where the covenant was not referred to in the ordinance and apparently was not relied upon by the legislative body.[92] The same result was reached where the legislative body affirmatively spelled out that it neither imposed conditions nor made them the basis for its action.[93] However, the Maryland courts disapproved a zoning ordinance which reclassified land on condition that the owners enter into an agreement with the city to develop the land in a particular way,[94] and detected lack of uniformity in a conditional zoning

agreement was enforceable that the enactment was not invalid as contract zoning. Re Rosedale Ave., 40 Misc 2d 1076, 243 NYS2d 814 (1963). An inferior New York court held that a zoning ordinance is invalid which changes the classification of land on condition that "the grade of the entire parcel shall be brought down to approximately the grade of Brush Hollow Road in accordance with the grades and specifications to be approved by the Town Engineer." Such conditional rezoning "in future" contingent on the performance of certain acts by the owners is contract zoning and is therefore invalid. Levine v Oyster Bay, 46 Misc 2d 106, 259 NYS2d 247 (1964). In order to sustain a claim of zoning by contract there must be a clear indication of an agreement binding upon the parties and a bargaining away of legislative power by the village board. A mere offer to convey a lot owned by the defendants (adjacent to a lot on which they sought a building permit) and needed by the village to widen a cross street and a subsequent conveyance of the lot to the village and issuance of a building permit after the village board amended the zoning ordinance does not sustain a claim of zoning by contract, where the village could have enacted the amendment at any time. Century Circuit, Inc. v Ott, 65 Misc 2d 250, 317 NYS2d 468 (1970), affd 37 App Div 2d 1044, 327 NYS2d 829. A municipality is without authority to diminish its legislative power by entering a settlement agreement in a zoning action which gives a landowner a vested right to use his land in a specified way, without regard to subsequent changes in the zoning regulations. Andgar Associates, Inc. v Board of Zoning Appeals, 30 App Div 2d 672, 291 NYS2d 991 (1968, 2d Dept).

91. Marino v Ramapo, 68 Misc 2d 44, 326 NYS2d 162 (1971), citing Anderson, New York Zoning Law and Practice (1st ed) § 8.14; Anderson, American Law of Zoning (2nd ed) § 8.21.

92. Pressman v Baltimore, 222 Md 330, 160 A2d 379 (1960).

The purchase by a municipality of a parcel of land from a developer pursuant to a zoning ordinance did not constitute contract zoning since any benefit to the developer was available to all other landowners under the ordinance. Baltimore v Crane, 277 Md 198, 352 A2d 786 (1976).

93. Somerset v County Council for Montgomery County, 229 Md 42, 181 A2d 671 (1962).

94. Baylis v Baltimore, 219 Md 164, 148 A2d 429 (1959).

amendment.[95] Zoning amendments encumbered by restrictions have been upheld by the courts of Alabama,[96] Georgia,[97] Illinois,[98] and Wisconsin.[99] A Florida court did not detect contract zoning where a legislative refusal to rezone was influenced by representatives of the land in issue.[1]

95. Carole Highlands Citizens Asso. v Board of County Comrs., 222 Md 44, 158 A2d 663 (1960).

Cf. Board of County Comrs. v Manny Holtz, Inc., 65 Md App 574, 501 A2d 489 (1985); People's Counsel for Baltimore County v Mockard, 73 Md App 340, 533 A2d 1344 (1987) (and cases cited therein).

96. A zoning ordinance which provided that the ordinance was subject to a reservation of a right-of-way for a parkway and that a second means of ingress and egress would be provided to the proposed parkway, was held by the reviewing court as not invalid on the ground that it constituted contract zoning, since the requirements were reasonable measures in light of anticipated traffic conditions. Haas v Mobile, 289 Ala 16, 265 So 2d 564 (1972).

97. Rezoning by city council was not illegal contract zoning even though council voted to compromise with landowner who alleged their failure to rezone was an unconstitutional deprivation of his property and 4 months later council voted to rezone his land. Each council member testified the votes were independent of each other and procedures required for rezoning were complied with. Marietta v Traton Corp., 253 Ga 64, 316 SE2d 461 (1984).

Rezoning of residential land to industrial to permit a rock quarry on condition that the property owner would make improvements on the road leading to the quarry was conditional zoning and valid. It was not contract zoning. Citing Anderson, American Law of Zoning (2nd ed) §§ 8.20, 8.21. Cross v Hall County, 238 Ga 709, 235 SE2d 379 (1977).

See also City of Powder Springs v WMM Properties, Inc., 253 Ga 753, 325 SE2d 155 (1985) (agreement to provide access to sewer system upheld).

98. "Ordinance which rezoned land to CUD was not invalid as contract zoning by reasons of negotiations and conferences between amusement park developers and development committee." Rutland Environmental Protection Asso. v Kane County, 31 Ill App 3d 82, 334 NE2d 215 (1975, 2d Dist), cert den 425 US 913, 47 L Ed 2d 764, 96 S Ct 1510.

99. An ordinance that effects a zoning change not on the effective date of the ordinance but on the date certain conditions spelled out in the ordinance are met is a lawful exercise of the police power and does not amount to contract zoning. Konkel v Common Council, Delafield, 68 Wis 2d 574, 229 NW2d 606 (1975).

Where a zoning authority does not make an agreement to zone but is motivated to do so by agreements made between others or by voluntary restrictions running with the land, the ordinance is valid and is not considered conditional or contract zoning. State ex rel. Zupancic v Schimenz, 46 Wis 2d 22, 174 NW2d 533 (1970), citing Anderson, American Law of Zoning (1st ed).

1. Walberg v Metropolitan Dade County, 296 So 2d 509 (1974, Fla App D3).

Zoning amendments related to covenants executed prior to the enactment of the amendment,[2] or subsequent thereto,[3] have been disapproved by some courts. A New Jersey court held invalid restrictions which purported to become effective when certain land was reclassified as a light industrial zone. The land was reclassified, but the court detected the relationship between the covenants and the amendment and declared both to be invalid. The entire proceedings were said to be ultra vires. The court stated: "Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."[4]

The New Jersey courts view this kind of conditional zoning as an improper bargaining away of legislative power which involves a hazard that private, rather than public, interests will be served. In V. F. Zahodiakin Corp. v Zoning Board of Adjustment, the court said: "Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the

2. Houston Petroleum Co. v Automotive Products Credit Ass'n, 9 NJ 122, 87 A2d 319 (1952).

The rezoning of an area on the basis of assurances by the owner of the tract that it would be developed in accordance with restrictive, already approved plans, was not permissible where the restrictions were not required or contemplated; in enacting an ordinance a municipality is engaged in legislating not contracting. Allred v Raleigh, 277 NC 530, 178 SE2d 432 (1971).

An ordinance, requiring property owners to agree that should their petition for rezoning be granted, and the property subsequently not be used for the purpose then permitted it shall revert to the more restrictive classification, constituted contract zoning and as such was invalid. Hausmann & Johnson, Inc. v Berea Bd. of Bldg. Code Appeals, 40 Ohio App 2d 432, 69 Ohio Ops 2d 379, 320 NE2d 685 (1974, Cuyahoga Co) citing Anderson, American Law of Zoning (1st ed) §§ 14.56 et seq., and § 15.61.

3. Hartnett v Austin, 93 So 2d 86 (1956, Fla).

4. Houston Petroleum Co. v Automotive Products Credit Ass'n, 9 NJ 122, 87 A2d 319 (1952).

An attempt to escape the effect of a valid zoning ordinance by agreement between the borough and a property owner was on its face illegal, void and ultra vires. Suski v Mayor & Comrs. of Beach Haven, 132 NJ Super 158, 333 A2d 25 (1975).

A property owner was not bound by restrictive covenants executed by contiguous landowners merely because his land was rezoned and that the self-imposition of an equitable servitude had been a condition precedent to reclassification. An equitable servitude is an interest in land within the Statute of Frauds. Therefore, a written instrument must be signed by the owner. Gunnell v Hurst Lumber Co., 30 Utah 2d 209, 515 P2d 1274 (1973).

legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts. The use restriction must needs have general application. The power may not be exerted to serve private interests merely, nor may the principle be subverted to that end. . . . It was not within the province of the local authority here to vest in the landowner by contract a special privilege or exemption to use its premises in violation of the general rule binding upon all other landowners within the zone. . . . The purported contract was ultra vires and all proceedings to effectuate it were coram non judice and utterly void."[5]

A Florida court found similar defects in a conditional zoning amendment which permitted certain uses subject to restrictions to be included in a collateral deed or agreement.[6] Similar disapproval has been registered by the courts in other states.[7]

5. V. F. Zahodiakin Engineering Corp. v Zoning Board of Adjustment, 8 NJ 336, 86 A2d 127 (1951).

6. Hartnett v Austin, 93 So 2d 86 (1956, Fla).

7. Transamerica Title Ins. Co. v Tucson, 23 Ariz App 385, 533 P2d 693 (1975).

Contract zoning is a concept held illegal in most states as an ultra vires bargaining away of the police power. Ford Leasing Development Co. v Board of County Comrs., 186 Colo 418, 528 P2d 237 (1974), citing Anderson, American Law of Zoning (1st ed) § 8.20.

Rezoning is legislative in nature and one county commission cannot deprive or restrict a succeeding commission in the exercise of its legislative power by entering into a contract or agreement purporting to limit the authority of the county commission. Barton v Atkinson, 228 Ga 733, 187 SE2d 835 (1972); County of Ada by Board of County Comrs. v Walter, 96 Idaho 630, 533 P2d 1199 (1975).

Ordinance which reclassified five acres of farmland from agricultural to a B-3 commercial use to permit defendant to build and operate a dance hall tavern allowed plaintiff to establish a prima facie case that zoning amendment was passed in exchange for restrictive covenant which limited use of defendant's land and which dedicated certain land to the county. This constituted invalid conditional zoning. Ziemer v County of Peoria, 33 Ill App 3d 612, 338 NE2d 145 (1975, 3d Dist).

Where the record contained no representation by petitioner regarding their specific plans for development of the subject property, there was no unlawful contract zoning involved in adopting an ordinance which rezoned a 30 acre parcel. Graham v Raleigh, 55 NC App 107, 284 SE2d 742, petition den 305 NC 299, 290 SE2d 702. See also Chrismon v Guilford County, 322 NC 611, 370 SE2d 579 (1988) (distinguishing illegal contract zoning from rezoning with conditions).

As contract zoning is invalid, an agreement between a municipality and a landowner to rezone property on the condition that there be no access road, has no effect. Carlino v Whitpain Investors, Whitpain Township, 52 Pa Cmwlth 145, 415 A2d 461 (1980), affd 499 Pa 498, 453 A2d 1385.

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§ 9.22. —Statutory authority.

In some jurisdictions specific kinds of contract zoning are authorized by statute.[8] An Indiana statute,[9] for example, authorizes a planning commission, in connection with a petition for an amendment to the zoning ordinance, to require or allow the landowner to make written commitments relative to the use or development of the parcel. Such commitments are recorded and take effect when the zoning amendment is adopted. The commitments bind the owner and subsequent owners, and there is a procedure for modification or termination. The filing of a commitment by a landowner does not obligate the municipality to make the zone change in issue.

Perhaps the nearest thing to contract zoning in a literal sense is a zoning amendment enacted by a municipal legislature pursuant to an agreement with a housing authority. Such agreements have been approved by the courts notwithstanding that the municipality agrees to rezone, and does so pursuant to the agree-

Restrictive covenants entered in consideration of the adoption of a zoning ordinance are not enforceable. Carlino v Whitpain Investors, 499 Pa 498, 453 A2d 1385 (1982).

A covenant by property owners to maintain a buffer zone between apartments on their land and the nearest property owner and a promise by the zoning board to rezone the land in return were void as against public policy. Haymon v Chattanooga, 513 SW2d 185 (1973, Tenn App). Cf. Benton v City of Chattanooga, slip op (1988, Tenn App) (distinguishing illegal contract zoning from rezoning with conditions).

An amendment to the zoning ordinance which required the developer prior to site plan approval to pledge to devote 15% of the lots to low-income housing as defined by H.U.D. was invalid as ultra vires. The legislature did not intend to permit socio-economic zoning. Secondly, the amendment, in establishing maximum rental and sale prices attempts to control compensation for the use of the land. Board of Supervisors v De Groff Enterprises, Inc., 214 Va 235, 198 SE2d 600, 62 ALR3d 874 (1973).

A contract made by the zoning authorities to zone or rezone is illegal and the ordinance involved is void because a municipality may not surrender its governmental powers or functions. State ex rel. Zupancic v Schimenz, 46 Wis 2d 22, 174 NW2d 533 (1970), citing Anderson, American Law of Zoning (1st ed).

See generally, Contract and Conditional Zoning: A Tool for Zoning Flexibility. 23 Hastings LJ 825 (1972); Contract Zoning: A Flexible Technique for Protecting Maine Municipalities. 24 Maine L Rev 263 (1972); "Contract Zoning" Method and Public Policy. 1972 Urban L Ann 219 (1972).

Comment, "Use and Abuse of Contract Zoning". 12 UCLA L Rev 897 (1965).

8. See generally Ziegler, Rathkopf's The Law of Zoning & Planning at Chapter 29A.

9. § 36-7-4-607, Ind Stat Ann.

ment.[10] Where two public agencies are involved, the likelihood of solely private benefit is reduced, and the problem of authority to enter into the contract may be solved by legislation specifically authorizing the contract. For example, in New York a state loan for public housing cannot be made unless the municipality in which the housing project is to be located has enacted, or agreed to enact, zoning regulations which will protect the site.[11] To permit compliance with this requirement, municipalities are authorized by statute to enter into an agreement with an "authority, housing company or a government" to zone or rezone an area to protect a proposed housing project.[12] It is clear, therefore, that the legislative authority of a New York municipality has power to enter into such an agreement, and that such an agreement does not offend the enabling legislation of the state.[13]

It should not be concluded that agreements to impose zoning

10. See, for example, Passaic Junior Chamber of Commerce v Housing Authority of Passaic, 45 NJ Super 381, 132 A2d 813 (1957); St. Stephen's Club v Youngstown Metropolitan Housing Authority, 164 Ohio St 194, 52 Ohio Ops 3, 115 NE2d 385 (1953).

Property owners and town council entered into a rezoning contract which obligated the town to rezone owner's land to permit construction of multi-family dwellings thereon, but did not expressly prohibit the town from at anytime rescinding or amending its rezoning of subject property. Where the town two years later amended said ordinance so that a multi-family dwelling became a conditionally permitted use and available only if authorized by the zoning board as a special exception, the court found it could not read into the contract a provision that the town would agree to exempt subject land from any subsequent zoning legislation changing a multi-family dwelling from a permitted use. Nicholson v Tourtellotte, 110 RI 411, 293 A2d 909, 70 ALR3d 118 (1972).

Where restaurant operators attempted to rectify a deficiency in off-street parking by a zoning variance and subsequently entered into an agreement with the village whereby neighboring structure would be demolished and the resulting vacant lot converted into off-street parking spaces, plaintiffs by accepting the benefit thereof for approximately three years could not rescind or repudiate their contract and attempt to relitigate the issues upon which the agreement was originally predicated. Psyhogios v Skokie, 4 Ill App 3d 186, 280 NE2d 552 (1972, 1st Dist).

11. NY Pub Housing Law § 71.

12. NY Pub Housing Law § 99.

13. Chase v Glen Cove, 34 Misc 2d 810, 227 NYS2d 131 (1962).

Where petitioners, tax-paying residents, argued that the zoning changes enacted by the town to enable the construction of a federally financed low income housing development in the vicinity of their property constituted illegal spot zoning, it was found that the amendments did not offend the state constitution nor did it constitute impermissible "contract zoning." Marino v Ramapo, 68 Misc 2d 44, 326 NYS2d 162 (1971), citing Anderson, New York Zoning Law and Practice

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restrictions are valid simply because they are between two public agencies. A Florida court held invalid an agreement between a city and the state whereby the city promised to adopt certain restrictive zoning regulations. The purpose of the regulation was to prevent the improvement of the land which the state planned to acquire for a public purpose. The court's opinion was grounded on its disapproval of the contract aspect of the transaction, as well as the confiscatory effect of the whole scheme.[14] Absent a scheme with confiscatory impact, a Florida court held that an agreement between a city and a public housing authority, whereby the city agreed to make specified zoning changes to protect a housing project, was not unlawful.[15]

§ 9.23. Incentive zoning.

The common zoning ordinance has a basically negative impact. It prohibits certain uses in certain districts, and imposes area restrictions in terms of yard, setback, size of lot, frontage and the like. Recent ordinances contain a growing number of affirmative provisions which require the construction of fences to conceal unsightly uses, the building of screens to protect residential users from glare, or the planting of trees and shrubs to enhance the appearance of the area. Even these provisions have minimal effect in guiding the development of the community into channels regarded as desirable.

Incentive zoning (sometimes referred to as bonus zoning) undertakes to add an affirmative thrust to the land use regulations by encouraging the establishment of uses regarded as desirable, or by inducing developers to add certain amenities when new construction is carried out. It is a carrot-and-stick technique which employs administrative concessions to induce needed construction or desired features thereof.[16]

The incentive zoning technique can be illustrated by describing

(1st ed) § 8.14; 1 Anderson, American Law of Zoning (1st ed) § 8.21.

14. Board of Comrs. of State Institutions v Tallahassee Bank & Trust Co., 108 So 2d 74 (1958, Fla App D1), cert quashed (Fla) 116 So 2d 762.

15. Housing Authority of Melbourne v Richardson, 196 So 2d 489 (1967, Fla App D4).

16. See generally, Marcus and Groves, The New Zoning: Legal, Administrative, and Economic Concepts and Techniques, p 200 (1970); Bonus or Incentive Zoning—Legal Implications. 21 Syracuse L Rev 895 (1970).

See also Ziegler, Rathkopf's The Law of Zoning & Planning at Chapter 9 ("Special Zoning Districts and Dis-

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ditional facts, such as a change in conditions or other considerations materially affecting the merits, have intervened since the adoption of the regulations.[13]

A change in zoning should be in accord with the statutory purposes or the general scheme of a comprehensive zoning plan.[14] Spot zoning which is not in harmony with an existing comprehensive plan[15] or ordinance[16] is invalid. On the other hand, where the zoning amendment is part of a comprehensive plan or is in conformity therewith, it is not illegal spot zoning.[17] The fact that a zoning ordinance may allow spot zoning does not make the ordinance bad; the question instead is whether particular zoning or rezoning is done for reasons other than the general welfare.[18] Considerations of public health, safety, and welfare may sometimes justify such a change as part of a comprehensive, well-considered plan in the public interest.[19]

§ 76 Contracts for amendments; conditional rezoning

A municipality generally does not have authority to enter into a contract with a property owner for the reclassification or rezoning of property or the enactment of amendments to the zoning law.

Research References

West's Key Number Digest, Zoning and Land Planning ⚖160

A municipality generally does not have authority to enter into a contract with a property owner for the reclassification or rezoning of property or the enactment of amendments to the zoning law.[1] Such a contract ordinarily is in contravention of the public policy embodied in the constitutional and statutory provisions relating to zoning.[2]

The term "contract zoning" refers to an agreement between a property owner and a local government whereby the owner agrees to certain conditions in return for the government's rezoning or enforceable promise to rezone.[3] Zoning, however, must be done through the exercise of legislative power rather than by special arrangements with the owner of a particular piece of property, and therefore, contract zoning is invalid because a local government surrenders its authority to determine proper land use and bypasses the entire legislative process.[4] The illegal aspect of contract zoning appears when a zoning authority binds itself to enact a zoning amend-

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[13]Cal.—Scrutton v. Sacramento County, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (3d Dist. 1969).

Miss.—Jitney-Jungle, Inc. v. City of Brookhaven, 311 So. 2d 652 (Miss. 1975).

As to a change of conditions or mistake as a necessary basis for rezoning, generally, see § 73.

[14]Conn.—Zandri v. Zoning Commission of Town of Ridgefield, 150 Conn. 646, 192 A.2d 876 (1963).

Ind.—Penn v. Metropolitan Plan Commission of Marion County, 141 Ind. App. 387, 228 N.E.2d 25 (Div. 2 1967).

As to comprehensive zoning plans, generally, see § 39.

[15]Mass.—Board of Appeals of Hanover v. Housing Appeals Committee in Dept. of Community Affairs, 363 Mass. 339, 294 N.E.2d 393 (1973).

Tex.—McWhorter v. City of Winnsboro, 525 S.W.2d 701 (Tex. Civ. App. Tyler 1975), writ refused n.r.e., (Oct. 1, 1975).

[16]Miss.—McKibben v. City of Jackson, 193 So. 2d 741 (Miss. 1967).

[17]Ala.—Grund v. Jefferson County, 291 Ala. 29, 277 So. 2d 334 (1973).

Conn.—Lathrop v. Planning and Zoning Commission of Town of Trumbull, 164 Conn. 215, 319 A.2d 376 (1973).

[18]Mo.—Treme v. St. Louis County, 609 S.W.2d 706 (Mo. Ct. App. E.D. 1980).

[19]Conn.—Malafronte v. Planning and Zoning Bd. of City of Milford, 155 Conn. 205, 230 A.2d 606 (1967).

Wis.—State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

[Section 76]

[1]Colo.—Ford Leasing Development Co. v. Board of County Com'rs of Jefferson County, 186 Colo. 418, 528 P.2d 237 (1974).

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

Ohio—Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals, 40 Ohio App. 2d 432, 69 Ohio Op. 2d 379, 320 N.E.2d 685 (8th Dist. Cuyahoga County 1974).

Wis.—State ex rel. Zupancic v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970).

[2]Ohio—Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals, 40 Ohio App. 2d 432, 69 Ohio Op. 2d 379, 320 N.E.2d 685 (8th Dist. Cuyahoga County 1974).

As to statutory and constitutional sources of zoning power, see § 8.

[3]Ark.—Murphy v. City of West Memphis, 352 Ark. 315, 101 S.W.3d 221 (2003).

[4]Tex.—Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249 (Tex. App. Fort Worth 2004), petition for review filed, (Apr. 9, 2004).

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ment and agrees not to alter a zoning change for a specified period of time; when a zoning authority takes such a step and curtails its independent legislative power, it acts ultra vires and the rezoning is therefore a nullity.[5] Where the record shows that the zoning action would not have taken place but for the understanding that impermissible conditions would be in operation, the impermissible conditional use zoning will be struck down, even if the impermissible influence is not explicit.[6] However, a municipality may be authorized by statute to make an agreement, prior to annexation of an area, with property owners in the area with respect to the zoning regulations to be applied to the owners' land.[7]

Grant of change on conditions.

Generally, zone changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances and when those regulations are uniformly applied.[8] In the absence of such authorization, the granting of a zoning change on conditions, or subject to the recording of restrictive covenants, may be an unauthorized exercise of the police power delegated to the municipality.[9] On the other hand, conditional rezoning is not invalid per se,[10] and the imposition of reasonable conditions on rezoning may be a lawful exercise of the police power in some circumstances.[11]

In the broadest of senses, both "contract zoning" and "conditional zoning" involve some sort of understanding between a governmental unit and developer, whereby the doing of certain acts by the developer will result in favorable rezoning treatment by the governmental unit.[12] However, in the context of conditional use zoning, a local zoning authority maintains its independent decisionmaking authority, whereas in the contract zoning scenario, it abandons that authority by binding itself contractually with a landowner seeking a zoning amendment.[13] Permissible conditional use zoning occurs when a governmental body, without committing its own authority, secures a given property owner's agreement to limit the use of his or her property to a particular use or to subject his or her tract to certain restrictions as a precondition to any rezoning.[14]

The practice of conditional use zoning is an

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[5]N.C.—Dale v. Town of Columbus, NC, 101 N.C. App. 335, 399 S.E.2d 350 (1991).

[6]Md.—Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514, 814 A.2d 469 (2002).

[7]Ill.—Union Nat. Bank v. Village of Glenwood, 38 Ill. App. 3d 469, 348 N.E.2d 226 (1st Dist. 1976).

Md.—Mayor and Council of Rockville v. Brookeville Turnpike Const. Co., 246 Md. 117, 228 A.2d 263 (1967).

[8]Conn.—Kaufman v. Zoning Com'n of City of Danbury, 232 Conn. 122, 653 A.2d 798 (1995).

[9]Md.—Montgomery County v. National Capital Realty Corp., 267 Md. 364, 297 A.2d 675 (1972).

Miss.—Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966).

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

Objections to conditional zoning

The primary objection to conditional zoning is that it permits the use of a particular property in a zoning district subject to restrictions other than those applicable to all land similarly classified; the evils inherent in conditional zoning agreements are not inherent in a regulation which applies equally to all rezoned properties.

Md.—Colwell v. Howard County, 31 Md. App. 8, 354 A.2d 210 (1976).

As to police power as a basis for zoning, see § 8.

As to the relationship of zoning to police power, see § 19.

[10]Ill.—Goffinet v. Christian County, 65 Ill. 2d 40, 2 Ill. Dec. 275, 357 N.E.2d 442 (1976).

N.Y.—Levine v. Town of Oyster Bay, 26 A.D.2d 583, 272 N.Y.S.2d 171 (2d Dep't 1966).

[11]Ariz.—Transamerica Title Ins. Co. v. City of Tucson, 23 Ariz. App. 385, 533 P.2d 693 (Div. 2 1975).

Colo.—King's Mill Homeowners Ass'n, Inc. v. City of Westminster, 192 Colo. 305, 557 P.2d 1186 (1976).

Ill.—Goffinet v. Christian County, 30 Ill. App. 3d 1089, 333 N.E.2d 731 (5th Dist. 1975), judgment aff'd, 65 Ill. 2d 40, 2 Ill. Dec. 275, 357 N.E.2d 442 (1976).

N.Y.—Dexter v. Town Bd. of Town of Gates, 36 N.Y.2d 102, 365 N.Y.S.2d 506, 324 N.E.2d 870 (1975).

R.I.—Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976).

[12]Md.—People's Counsel for Baltimore County v. Beachwood I Ltd. Partnership, 107 Md. App. 627, 670 A.2d 484 (1995).

[13]N.C.—Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988).

[14]N.C.—Westminster Homes, Inc. v. Town of Cary Zoning Bd. of Adjustment, 354 N.C. 298, 554 S.E.2d 634 (2001).

Contingent rezoning not illegal contract zoning

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approved practice, in some jurisdictions, so long as the action of a local zoning authority in accomplishing zoning is reasonable, neither arbitrary, nor unduly discriminatory, and so long as it is in the public interest.[15] The validity of conditions thus may depend on whether they are reasonably conceived and are nondiscriminatory,[16] and an arbitrarily conceived exaction, imposed by a zoning authority upon a landowner as a prerequisite to the grant of rezoning, is invalid.[17]

The grant of a public privilege such as a zoning change may not be conditioned upon deprivation of constitutional protections.[18]

§ 77 Other circumstances and conditions to be considered

The necessity or advisability of changes in zoning regulations must be determined after consideration of all relevant circumstances and conditions, and consideration should be given to the nature of present and potential uses of the area in question, as well as to future concerns such as the effect on property values and traffic conditions.

Research References

West's Key Number Digest, Zoning and Land Planning ⚷154, 163 to 166

The necessity or advisability of making a change or amendment in zoning regulations,[1] and the propriety thereof,[2] must be determined in the light of all relevant circumstances and conditions existing at the time of its enactment.[3] Matters which are required to be considered in making the original zoning regulations must also be considered in making changes in such regulations.[4]

It is appropriate, in considering a zoning change, to view the municipality as a whole and to plan for the future.[5] The existing location of the boundaries of a zoning district is a circumstance to be weighed in determining

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A city council did not engage in illegal "contract zoning" by approving rezoning contingent upon the meeting of 23 conditions relating to a planned unit development, which served as a helpful tool in ensuring that the concerns of many of the area residents were met.

Miss.—Old Canton Hills Homeowners Ass'n v. Mayor and City Council of City of Jackson, 749 So. 2d 54 (Miss. 1999).

[15]N.C.—Chrismon v. Guilford County, 322 N.C. 611, 370 S.E.2d 579 (1988).

Amelioration of effects of zoning change

Conditional zoning is permissible and will be upheld when imposed pursuant to the police power for the protection or benefit of neighbors, in order to ameliorate the effects of a zoning change.

Ga.—Warshaw v. City of Atlanta, 250 Ga. 535, 299 S.E.2d 552 (1983).

As to the prohibition against discrimination in zoning matters, see § 24.

[16]Ariz.—Transamerica Title Ins. Co. v. City of Tucson, 23 Ariz. App. 385, 533 P.2d 693 (Div. 2 1975).

Colo.—King's Mill Homeowners Ass'n, Inc. v. City of Westminster, 192 Colo. 305, 557 P.2d 1186 (1976).

Va.—City of Richmond v. Randall, 215 Va. 506, 211 S.E.2d 56 (1975).

[17]Cal.—Scrutton v. Sacramento County, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (3d Dist. 1969).

[18]Cal.—Scrutton v. Sacramento County, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (3d Dist. 1969).

[Section 77]

[1]D.C.—Lewis v. District of Columbia, 190 F.2d 25 (D.C. Cir. 1951).

Ill.—Duggan v. Cook County, 60 Ill. 2d 107, 324 N.E.2d 406 (1975).

Population concentration

Prevention of undue population concentration in a given area is a factor to be considered in changing a zoning classification.

Kan.—Hukle v. City of Kansas City, 212 Kan. 627, 512 P.2d 457 (1973).

[2]Fla.—Miles v. Dade County by Board of County Com'rs, 260 So. 2d 553 (Fla. Dist. Ct. App. 3d Dist. 1972).

Ill.—Duggan v. Cook County, 60 Ill. 2d 107, 324 N.E.2d 406 (1975).

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

[3]Ohio—White v. City of Cincinnati, 101 Ohio App. 160, 1 Ohio Op. 2d 92, 138 N.E.2d 412 (1st Dist. Hamilton County 1956).

[4]Conn.—Mallory v. Town of West Hartford, 138 Conn. 497, 86 A.2d 668 (1952).

D.C.—Prentiss v. American University, 214 F.2d 282 (D.C. Cir. 1954).

Ill.—Garner v. City of Carmi, 28 Ill. 2d 560, 192 N.E.2d 816 (1963).

As to matters to be considered in original zoning enactments, generally, see § 17.

[5]D.C.—W. C. & A. N. Miller Development Co. v. District of Columbia Zoning Commission, 340 A.2d 420 (D.C. 1975).

Md.—Jacobs v. County Bd. of Appeals for Baltimore County, 234 Md. 242, 198 A.2d 900 (1964).

Mass.—Rosko v. City of Marlborough, 355 Mass. 51, 242 N.E.2d 857 (1968).

proposed changes,[6] but the fact that the property in question is on the perimeter of the district rather than in the center thereof does not necessarily make it more subject to rezoning.[7]

In making zoning changes, consideration may and should be given to the nature of the existing uses in the area,[8] and what would be an appropriate use of the properties in question.[9] A change of zoning for a requested use not compatible with existing uses should ordinarily be refused.[10] However, conditions may be such as to support a rezoning of a tract to a classification different from that of adjoining property.[11]

Effect on property values.

Incidental benefit or detriment to the owners, either of the property sought to be rezoned or of neighborhood property, is generally of no direct consequence in determining the validity of rezoning legislation.[12] Thus, the fact that hardship may result from retention of an existing use is not of itself sufficient to justify a rezoning.[13] Similarly, rezoning cannot be justified solely on grounds that it is necessary to allow the most remunerative use of a tract of land.[14] On the other hand, in determining the validity of a zoning amendment or the application therefor, the extent to which the value of property is affected thereby generally may be considered.[15] Likewise, the fact that a property for which rezoning is sought has itself changed so that the property can no longer reasonably be put to the principal use for which it had previously been zoned is a factor which can properly be considered in determining whether the standards for rezoning have been met.[16]

A city may have the right to deny a zoning change request if it has a reasonable basis to

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Choice between two reasonable uses

A legislative body presented with two property uses, both reasonable, could choose to retain the use permitted under present rezoning, even though the proposed use might have been more appropriate or even the most appropriate use for the land.

Va.—Board of Sup'rs of Roanoke County v. International Funeral Services, Inc., 221 Va. 840, 275 S.E.2d 586 (1981).

[6]Mass.—Canteen Corp. v. City of Pittsfield, 4 Mass. App. Ct. 289, 346 N.E.2d 732 (1976).

[7]Fla.—Dade County v. Miller, 325 So. 2d 418 (Fla. Dist. Ct. App. 3d Dist. 1976).

Ill.—Littlestone Co. v. Cook County, 19 Ill. App. 3d 222, 311 N.E.2d 268 (1st Dist. 1974).

Tex.—Hunt v. City of San Antonio, 462 S.W.2d 536 (Tex. 1971).

[8]Ill.—Duggan v. Cook County, 60 Ill. 2d 107, 324 N.E.2d 406 (1975).

Md.—Boyce v. Sembly, 25 Md. App. 43, 334 A.2d 137 (1975).

Preservation of residential area as valid goal

In considering a rezoning request, preserving an existing residential area is a valid goal.

Miss.—Saunders v. City of Jackson, 511 So. 2d 902 (Miss. 1987).

[9]Conn.—Wade v. Town Plan and Zoning Commission of Town of Hamden, 145 Conn. 592, 145 A.2d 597 (1958).

[10]Minn.—N. R. Fairbanks Co. v. City of Blaine, 308 Minn. 315, 242 N.W.2d 99 (1976).

[11]Okla.—City of Tulsa v. Mobley, 1969 OK 85, 454 P.2d 901 (Okla. 1969).

Pa.—Clawson v. Harborcreek Tp. Zoning Hearing Bd., 9 Pa. Commw. 124, 304 A.2d 184 (1973).

[12]Conn.—Zelvin v. Zoning Bd. of Appeals of Town of Windsor, 30 Conn. Supp. 157, 306 A.2d 151 (C.P. 1973).

N.Y.—Humble Oil & Refining Co. v. Dekdebrun, 38 A.D.2d 46, 326 N.Y.S.2d 444 (4th Dep't 1971).

[13]Md.—Cabin John Limited Partnership v. Montgomery County Council, 259 Md. 661, 271 A.2d 174 (1970).

Projection of financial loss insufficient

Where one seeks to change the basic use of his or her property from one zoning classification to another, a mere projection of financial loss under the less advantageous classification, without more, will not justify the change.

Ala.—Hall v. Jefferson County, 450 So. 2d 792 (Ala. 1984).

[14]Ark.—City of Little Rock v. Breeding, 273 Ark. 437, 619 S.W.2d 664 (1981).

No unconstitutional taking

The fact that property would have been more valuable if rezoned, or the fact that it would have been more difficult to develop the property as zoned than if rezoned, failed to show such a significant detriment in existing zoning as would amount to an unconstitutional taking of property and was insufficient to warrant rezoning.

Ga.—Delta Cascade Partners, II v. Fulton County, 260 Ga. 99, 390 S.E.2d 45 (1990).

As to the constitutional prohibition against the taking of property without compensation, see § 23.

[15]Ill.—Duggan v. Cook County, 60 Ill. 2d 107, 324 N.E.2d 406 (1975).

[16]Miss.—Thrash v. Mayor and Com'rs of City of Jackson, 498 So. 2d 801 (Miss. 1986).

believe that it will conserve the values of other properties and encourage the most appropriate use thereof.[17] However, the mere fact that a rezoning will depreciate the value of surrounding property does not establish that the rezoning is illegal.[18]

Traffic conditions.

Traffic conditions in an area involved in an amendment or change in zoning regulations or classification, and the effect of such change on the traffic conditions, must be given consideration.[19] Traffic problems are matters rezoning authorities are required to consider to weigh and balance with and against all other relevant factors or interests in determining the propriety of a zoning reclassification.[20] However, traffic conditions and problems are not always controlling as against other considerations involved in a change of zoning,[21] especially where they might otherwise be dealt with by the public authorities.[22]

§ 78 Regulations as to particular uses or restrictions

Particular amendments and changes have been considered, including changes effecting a rezoning of property from residential to business, commercial, or industrial use, and vice versa.

Research References

West's Key Number Digest, Zoning and Land Planning ⊜167.1 to 170

Where an amendment or change in the regulations is reasonable under the circumstances and justified by considerations of the public welfare, property may be rezoned with respect to various uses or restrictions,[1] such as from residential to business or commercial use,[2] or from a residential classification to an

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[17]Utah—Bradley v. Payson City Corp., 2003 UT 16, 70 P.3d 47 (Utah 2003).

[18]Neb.—Giger v. City of Omaha, 232 Neb. 676, 442 N.W.2d 182 (1989).

[19]Md.—Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968).

Utah—Gayland v. Salt Lake County, 11 Utah 2d 307, 358 P.2d 633 (1961).

[20]Miss.—Woodland Hills Conservation Ass'n, Inc. v. City of Jackson, 443 So. 2d 1173 (Miss. 1983).

Slight increase in traffic insufficient

A slight increase in traffic on an already busy thoroughfare is not a sufficient objection to prevent rezoning for commercial development.

Kan.—Taco Bell v. City of Mission, 234 Kan. 879, 678 P.2d 133 (1984).

Creation of particular problem due to increase in traffic

While generally an increase of traffic is not given great weight in determining whether to rezone a property, creation of a particular traffic problem connected to a particular use at a particular location could be, in and of itself, a sufficient reason for a denial of that use at that location.

Ill.—Amalgamated Trust and Sav. Bank v. Cook County, 82 Ill. App. 3d 370, 37 Ill. Dec. 717, 402 N.E.2d 719 (1st Dist. 1980).

[21]Ark.—Lindsey v. City of Fayetteville, 256 Ark. 352, 507 S.W.2d 101 (1974).

Md.—Bigenho v. Montgomery County Council, 248 Md. 386, 237 A.2d 53 (1968).

[22]N.Y.—Board of Ed., Union Free School Dist. No. 14, Town of Hempstead, Nassau County v. Town of Hempstead, 202 N.Y.S.2d 629 (Sup 1960).

[Section 78]

[1]Conn.—Jablon v. Town Planning & Zoning Commission of Town of Newtown, 157 Conn. 434, 254 A.2d 914 (1969).

Mass.—Woodland Estates, Inc. v. Building Inspector of Methuen, 4 Mass. App. Ct. 757, 358 N.E.2d 468 (1976).

N.J.—Hyland v. Mayor and Tp. Committee of Morris Tp., 130 N.J. Super. 470, 327 A.2d 675 (App. Div. 1974), judgment aff'd, 66 N.J. 31, 327 A.2d 657 (1974).

[2]Ga.—Pendley v. Lake Harbin Civic Ass'n, 230 Ga. 631, 198 S.E.2d 503 (1973).

La.—Carlo Ditta, Inc. v. Jefferson Parish, 315 So. 2d 361 (La. Ct. App. 4th Cir. 1975), writ denied, 320 So. 2d 559 (La. 1975) and writ denied, 320 So. 2d 560 (La. 1975).

N.J.—Wallington Home Owners Ass'n v. Borough of Wallington, 130 N.J. Super. 461, 327 A.2d 669 (App. Div. 1974), judgment aff'd, 66 N.J. 30, 327 A.2d 657 (1974).

Rezoning not arbitrary or capricious

(1) A city ordinance rezoning a lot from a residential to a business classification was not arbitrary and capricious, where it was at least fairly debatable that the character and use of property in the neighborhood was changing to business and professional offices.

Ala.—City of Gadsden v. Downs, 412 So. 2d 267 (Ala. 1982).

(2) A decision of city council to rezone property from multifamily residential and single-family residential to residential offices was not unreasonable, arbitrary, or capricious, and was at least fairly debatable, where there was evidence of change in the neighborhood, and a land

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COMMENTARIES

ON THE LAW OF

MUNICIPAL CORPORATIONS.

BY

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repealed, as respects a particular municipality, or as respects all municipalities, *laws of a general nature,* elsewhere in force throughout the State; yet a charter or special act passed subsequent to the general law, and plainly irreconcilable with it, will to the extent of the conflict operate a repeal of the latter by implication. But by a well-known rule, founded on solid reasons, such repeals are not favored; and the principle of implied repeals ought to be applied with extreme caution.[1]

§ 237 (89). **Extent of Power; Limitations; Canons of Construction.** — It is a general and undisputed proposition of law that

[1] See cases cited to last preceding section; also St. Louis *v.* Alexander, 23 Mo. 483; Baldwin *v.* Green, 10 Mo. 410; State *v.* Binder, 38 Mo. 450, 451; State *v.* Young (intoxicating liquors), 17 Kan. 414 (where the Kansas cases on the subject are discussed by *Horton,* C. J.); State *v.* Clarke, 25 N. J. L. 54; State *v.* Douglass, 33 N. J. L. 363; State *v.* Mills, 34 N. J. L. 177, 180; Montezuma *v.* Minor, 70 Ga. 191; St. Johnsbury *v.* Thompson, 59 Vt. 300.

The case of State *v.* Clarke, 54 Mo. 17, and of State *v.* De Bar, 58 Mo. 395, relating to the *social evil* powers of the city of St. Louis, are highly instructive on the question on *the effect of a special act upon the general law.* In each case the defendant was indicted under the general criminal code of the State, which prohibited the keeping of bawdy houses. In the first case the defendant pleaded a license from the city to keep such a house. In 1870 the charter of the city was amended, and the previous power to "suppress" such houses was changed to the power "to *pass ordinances,* not inconsistent with any law of the State, to *regulate* or suppress" such houses. Under this power to regulate, the city regulated such houses by passing an order licensing them; and such an ordinance was held to be valid notwithstanding the general law, and to have the effect to prevent the enforcement of the general criminal law of the State within the city of St. Louis. The question was a close one, but the majority opinion of *Napton,* J., in view of the legislation recited in it, seems to be sound. State *v.* Clark, 54 Mo. 17. The next year, 1874, in consequence of the decision, the charter of the city was amended in this respect, by substituting the words "to suppress, but not to *license,* bawdy houses." After this act went into effect, State *v.* De Bar, *supra,* arose. The defendant was indicted under the general law of the State for keeping such a house. There was another provision in the general law, that the repeal of a law shall not by implication revive a former law. And it was held by a majority of the court that the amendment of 1874, which repealed the former amendment of 1870, did not thereby revive the general criminal statute in the city of St. Louis, and, as a consequence, that the defendant could not be convicted. This last decision seems to the author to be erroneous, on the ground that the Act of 1870 did not *ipso facto* repeal the general law in the city, but such repeal, or suspension rather, was only effected when the city passed the ordinance. If so, a repeal of the ordinance by the council, without the Act of 1874, would have left the general law of the State in force within the city, and its repeal by the Act of 1874 would have precisely the same effect. These cases may be usefully consulted on the nature and scope of the power to "*regulate.*" See also Givens *v.* Van Studdiford, 86 Mo. 149. General power in a municipal charter held not to repeal by implication the chartered rights of a railroad company. State *v.* Jersey City, 29 N. J. L. 170. Or to interfere with vested rights. State *v.* Jersey City, 34 N. J. L. 32, 33.

A charter which confers *exclusive* jurisdiction upon municipal authorities operates to repeal the general law on the same subject within the municipality; not so ordinarily when the charter confers concurrent authority. Seibold *v.* People, 86 Ill. 33. As to repeal of special provisions by general laws, and *vice versa,* see *ante,* § 167.

a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in *express words;* second, those *necessarily or fairly implied* in or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable.[1] Any fair, reasonable, substantial

[1] Smith *v.* Newbern, 70 N. Car. 14. Referring to the text, *McAllister,* J., in People *v.* Howard, not officially reported, says: "It is the best summary of all the decisions upon that point to be found in all the books." *Text cited and approved* in the following cases: Cook Co. *v.* McCrea, 93 Ill. 236; Ottawa *v.* Carey, 108 U. S. 110; Kelly *v.* Town of Milan, 21 Fed. Rep. 842; Scott *v.* Shreveport, 20 Fed. Rep. 714; Desmond *v.* City of Jefferson, 19 Fed. Rep. 483; *In re* Lee Tong, 18 Fed. Rep. 253; Eufaula *v.* McNab, 67 Ala. 588; Henke *v.* McCord, 55 Iowa, 378; Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118; Corvalis *v.* Carlile, 10 Oreg. 139; Danville *v.* Shelton, 76 Va. 325; Bell *v.* Platteville, 71 Wis. 139; Gilman *v.* Milwaukee, 61 Wis. 588; Blake *v.* Walker, 23 S. Car. 517; Charleston *v.* Reed, 27 W. Va. 681; Kansas *v.* Swope, 79 Mo. 446; Portland *v.* Schmidt, 13 Oreg. 17; Levy *v.* Salt Lake City, 3 Utah, 63; Richmond *v.* McGirr, 78 Ind. 192, 197.

The doctrine *stated in the text* is also followed, approved, applied, and illustrated in the following cases: Barnett *v.* Denison, 145 U. S. 135; Detroit Citizens St. Ry. Co. *v.* Detroit Ry., 171 U. S. 48; s. c. 22 U. S. App. 570, 590; Grand Rapids El., &c. Co. *v.* Grand Rapids, &c. Co., 33 Fed. Rep. 659; Detroit *v.* Detroit City Ry. Co., 56 Fed. Rep. 867; Andrews *v.* Nat. Foundry & Pipe Works, 61 Fed. Rep. 782; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. Rep. 720; Fort Scott *v.* Eads Brokerage Co., 117 Fed. Rep. 51; New Decatur *v.* Berry, 90 Ala. 432; Gambill *v.* Erdrich, 143 Ala. 506; Cleveland School Furn. Co. *v.* Greenville, 146 Ala. 559; San Pedro *v.* Southern Pac. Ry. Co., 101 Cal. 333; Durango *v.* Reinsberg, 16 Colo. 327; Hayward *v.* Red Cliff Trustees, 20 Colo. 33; Bridgeport *v.* Housatonic R. Co., 15 Conn. 475; Crofut *v.* Danbury, 65 Conn. 294; Jacksonville Electric L. Co. *v.* Jacksonville, 36 Fla. 229; Porter *v.* Vinzant, 49 Fla. 213; Keen *v.* Waycross, 101 Ga. 588; Smith *v.* McDowell, 148 Ill. 51, 62; Chicago *v.* Norton Milling Co., 196 Ill. 580, aff'g 97 Ill. App. 651; Ladd *v.* Jones, 61 Ill. App. 584; Pittsburgh, &c. R. Co. *v.* Crown Point, 146 Ind. 421; Walker *v.* Towle, 156 Ind. 639; McAllen *v.* Hamblin, 129 Iowa, 329; Anderson *v.* Wellington, 40 Kan. 173, 176; *In re* Fryor, 55 Kan. 724; Henderson *v.* Covington, 14 Bush (Ky.), 312; Nelson *v.* Homer, 48 La. An. 258; Mayo *v.* Dover & Foxcroft Village Fire Co., 96 Me. 539; Foster *v.* Worcester, 164 Mass. 419; Taylor *v.* Bay City St. R. Co., 80 Mich. 77; People *v.* Holly, 119 Mich. 637; Leach *v.* Cargill, 60 Mo. 316; State *v.* Butler, 178 Mo. 272, approving text; Joplin *v.* Leckie, 78 Mo. App. 8; Kirkwood *v.* Meramec Highlands Co., 94 Mo. App. 637; Christensen *v.* Fremont, 45 Neb. 160; State *v.* Webber, 107 N. Car. 962; State *v.* Eason, 114 N. Car. 787, citing text; Love *v.* Raleigh, 116 N. Car. 296; State *v.* Higgs, 126 N. Car. 1014; Ravenna *v.* Pennsylvania Co., 45 Ohio St. 118; Markley *v.* Mineral City, 58 Ohio St. 430; McIntosh *v.* Charleston, 45 S. Car. 584; Ysleta *v.* Babbitt, 8 Tex. Civ. App. 432; Ogden City *v.* Bear Lake, &c. Irrig. Co., 16 Utah, 440; Winchester *v.* Redmond, 93 Va. 711; Lynchburg & R. St. R. Co. *v.* Dameron, 95 Va. 545; Duncan *v.* Lynchburg (Va.), 34 S. E. Rep. 964; Donable *v.* Harrisonburg, 104 Va. 533; Tacoma Gas & Elec. Light Co. *v.* Tacoma, 14 Wash. 288; Farwell *v.* Seattle, 43 Wash. 141; Trester *v.* Sheboygan, 87 Wis. 496; Schneider *v.* Menasha, 118 Wis. 298; Lewis *v.* Alexander, 24 Canada S. C. R. 551.

Implied power to appropriate money out of city treasury to assist in the *maintenance of national guard* denied. Knapp *v.* Kansas City, 48 Mo. App. 485. But the general welfare clause in charter was held to authorize pensions to members of the police force. Commonwealth *v.* Walton, 182 Pa. 373. Where an act authorized existing corporations by vote of their members to *alter, change, and amend the charters,* but did not confer upon the corporation

doubt concerning the existence of power is resolved by the courts against the corporation, and the power is denied.[1] Of every municipal corporation the charter or statute by which it is created is its organic act. Neither the corporation nor its officers can do any act, or make any contract, or incur any liability, not authorized thereby, or by some legislative act applicable thereto. All acts beyond the scope of the powers granted are void.[2] Much less can any power be exercised, or any act done, which is forbidden by charter or statute. *These principles are of transcendent importance, and lie at the foundation of the law of municipal corporations.* Their reasonableness, their necessity, and their salutary character have been often vindicated, but never more forcibly than by the learned Chief Justice Shaw, who, speaking of municipal and public corporations, says:

the power to incorporate within its charter *any grant of any privilege not existing in the original charter*, it was held that the power to *establish a public school* could not be inferred from any power necessary for municipal existence, and that there was no authority under the act for the corporation to so amend its charter as to authorize the levying of a tax for the maintenance of a high school, or for any other educational purpose. Nelson *v.* Homer, 48 La. An. 258.

[1] *Text quoted with approval.* Williams *v.* Davidson, 43 Tex. 33; Brenham *v.* Water Co., 67 Tex. 542; Hanger *v.* Des Moines, 52 Iowa, 193; City of Corvalis *v.* Carlile, 10 Oreg. 139; Kirkham *v.* Russell, 76 Va. 956; Tax Collector *v.* Dendinger, 38 La. An. 261; Merrill *v.* Monticello, 138 U. S. 673; Hart *v.* Buckner, 2 U. S. App. 488; Los Angeles City Water Co. *v.* Los Angeles, 88 Fed. Rep. 720; *Ex parte* Florence, 78 Ala. 419; Newport *v.* Batesville & B. Railway Co., 58 Ark. 270; Von Schmidt *v.* Wiber, 105 Cal. 151; St. Louis *v.* Bell Tel. Co., 96 Mo. 623; Knapp *v.* Kansas City, 48 Mo. App. 485; Joplin *v.* Leckie, 78 Mo. App. 8; Meday *v.* Rutherford, 65 N. J. L. 645.

[2] McCann *v.* Otoe Co., 9 Neb. 324; Stewart *v.* Otoe Co., 2 Neb. 177; Sioux City & P. R. R. Co. *v.* Washington County, 3 Neb. 30, 42; Somerville *v.* Dickerman, 127 Mass. 272; Boylston Market *v.* Boston, 113 Mass. 528; Harvard College *v.* Boston, 104 Mass. 470; Brimmer *v.* Boston, 102 Mass. 19; People *v.* Weber, 89 Ill. 347; Bryan *v.* Page, 51 Tex. 532; Francis *v.* Troy, 74 N. Y. 338; State *v.* Passaic, 41 N. J. L. 90; Perrine *v.* Farr, 22 N. J. L. 356; Carron *v.* Martin, 26 N. J. L. 594; State *v.* Hudson, 29 N. J. L. 104; State *v.* Marion Co., 21 Kan. 419; Green *v.* Cape May, 41 N. J. L. 45; Lord *v.* Oconto, 47 Wis. 386; Garvey, *In re*, 77 N. Y. 523; Smith *v.* Newburg, 77 N. Y. 130; Allen *v.* Galveston, 51 Tex. 302; Dore *v.* Milwaukee, 42 Wis. 18; Butler *v.* Nevin, 88 Ill. 575; Kansas City *v.* Flanagan, 69 Mo. 22; Bentley *v.* County Com'rs, 25 Minn. 259; Fulton *v.* Lincoln, 9 Neb. 358; Hurford *v.* Omaha, 4 Neb. 336, 350; Reis *v.* Graff, 51 Cal. 86. Text cited with approval in Cook Co. *v.* McCrea, 93 Ill. 236; Birmingham & Pratt M. Ry. Co. *v.* Birmingham Street Ry. Co., 79 Ala. 465; Davenport *v.* Kleinschmidt, 6 Mont. 502; Heiskell *v.* Baltimore, 65 Md. 125; Dwyer *v.* City of Brenham, 65 Tex. 526; St. Johnsbury *v.* Thompson, 59 Vt. 300; Christie *v.* Malden, 23 W. Va. 667; Spengler *v.* Trowbridge, 62 Miss. 46 (an appropriation to pay expenses of a committee in endeavoring to obtain legislation from Congress held illegal, and payment enjoined); Gas Co. *v.* Parkersburg, 30 W. Va. 435. The citizens of a city cannot confer upon its common council powers not granted by charter. Torrent *v.* Muskegon, 47 Mich. 115. Applying the rule in the text, an act authorizing the sale of municipal bonds at not less than par was held not to warrant the allowance of a commission to a purchaser of the bonds from the city at par. Whelen's Appeal, 108 Pa. St. 162, 197. *Post*, chapter on Municipal Bonds.

"*They can exercise no powers* but those which are conferred upon them by the act by which they are constituted, or such as are necessary to the exercise of their corporate powers, the performance of their corporate duties, and the accomplishment of the purposes of their association. This principle is derived from the nature of corporations, the mode in which they are organized, and in which their affairs must be conducted."

§ 238 (90). **Same Subject.** — "In aggregate corporations, as a general rule," continues Chief Justice Shaw, "the act and will of a majority is deemed in law the act and will of the whole, — as the act of the corporate body. The consequence is that a minority must be bound not only without, but against, their consent. Such an obligation may extend to every onerous duty, — to pay money to an unlimited amount, to perform services, to surrender lands, and the like. It is obvious, therefore, that if this liability were to extend to unlimited and indefinite objects, the citizen, by being a member of a corporation, might be deprived of his most valuable personal rights and liberties. The security against this danger is in a steady adherence to the principle stated, viz., *that corporations can only exercise their powers over their respective members, for the accomplishment of limited and defined objects.* And if this principle is important, as a general rule of social right and municipal law, it is of the highest importance in these States, where corporations have been extended and multiplied so as to embrace almost every object of human concern."[1] The language of another learned judge on this subject is

[1] *Per Shaw*, C. J., in Spaulding *v.* Lowell, 23 Pick. (Mass.) 71, 74; Bangs *v.* Snow, 1 Mass. 181; Stetson *v.* Kempton, 13 Mass. 272; Willard *v.* Newburyport, 12 Pick. (Mass.) 227; Keyes *v.* Westford, 17 Pick. 273, 279; Com. *v.* Turner, 1 Cush. (Mass.) 493, 495; Cooley *v.* Granville, 10 Cush. 56, 57; Merriam *v.* Moody, 25 Iowa, 163; Minturn *v.* Larue, 23 How. (U. S.) 435; Lafayette *v.* Cox, 5 Ind. 38; Paine *v.* Spratley, 5 Kan. 525; Vincent *v.* Nantucket, 12 Cush. (Mass.) 103, 105; Clark *v.* Davenport, 14 Iowa, 494; Mays *v.* Cincinnati, 1 Ohio St. 268; Gallia Co. *v.* Holcomb, 7 Ohio, part i., 232; Hamilton County Com'rs *v.* Mighels, 7 Ohio St. 109; Fitch *v.* Pinckard (taxing power), 5 Ill. 78; Caldwell *v.* Alton (market ordinance), 33 Ill. 416; Jacksonville, &c. *v.* McConnel, 12 Ill. 138, 140; Louisiana State Bank *v.* New Orleans Nav. Co., 3 La. An. 294; State *v.* Mobile (market-house case), 5 Port. (Ala.) 279; Head *v.* Ins. Co., 2 Cranch, 127; DeRussy *v.* Davis (sale of ferry lease), 13 La. An. 468; People *v.* Oakland County Bank, &c., 1 Doug. (Mich.) 282; Montgomery *v.* Montgomery & W. Plank Road Co., 31 Ala. 76; Burnett, *In re*, 30 Ala. 461, and cases cited; Le Couteulx *v.* Buffalo, 33 N. Y. 333; Hayes *v.* Appleton, 24 Wis. 544; People *v.* River Raisin & L. E. R. Co., 12 Mich. 389; Vance *v.* Little Rock, 30 Ark. 435; Indianapolis *v.* Indianapolis Gas Co., 66 Ind. 396. Text approved in the following cases: Noyes *v.* Mason, 53 Iowa, 418; Frank, *In re*, 52 Cal. 606; Green *v.* Cape May, 41 N. J. L. 45.

"*The powers of all corporations are limited by the grants in their charters, and cannot extend beyond them.*" *Per Breese*, J., Petersburg *v.* Metzker, 21 Ill. 205. "Corporations have only such rights and powers as are expressly

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LAND USE LAW

Fifth Edition

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2003

Lexis 3-13-03

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1 they were not consistent with a
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ien the floating zone authorizes
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59); Pleasant Valley Neighborhood Ass'n
App. 1988); Bellemeade Co. v. Priddle,
Appeals, 133 A.2d 83 (Md. 1957); Treme
; 80 A.L.R.3d 95 (1977). *But see* Lutz v.
so Carron v. Board of County Comm'rs,
on" procedure); Montgomery County v.
987) (basis for approving floating zone).
mm'n, 600 A.2d 13 (Conn. App. 1991)
zone; denial upheld).

:7); Town of Hobart v. Collier, 87 N.W.2d
nent, 164 A.2d 7 (Pa. 1960), *with* Klem
78).

94 (Conn. 1971). *See* McQuail v. Shell
ouncil, 461 A.2d 76 (Md. App. 1983).

§ 6.62 Contract and Conditional Zoning.

Contract or conditional zoning is another zoning technique that provides more flexibility in the administration of the zoning ordinance. Contract zoning is used because of problems created by the zoning district system. In the typical zoning ordinance, each zoning district allows a wide range of permitted uses. An example is a neighborhood commercial zone, which may allow a wide variety of neighborhood commercial uses.

Adjacent property owners may object to a rezoning because the landowner may use his land for any of the uses permitted in the new zone, not just the use he contemplates. In contract zoning, the landowner agrees to restrict the use of his land to the use for which he seeks the zoning amendment. The landowner may agree to other protective conditions, such as a landscaped buffer adjacent to the residential dwellings. Municipalities may also use contract zoning to secure street widening or other contributions from the landowner.

Contract zoning can take several forms. One frequently used classification distinguishes between unilateral and bilateral contract zoning. In unilateral contract zoning, the landowner unilaterally agrees to impose restrictions on his land in a written document, which he records. The municipal governing body or planning commission indicates the restrictions it wants the landowner to adopt but does not formally agree to a rezoning if the landowner complies. In bilateral contract zoning, a landowner and the municipality execute a bilateral contract in which the municipality promises to rezone in return for the landowner's promise to record a document that contains the restrictions the municipality requires. A landowner can also execute a bilateral contract with adjacent landowners.

Some courts refer to the case in which a landowner imposes restrictions on his land unilaterally as conditional zoning. They apply the term "contract zoning" only to a true bilateral contract between a landowner and a municipality. This text uses all of these terms interchangeably.

Contract zoning advocates defend it as an appropriate zoning technique that tailors land development to its environment and assures its compatibility with adjacent land uses. The objections to contract zoning are similar to those raised against floating zones. Contract zoning is claimed to be invalid because it is unauthorized by the zoning statute, because it is arbitrary spot zoning and an illegal bargaining away of the zoning power, and because it violates the statutory provision that requires uniform land use regulations within zoning districts. Several states now authorize contract zoning.[1]

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[1] Ariz. Rev. Stat. Ann. § 11-832; Idaho Code § 67-6511A; Md. Code Ann. art. 66B, § 4.01(c)(1); R.I. Gen. Laws. § 45-24-53(h); Va. Code Ann. §§ 15.2-2303, 15.2-2297. *See* Sweetman v. Town of Cumberland, 364 A.2d 1277 (R.I. 1977) (statute held constitutional).

The case law on contract and conditional zoning is mixed, although most of the more recent decisions approve this technique. Whether the conditions on development are imposed bilaterally or unilaterally makes a difference. The courts usually disapprove bilateral contract zoning but approve conditions on development that are imposed unilaterally.

Despite growing judicial approval of conditional zoning, its use by municipalities is unwise. Individually negotiated zoning agreements undercut the uniformity of the land use regulations imposed by the zoning ordinance. The proliferation of a large number of zoning agreements throughout a municipality complicates zoning enforcement. Although a municipality may be able to amend the zoning ordinance to impose restrictions that conflict with a rezoning agreement, this problem is also troublesome.[2] Detailed control over land development is possible under acceptable zoning techniques that impose development standards subject to approval by the zoning agency. Floating zones and site plan review are two examples.

The terminology used by the courts in the "contract" zoning cases is not clear, and it is difficult to find accepted terms that describe the results in the cases. The discussion that follows divides the cases into the "bilateral" and "unilateral" categories, but the text indicates that the courts have different views of these terms. One court has adopted the term "concomitant agreement zoning" for this zoning device.[3]

The Nebraska court upheld a rezoning for a mixed use development that included four agreements executed by the city and the developer incorporating the development plan.[4] The court held that the distinction between contract and conditional zoning was irrelevant and that the critical question was whether the conditions on the rezoning advanced the public health, safety and general welfare. The court held that the city was entitled to make agreements with developers requiring them to follow their plans, because otherwise these plans are difficult to enforce.

§ 6.63 Bilateral.

A number of cases have held bilateral contract zoning invalid.[1] In these cases the municipality and the developer executed a bilateral contract, or the ordinance

[2] Delucchi v. County of Santa Cruz, 225 Cal. Rptr. 43 (Cal. App. 1986); Nicholson v. Tourtellotte, 293 A.2d 909 (R.I. 1972).

[3] State ex rel. Myhre v. City of Spokane, 422 P.2d 790 (Wash. 1967).

[4] Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989) (court also found no bargaining away of police power). *See also* Bradley v. City of Trussville, 527 So. 2d 1303 (Ala. Civ. App. 1988) (no delegation of legislative power).

[1] Hale v. Osborn Coal Enters., Inc., 729 So.2d 853 (Ala. Civ. App. 1997); Hartman v. Buckson, 467 A.2d 694 (Del. Ch. 1983); Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Cederberg v. City

that adopted the rezoning included the terms of a bilateral agreement. *Houston Petroleum Co. v. Automotive Prods. Credit Ass'n*[2] best expresses the reasoning these cases adopt. The court held invalid an agreement in which the developer agreed to impose site development restrictions and stated:

> Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations.[3]

The purpose of a rezoning agreement may make it invalid. Municipalities sometimes insist on "reverter" agreements under which the land reverts to its initial zoning classification if the landowner does not begin development in a reasonable period of time. The cases hold these agreements invalid because they accomplish a rezoning without recourse to the usual notice and hearing requirements that apply to zoning amendments.[4]

A court may uphold a bilateral agreement when it is made with third parties, such as neighbors. In *State ex rel. Zupancic v. Schimenz*,[5] an applicant for a zoning change executed an agreement with neighbors that restricted the site to a specified use and imposed site development restrictions. The agreement was executed and recorded after the neighbors expressed concern about the rezoning at a plan commission meeting.

The court upheld the rezoning and noted that there was no agreement with the city and no agreement to rezone. A rezoning is not invalid contract zoning when "a zoning authority . . . is motivated to zone by agreements as to use of the land made by others." Private agreements that "underlie" zoning provide the "flexibility and control" that allow "a municipality to meet the ever-increasing demands for rezoning in a rapidly changing area."[6] The court also held that the rezoning must be "otherwise valid" and suggested that the imposition of

of Rockford, 291 N.E.2d 249 (Ill. App. 1972); Baylis v. City of Baltimore, 148 A.2d 429 (Md. 1959); Rodriguez v. Prince George's Cty., 558 A.2d 742 (Md. App. 1989); Carlino v. Whitpain Invs., 453 A.2d 1385 (Pa. 1982). *See also* Chung v. Sarasota County, 686 So.2d 1358 (Fla. App. 1996) (settlement agreement). But see Broward County v. Griffey, 366 So. 2d 869 (Fla. App. 1979). *See generally* 70 A.L.R.3d 125 (1976).

[2] 87 A.2d 319 (N.J. 1952).

[3] *Id.* at 322.

[4] Scrutton v. County of Sacramento, 79 Cal. Rptr. 872 (Cal. App. 1969); Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code Appeals, 320 N.E.2d 685 (Ohio App. 1974). *But see* Goffinet v. County of Christian, 357 N.E.2d 442 (Ill. 1976); Colwell v. Howard County, 354 A.2d 210 (Md. App. 1976). *See also* Dexter v. Town Bd., 324 N.E.2d 870 (N.Y. 1975). *Contra*, Beyer v. Burns, 567 N.Y.S.2d 599 (Sup. Ct. 1991) (in floating zone ordinance).

[5] 174 N.W.2d 533 (Wis. 1970).

[6] *See also* City of Greenbelt v. Bresler, 236 A.2d 1 (Md. 1967); Pressman v. City of Baltimore, 160 A.2d 379 (Md. 1960).

conditions on land development "might better be done by uniform ordinances providing for special uses, special exceptions and overlaid districts."

§ 6.64 Unilateral.

A growing number of cases uphold contract zoning when the restrictions on the rezoned property are imposed unilaterally by the landowner.[1] Courts sometimes refer to this type of zoning as conditional zoning. In these cases there was no evidence of a bilateral contract between the landowner and the municipality, although the rezoning ordinance may have contained the restrictions the landowner imposed on the land.[2] The cases emphasized the protective function of restrictions unilaterally imposed on the land that avoided or mitigated the adverse impacts of the development on adjacent property owners. In other cases the municipality executed a contract with the developer, concurrent with the rezoning, in which he agreed to dedicate land or make a contribution to street widenings and other improvements. Some cases upheld these agreements, emphasizing that the municipality did not agree to rezone and that the improvements to which the owner contributed were reasonably required by the development.[3]

The favorable judicial view of conditional zoning was expressed in extensive dictum in *Collard v. Incorporated Village of Flower Hill.*[4] The court indicated conditional zoning is not objectionable as a form of spot zoning. It held that, if a zoning change is proper, it is not automatically invalid simply because conditions are imposed. The court pointed out that "imposing limiting conditions while benefitting surrounding properties, normally adversely affects the premises on which the conditions are imposed."

The court held that conditional zoning is not an improper bargaining away of the police power "absent proof of a contract purporting to bind the local legislature in advance." It held the zoning act did not prohibit conditional zoning,

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[1] Haas v. City of Mobile, 265 So.2d 564 (Ala. 1972); J-Marion Co. v. County of Sacramento, 142 Cal. Rptr. 723 (Cal. App. 1977); Martin v. Hatfield, 308 S.E.2d 833 (Ga. 1983); Ogden v. Premier Props., USA, Inc., 755 N.E.2d 661 (Ind. App. 2001); Sylvania Elec. Prods., Inc. v. City of Newton, 183 N.E.2d 118 (Mass. 1962); Rando v. Town of North Attleboro, 692 N.E.2d 544 (Mass. App. 1998); Bucholz v. City of Omaha, 120 N.W.2d 270 (Neb. 1963); Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960); Chrismon v. Guilford Cty., 370 S.E.2d 579 (N.C. 1988) (citing this treatise); Hall v. City of Durham, 372 S.E.2d 564 (N.C. 1988) (same).

[2] King's Mill Homeowners Ass'n v. City of Westminster, 557 P.2d 1186 (Colo. 1976).

[3] Scrutton v. County of Sacramento, 79 Cal. Rptr. 872 (Cal. App. 1969); Gladwyne Colony, Inc. v. Township of Lower Merion, 187 A.2d 549 (Pa. 1963); State ex rel. Myhre v. City of Spokane, 422 P.2d 790 (Wash. 1967). *But see* Transamerica Title Ins. Co. v. City of Tucson, 533 P.2d 693 (Ariz. App. 1975). *See also* §§ 9.11–9.15.

[4] 421 N.E.2d 818 (N.Y. 1981). *Accord* DePaolo v. Town of Ithaca, 694 N.Y.S.2d 235 (App. Div. 1999). *See also* Chrismon v. Guilford Cty., 370 S.E.2d 579 (N.C. 1988) (reviewing benefits of conditional zoning; citing this treatise);

which was "within the spirit" of the enabling legislation as a means of harmonizing "the landowner's need for rezoning with the public interest." It added that preventing the legislative body from imposing conditions that protect adjacent property would not be "in the best interests of the public."

Some courts do not approve unilateral conditional zoning. In *Bartsch v. Planning & Zoning Comm'n*,[5] a municipality conditioned a rezoning on the filing of a restrictive covenant that limited the use of the land to a medical office building. The court held the covenant was a "blatant violation" of the "strict" statutory provision that requires uniform regulations within zoning districts.

§ 6.65 Proper Purpose View.

Collard[1] represents a judicial view which holds that unilateral conditions do not necessarily invalidate a rezoning if they serve proper zoning purposes and if the rezoning is valid under the usual zoning map amendment tests. This point of view is illustrated by *Cross v. Hall County*,[2] which held that neighbors cannot attack conditions imposed for their "benefit and protection . . . to ameliorate the effects of the zoning change." *Goffinet v. County of Christian*[3] is a similar case. The county imposed site development conditions on a rezoning for a synthetic gas production facility. The court held that the conditions "are not of such a nature as to constitute an abrupt departure from the comprehensive zoning plan . . ., which emphasizes substantial industrial development for the future." The court reviewed and upheld the rezoning under its traditional zoning tests and rejected a spot zoning objection to the zoning amendment.

These cases treat zoning conditions as a neutral factor in their review of zoning map amendments. They take the reasonable view that neighbors should not be allowed to complain of zoning conditions imposed for their benefit. Some courts still show concern over possible abuses of the conditional zoning process.[4]

§ 6.66 Site Plan Review.

Site plan review is a zoning technique that allows municipalities to exercise control over the site details of a development. In the typical site plan review procedure, the applicant for an amendment, conditional use, variance, or building permit submits a detailed site plan to the plan commission, zoning board, or

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[5] 506 A.2d 1093 (Conn. App. 1986). *Accord* Board of County Comm'rs v. H. Manny Holtz, Inc., 501 A.2d 489 (Md. App. 1985); Dacy v. Village of Ruidoso, 845 P.2d 793 (N.M. 1992) (municipality promised to rezone).

[1] § 6.64.

[2] 235 S.E.2d 379 (Ga. 1977).

[3] 357 N.E.2d 442 (Ill. 1976). *See* Thornber v. Village of N. Barrington, 747 N.E.2d 513 (Ill. App. 2001) (contract zoning not found).

[4] Nolan v. City of Taylorville, 420 N.E.2d 1037 (Ill. App. 1981).

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make a fill on land, fix fences, and indemnify him against risks in moving the building as to persons and property, since it cannot engage in the work of moving and repairing buildings of another nor can it carry casualty and indemnity risks for individuals or other corporations.[27]

§ 29:11 Contracts prohibited—Contracts limiting legislative power

Research References

West's Key Number Digest, Municipal Corporations ⚖246; Zoning and Planning ⚖160

Am. Jur. 2d, Public Contacts § 14

The officers of a municipal corporation cannot confer public powers upon others, nor delegate legislative powers; nor can powers conferred upon, or which appertain, or properly belong, to any office or department be surrendered or transferred and be performed by others.[1] These principles apply to all municipal contracts. No part of any power

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[27]**Mich.**—Wheeler v. City of Sault Ste. Marie, 164 Mich. 338, 129 N.W. 685 (1911).

[Section 29:11]

[1]**Ark.**—Paving Imp. Dist. No. 105 of Pine Bluff v. Wright, 181 Ark. 919, 28 S.W.2d 1062 (1930).

Colo.—Crossroads West Limited Liability Co. v. Town of Parker, 929 P2d 63 (Colo App 1996).

Fla.—County of Volusia v. City of Deltona, 925 So. 2d 340 (Fla. Dist. Ct. App. 5th Dist. 2006).

Iowa—Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41 (Iowa 1991).

Kan.—Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001).

Md.—Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514, 814 A.2d 469 (2002).

N.J.—Contract of municipal corporation will not be construed to waive or surrender right of corporation to act with freedom with reference to its revenues unless intention, as well as power, to do so clearly appears. Curtiss-Wright Corp. v. Passaic Val. Water Commission, 89 N.J. Super. 111, 214 A.2d 36, 62 Pub. Util. Rep. 3d (PUR) 37 (App. Div. 1965).

N.Y.—Belden v. City of Niagara Falls, 230 A.D. 601, 245 N.Y.S. 510 (4th Dep't 1930).

N.C.—McGuinn v. City of High Point, 217 N.C. 449, 8 S.E.2d 462, 128 A.L.R. 608 (1940).

Or.—Morris v. City of Salem, 179 Or. 666, 174 P.2d 192 (1946) (cit-

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Or. 666, 174 P.2d 192 (1946) (cit-

conferred upon the corporation can be transferred or delegated to other persons,[2] nor can the city or town, through its officers, grant away by contract or otherwise to private corporations or individuals the authority to control the powers and functions properly pertaining to the municipal government.[3] This rule is well-illustrated in the cases relating to granting franchises of various kinds, market, and

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ing this treatise).

Vt.—Larkin v. City of Burlington, 172 Vt. 566, 772 A.2d 553 (2001).

Va.—Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994) (no delegation of power).

See also §§ 10:1 et seq.

[2]**Cal.**—San Diego County v. California Water & Tel. Co., 30 Cal. 2d 817, 186 P.2d 124, 175 A.L.R. 747 (1947) (citing this treatise).

Colo.—Crossroads West Limited Liability Co. v. Town of Parker, 929 P2d 63 (Colo App 1996).

Fla.—County of Volusia v. City of Deltona, 925 So. 2d 340 (Fla. Dist. Ct. App. 5th Dist. 2006).

Iowa—Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41 (Iowa 1991).

La.—Hudson v. City of Bossier City, 930 So. 2d 881 (La. 2006).

Miss.—Smith v. Mitchell, 190 Miss. 819, 1 So. 2d 765 (1941).

Mo.—Contract to pay for maintenance of fire patrol service by revenue derived from insurance license tax held not a delegation of municipal power to tax. State ex rel. Kansas City Ins. Agent's Ass'n v. Kansas City, 319 Mo. 386, 4 S.W.2d 427 (1928).

N.C.—Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980) (citing this treatise).

Va.—Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994) (no delegation of power).

[3]**Colo.**—Crossroads West Limited Liability Co. v. Town of Parker, 929 P2d 63 (Colo App 1996).

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Iowa—Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41 (Iowa 1991).

Ky.—City of Middlesboro v. Kentucky Utilities Co., 284 Ky. 833, 146 S.W.2d 48 (1940) (lack of power of municipal electric utility to contract with federal agency for term of 20 years as to purchase and distribution of current).

Mo.—Aquamsi Land Co. v. City of Cape Girardeau, 346 Mo. 524, 142 S.W.2d 332 (1940) (park construction agreement giving federal agency control of city's operations as being invalid).

other privileges, which may result in a monopoly or constitute exclusive rights in the grantee which will prevent or hamper the municipal authorities in providing the proper local regulations.[4] A governmental function is one undertaken because of a duty imposed upon the municipality for the welfare or protection of its citizens.[5]

The established rule is that municipal corporations have no power to make contracts which will control them in the performance of their legislative powers and duties.[6] Accordingly, the law is well-settled that a city cannot by contract

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Neb.—Seidel v. City of Seward, 178 Neb. 345, 133 N.W.2d 390 (1965).

N.J.—Beckmann v. Teaneck Tp., 6 N.J. 530, 79 A.2d 301 (1951) (citing this treatise) (lack of power of municipality to bind itself in contract to rezone an area) .

N.Y.—Where the council has authority to acquire a waterworks system, it cannot, before the city has acquired any water system at all, enter into a contract with an engineer by which he is to have charge for an indefinite period of the additions to be made to the plant if purchased. Witmer v. City of Jamestown, 125 A.D. 43, 109 N.Y.S. 269 (4th Dep't 1908), aff'd, 196 N.Y. 553, 90 N.E. 1167 (1909).

Tex.—City of Farmers Branch v. City of Addison, 694 S.W.2d 94 (Tex. App. Dallas 1985), writ refused n.r.e., (July 10, 1985).

Vt.—Larkin v. City of Burlington, 172 Vt. 566, 772 A.2d 553 (2001).

Va.—Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994) (no delegation of power).

[4]**Va.**—Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994) (no delegation of power).

See §§ 34:1 et seq.

[5]**Ariz.**—Copper Country Mobile Home Park v. City of Globe, 131 Ariz. 329, 641 P.2d 243 (Ct. App. Div. 2 1981) (provision of sewer service to nonresidents of municipality as being a proprietary function).

Iowa—Marco Development Corp. v. City of Cedar Falls, 473 N.W.2d 41 (Iowa 1991).

[6]**U.S.**—Byrd v. Martin, Hopkins, Lemon and Carter, P.C., 564 F. Supp. 1425 (W.D. Va. 1983), judgment aff'd, 740 F.2d 961 (4th Cir. 1984).

Cal.—Wills v. City of Los Angeles, 209 Cal. 448, 287 P. 962, 69 A.L.R. 1044 (1930).

Fla.—County of Volusia v. City of Deltona, 925 So. 2d 340 (Fla. Dist. Ct. App. 5th Dist. 2006).

Ill.—Selby v. Village of Winfield, 255 Ill. App. 67, 1929 WL 3387 (2d Dist. 1929).

Ind.—Agreement or contract made by individuals with municipal

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or public officials for purpose of influencing exercise of discretion vested in them by law, as to manner in which they shall perform public duties, is void as against public policy even though consideration for it inures to benefit of public. Pippenger v. City of Mishawaka, 119 Ind. App. 397, 88 N.E.2d 168 (1949).

Kan.—Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001); Landau v. City of Leawood, 214 Kan. 104, 519 P.2d 676 (1974) (covenant limiting assessment for use of city sewer as unenforceable).

La.—Hudson v. City of Bossier City, 930 So. 2d 881 (La. 2006).

Md.—Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514, 814 A.2d 469 (2002). Although a contract or agreement to zone, where made between a developer and the zoning authority, is invalid, a contract entered into in good faith between the developer and a municipality which does not have control over the classification and whose authority is limited to recommendation is valid. City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967).

Minn.—A contract by a city with a railway company to maintain for all future time a bridge used by the railroad company and the public and restore it to its former condition of usefulness is invalid on this ground. State ex rel. City of St. Paul v. Minnesota Transfer Ry. Co., 80 Minn. 108, 83 N.W. 32 (1900).

N.Y.—Andgar Associates, Inc. v. Board of Zoning Appeals of Incorporated Village of Port Washington North, 30 A.D.2d 672, 291 N.Y.S.2d 991 (2d Dep't 1968); City of New York v. Second Ave. R. Co., 32 N.Y. 261, 1865 WL 3959 (1865).

Ohio—State ex rel. Gordon v. Taylor, 149 Ohio St. 427, 37 Ohio Op. 112, 79 N.E.2d 127 (1948).

S.D.—Ericksen v. City of Sioux Falls, 70 S.D. 40, 14 N.W.2d 89 (1944) (bargaining away police powers with respect to sewers).

Tex.—Fidelity Land & Trust Co. of Texas v. City of West University Place, 496 S.W.2d 116 (Tex. Civ. App. Houston 14th Dist. 1973), writ refused n.r.e., (Sept. 25, 1973).

Va.—Concerned Residents of Gloucester County v. Board of Sup'rs of Gloucester County, 248 Va. 488, 449 S.E.2d 787 (1994) (no delegation of power).

[7]**Cal.**—Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1st Dist. 1976) (citing this treatise).

Colo.—Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 60 Ed. Law Rep. 964 (Colo. 1990) (school termination policy handbook as not binding subsequent school boards).

N.M.—There is a distinction between contracts which merely involve a city's proprietary or business functions and those attempting to curtail or prohibit its legislative or administrative authority; the former are valid, the latter are uniformly invalid. Spray v. City of Albuquerque,

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powers.[8] Hence, a municipality cannot agree that a sidewalk shall not be graded beyond a certain depth,[9] that a street or public way shall be vacated[10] or that a boulevard shall be constructed.[11] Nor may a municipality bind itself to assist in securing zoning changes and in other matters requiring local

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94 N.M. 199, 608 P.2d 511 (1980).

N.Y.—Britton v. City of New York, 12 Abb. Pr. 367, 21 How. Pr. 251, 1843 WL 4913 (N.Y. 1843); Britton v. City of New York, 12 Abb. Pr. 367, 21 How. Pr. 251, 1843 WL 4913 (N.Y. 1843).

Tex.—City of Marshall v. Allen, 115 S.W. 849 (Tex. Civ. App. 1909), writ refused; Waterbury v. City of Laredo, 68 Tex. 565, 5 S.W. 81 (1887) (contract divesting city of legislative power as void).

Vt.—Larkin v. City of Burlington, 172 Vt. 566, 772 A.2d 553 (2001).

[8]**U.S.**—Joleewu, Ltd. v. City of Austin, 916 F.2d 250 (5th Cir. 1990), opinion vacated in part, 934 F.2d 621 (5th Cir. 1991) (Texas law); Joleewu, Ltd. v. City of Austin, 916 F.2d 250 (5th Cir. 1990), opinion vacated in part, 934 F.2d 621 (5th Cir. 1991) (timing of acquisition of property).

Cal.—Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1st Dist. 1976) (citing this treatise).

Colo.—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

Kan.—Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001).

Minn.—Western States Utilities Co. v. City of Waseca, 242 Minn. 302, 65 N.W.2d 255, 6 Pub. Util. Rep. 3d (PUR) 324 (1954).

Tex.—Southwestern Bell Tel. Co. v. City of Port Arthur, 491 S.W.2d 187 (Tex. Civ. App. Beaumont 1973), writ refused n.r.e., (July 3, 1973) (by franchise).

Vt.—Larkin v. City of Burlington, 172 Vt. 566, 772 A.2d 553 (2001).

[9]**Tex.**—City of Marshall v. Allen, 115 S.W. 849 (Tex. Civ. App. 1909), writ refused.

[10]**Cal.**—An agreement by local officials to abandon, vacate, or sell a road is void because it constitutes an improper attempt by local officials to bind themselves in advance as to the exercise of their judgment in the future and because the receipt of the agreed consideration might influence their future decision, which is to be made primarily upon considerations of public necessity for highway purposes. San Diego County v. California Water & Tel. Co., 30 Cal. 2d 817, 186 P.2d 124, 175 A.L.R. 747 (1947).

[11]**Ind.**—Pippenger v. City of Mishawaka, 119 Ind. App. 397, 88 N.E.2d 168 (1949) (vacation of streets).

Mo.—Thompson v. City of St. Louis, 253 S.W. 969 (Mo. 1923).

N.C.—Bessemer Imp. Co. v. City of Greensboro, 247 N.C. 549, 101 S.E.2d 336 (1958) (promise of city to open street was unenforceable).

governmental approval.[12] Such an agreement has been held void as against public policy since it not only creates the possibility of future conflicts of interest but also obligates the municipality to create future legislation.[13]

Where a city has the right to lease a part of its wharf for the purpose of a warehouse and grain elevator, it must reserve the right to terminate such lease whenever the public interest demands such action.[14] Also, municipal authorities cannot bargain away the right to make reasonable laws and to exercise the police power whenever it becomes necessary to conserve or promote the health, safety or welfare of the community.[15] So, power conferred upon a city to contract

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[12]**Ky.**—City of Louisville v. Fiscal Court of Jefferson County, 623 S.W.2d 219 (Ky. 1981).

Md.—Mayor and Council of Rockville v. Rylyns Enterprises, Inc., 372 Md. 514, 814 A.2d 469 (2002).

[13]**Ky.**—City of Louisville v. Fiscal Court of Jefferson County, 623 S.W.2d 219 (Ky. 1981).

[14]**Mo.**—Belcher Sugar Refining Co. v. St. Louis Grain Elevator Co., 101 Mo. 192, 13 S.W. 822 (1890).

See also §§ 28:1 et seq.

[15]**Cal.**—City's contract to make sewer connections on certain premises free of charge in exchange for sewer line right-of-way over such premises was not assailable on ground that it constituted a bargaining of city's police power to regulate charges for sewerage, since premises involved were outside city limits and not subject to police jurisdiction of city. Tronslin v. City of Sonora, 144 Cal. App. 2d 735, 301 P.2d 891 (3d Dist. 1956).

Colo.—Crossroads West Limited Liability Co. v. Town of Parker, 929 P2d 63 (Colo App 1996).

Fla.—Housing Authority of City of Melbourne v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App. 4th Dist. 1967) (agreement where city agreed to cooperate with public housing authority, and, insofar as it might lawfully do so, make such changes in any zoning of the site and surrounding territory as were reasonable and necessary for the development and protection of the project and surrounding territory was not illegal on the ground that it constituted an unlawful delegation of the city's power to zone); Florida East Coast Ry. Co. v. City of Miami, 76 Fla. 277, 79 So. 682, 1 A.L.R. 303 (1918) (power of city to compel a railway to put in, maintain, and operate safety gates at crossing of its railway and a street which had been dedicated by the railway for street purposes, where a contract between the city and railway was involved, which granted to the city a right-of-way over the property of the railway in consideration of the city bearing the expense of the safety gates, etc., was not a bartering away of the city's police power).

Ind.—City of New Albany v. New Albany Street R. Co., 172 Ind.

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respecting a particular matter does not confer power, by implication, so to contract with reference to it as to embarrass and interfere with its future control over the matter, as the public interests may require.[16] Hence, all contracts which interfere with the legislative or governmental functions of the municipality are absolutely void.[17]

487, 87 N.E. 1084 (1909).

Kan.—Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001).

Ky.—A contract to keep a pavement in repair for 10 years is not beyond the power of a city to make on the ground that it amounts to an abrogation by the city of a governmental function or of its police power. Barber Asphalt Pav. Co. v. City of Louisville, 123 Ky. 687, 29 Ky. L. Rptr. 1255, 97 S.W. 31, 29 (1906).

Or.—The installation of parking meters is not a bartering away or surrendering of the city's police power. On the contrary, it is an exercise of that power. Morris v. City of Salem, 179 Or. 666, 174 P.2d 192 (1946).

Pa.—Contract with two universities relating to the operation, management, and control of the city's general hospital was not an unlawful delegation of a city's powers and responsibilities. Robinson v. City of Philadelphia, 400 Pa. 80, 161 A.2d 1, 1 Fair Empl. Prac. Cas. (BNA) 14, 1 Fair Empl. Prac. Cas. (BNA) 478, 46 L.R.R.M. (BNA) 2922, 1 Empl. Prac. Dec. (CCH) P 9664, 40 Lab. Cas. (CCH) P 66539 (1960).

[16]**U.S.**—Scofield Engineering Co. v. City of Danville, 35 F. Supp. 668 (W.D. Va. 1940), judgment aff'd, 126 F.2d 942 (C.C.A. 4th Cir. 1942).

Kan.—Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001).

N.M.—City contract with homeowners barring city from erecting five-foot fence around city golf course and providing for lower fencing specifications was not void as against public policy inasmuch as maintenance of golf course was proprietary rather than governmental function. Spray v. City of Albuquerque, 94 N.M. 199, 608 P.2d 511 (1980).

Tex.—City of Brenham v. Brenham Water Co., 67 Tex. 542, 4 S.W. 143 (1887).

Municipal contracts with grantees of franchises to use streets, see §§ 34:1 et seq.

[17]**U.S.**—Contract between county and developer to install sewer in area of proposed shopping center concerned governmental function and was beyond powers of county since future county governing bodies would have been bound by agreement as to location of sewer and agreement was made irrespective of financial ability of county to complete sewer construction. Byrd v. Martin, Hopkins, Lemon and Carter, P.C., 564 F. Supp. 1425 (W.D. Va. 1983), judgment aff'd, 740 F.2d 961 (4th Cir. 1984).

Ark.—Lamar Bath House Co. v. City of Hot Springs, 229 Ark. 214, 315 S.W.2d 884 (1958) (contract for exemption from city sewer charges invalid).

The reserved powers doctrine rests on a fundamental inability of sovereign governments to contract away essential attributes of their sovereignty.[18] Certain core governmental powers, like the power of eminent domain and the police power, are reserved to the sovereign and cannot be abdicated or surrendered by contract,[19] and any attempt to do so is simply unenforceable.[20] Thus, contracts surrendering the power of eminent domain are void.[21] However, the doctrine

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Colo.—Crossroads West Limited Liability Co. v. Town of Parker, 929 P2d 63 (Colo App 1996); Adams County School Dist. No. 50 v. Dickey, 791 P.2d 688, 60 Ed. Law Rep. 964 (Colo. 1990) (school termination policy handbook as not binding subsequent school boards).

Ga.—Barr v. City Council of Augusta, 206 Ga. 750, 58 S.E.2d 820 (1950) (city agreement to furnish sewer services throughout county as being invalid).

Kan.—Red Dog Saloon v. Sedgwick County Bd. of Com'rs, 29 Kan. App. 2d 928, 33 P.3d 869 (2001).

Nev.—Agreement between city and power company to place electric wires above ground in violation of ordinance requiring underground circuits was void. City of Las Vegas v. Cragin Industries, Inc., 86 Nev. 933, 478 P.2d 585 (1970) (disapproved of by, Sandy Valley Associates v. Sky Ranch Estate Owners Ass'n, 117 Nev. 948, 35 P.3d 964 (2001)).

N.Y.—Atlantic Beach Property Owners' Ass'n v. Town of Hempstead, 3 N.Y.2d 434, 165 N.Y.S.2d 737, 144 N.E.2d 409 (1957) (citing this treatise).

N.C.—Contract between a city director of utilities and persons who laid out water lines beyond the corporate limits, where those persons would be reimbursed the amount expended in constructing the lines if and when the corporate boundaries were enlarged and the lines included within the new boundaries, was void. Styers v. City of Gastonia, 252 N.C. 572, 114 S.E.2d 348 (1960).

Tenn.—An agreement to dedicate land for public park purposes provided that the city amend a zoning ordinance was unenforceable. City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953).

Tex.—Bowers v. City of Taylor, 16 S.W.2d 520 (Tex. Comm'n App. 1929).

Utah.—Warm Springs Co. v. Salt Lake City, 50 Utah 58, 165 P. 788 (1917) (quoting this treatise).

[18]**Colo.**—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

[19]**Colo.**—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

[20]**Colo.**—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

[21]**Colo.**—Wheat Ridge Urban Renewal Authority v. Cornerstone

implies nothing about the ability of governments to otherwise enter into contracts involving the exercise of their sovereign powers.[22] A contract with a governmental unit is not rendered void merely by the fact that it includes a commitment to exercise a core governmental power.[23]

§ 29:12 Contracts prohibited—Contract to perform public duty

Research References

West's Key Number Digest, Municipal Corporations ⚷246
Am. Jur. 2d, Public Contacts § 14

A city may not enter into a contract under which it exacts compensation from a citizen for the performance of a public duty imposed on it by law, either expressly or by implication.[1] For example, a city could not, for compensation, agree to keep a street open and unobstructed[2] to furnish within the municipal limits police or fire protection[3] or sewerage service.[4] A contract by county commissioners with a guardian of a mentally ill person to take care of him or her in the

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Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

[22]**Colo.**—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

[23]**Colo.**—Wheat Ridge Urban Renewal Authority v. Cornerstone Group XXII, L.L.C., 176 P.3d 737 (Colo. 2007).

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[1]**Ky.**—Holbrook v. Letcher County, 223 Ky. 597, 4 S.W.2d 382 (1928).

Miss.—Fitzgerald v. Town of Magnolia, 183 Miss. 334, 184 So. 59 (1938).

N.Y.—Brown v. Ward, 246 N.Y. 400, 159 N.E. 184 (1927).

S.C.—Green v. City of Rock Hill, 149 S.C. 234, 147 S.E. 346 (1929).

[2]**Me.**—Penley v. City of Auburn, 85 Me. 278, 27 A. 158 (1893).

[3]**U.S.**—"I suppose a city can make no contract for the discharge of a purely public duty; such a contract as in case of performance it can enforce compensation for, or for nonperformance expose itself to liability. It cannot use public funds in any such direction. A city cannot contract with me to put out a fire in my building, and then exact a compensation from me for the extinguishing of that fire, nor thus expose itself to liability if it failed to put out that fire. It is discharging a purely public duty." The Maggie P., 25 F. 202 (C.C.E.D. Mo. 1885).

[4]**Ill.**—Where a residential subdivision, in which property owners had covenanted to pay certain charges for maintenance services to be performed by a subdivision committee, was incorporated into a city, city

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rights transferred by "permitting a greater than normal intensity of development of the transferee or 'receiving' property."[349] Development rights not used by the transferor can be sold to the transferee, compensating the transferor for the loss caused by the original restriction.

The Supreme Court has never ruled directly on the constitutional validity of TDRs, but in *Penn Central Transportation Company v. New York City,* the court did mention that TDRs should be considered in a taking analysis. "While these rights [TDRs] may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the lot has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation."[350] Because the court held that New York City's Landmarks Preservation Law as applied to Grand Central Terminal was not a taking, the court did not have to rule directly on the validity of TDRs as compensation. Some state courts, however, have invalidated the use of TDRs as compensation.[351]

In *Suitum v. Tahoe Regional Planning Agency,* the Supreme Court discussed TDRs in the context of a ripeness question.[352] All nine justices agreed that a challenge to the Tahoe agency's decision that an undeveloped lot near Lake Tahoe was ineligible for development was a "final decision" and thus ripe for review.[353] Justice Souter writing for a six-justice majority considered the facts that the landowner was entitled to TDRs under the applicable regulation and that no discretionary decision was necessary before she could sell her TDRs as evidence that a "final decision" had been reached.[354]

Justice Scalia, writing a concurring opinion joined by Justices O'Connor and Thomas, objected strongly to the notion that TDRs should be considered "on the taking rather than the just compensation side of the equation." Because TDRs have nothing to do with the use of the property being regulated, they are not relevant to the taking question, he asserted:

> I do not mean to suggest that there is anything undesirable or devious about TDRs themselves. To the contrary, TDRs can serve a commendable purpose in mitigating the economic loss suffered by an individual whose property use is restricted, and property value diminished, but not so substantially as to produce a compensable taking. They may also form a proper part, or indeed the entirety, of the full compensation accorded a landowner when his property is taken. . . . I suggest only that the relevance of TDRs is limited to the compensation side of the takings analysis, and that taking them into account in determining whether a taking has occurred will render much of our regulatory takings jurisprudence a nullity.[355]

Conditional Zoning

Municipalities, developers, and affected neighbors compromise many land use controversies by adding conditions to approval of the particular project. In a leading case, the Court of Appeals of New York upheld a municipality's decision to condition an amendment to its zoning ordinance on the execution of a declaration of conveyance by the developer that provided in part that "no

construction may occur on the property so rezoned without the consent of the municipality."[356] An application to enlarge and extend an existing structure on the premises was later denied. In upholding the condition against the charge that it was arbitrary and capricious, the court made the following comments about conditional zoning:

> Probably the principal objection to conditional rezoning is that it constitutes illegal spot zoning, thus violating the legislative mandate requiring that there be a comprehensive plan for, and that all conditions be uniformed within, a given zoning district. When courts have considered the issue, the assumptions have been made that conditional zoning benefits particular land owners rather than the community as a whole and that it undermines the foundation upon which comprehensive zoning depends, by destroying uniformity within used districts. Such unexamined assumptions are questionable. First, it is a downward change to a less restrictive zoning classification that benefits the property rezoned and not the opposite imposition of greater restrictions on land use. Indeed, imposing limiting conditions, while benefitting surrounding properties, normally adversely affects the premises on which the conditions are imposed. Second, zoning is not invalid per se, mainly because only a single parcel is involved or benefitted; the real test for spot zoning is whether the change is other than part of a well considered and comprehensive plan calculated to serve the general welfare of the community. Such a determination, in turn, depends on the reasonableness of the rezoning in relation to neighboring uses—an inquiry required regardless of whether the change in zone is conditional in form. Third, if it is initially proper to change a zoning classification without the imposition of restrictive conditions notwithstanding that such change may depart from uniformity, then no reason exists why accomplishing that change, subject to condition should automatically be classified as impermissible spot zoning. . . . Another fault commonly voiced in disapproval of conditional zoning is that it constitutes an illegal bargaining away of a local government's police power. . . . The imposition of conditions on property sought to be rezoned may not be classified as a prospective commitment on the part of the municipality to zone as requested if the conditions are met; nor would the municipality necessarily be precluded on this account from later reversing or altering its decision. . . . Conditional rezoning is a means of achieving some degree of flexibility in land use control by minimizing the potentially deleterious effect of a zoning change on neighboring properties; reasonably conceived conditions harmonize the landowners' need for rezoning with the public interest, and certainly fall within the spirit of the neighboring legislation.[357]

Development Agreements and Contract Zoning

Because of the uncertainty of the more flexible review processes described previously, developers often seek "developer agreements," authorized in sev-

eral states, to set the "rules of the game" for the review process.[358] More significantly, however, the developer may want assurance on substantive zoning issues. The rise in incentive-based urban and suburban redevelopment has given way to the issue of "contract zoning"—a conclusion that the government has illegally bargained away its legislative obligation to independently engage in land use zoning and regulation. In virtually all urban and redevelopment projects, the developer and city enter into a development agreement or redevelopment agreement. The essence of such agreements, which are true legal agreements, is a promise by the city to provide economic incentives and often eminent domain rights to the developer in exchange for a promise by the developer to acquire and develop the property.

In most such agreements, subsequent land use approvals by the very entity that is a party to the agreement is assumed, but not necessarily contractual. Thus the agreement is entered into, but the developer may not legally bind the city to a promise to grant subseqent rezonings or subdivision approvals. The developer will always reserve such items as contingencies, however. Given the universal validity and use of development agreements, there is a new relevance to the issue of contract zoning, which involves the duality of the city's identity as both a private business party or even "partner" with the developer and as the government, with power and statutory obligation to regulate, independent of its contractual promises.

The states vary in their scrutiny of city commitments or promises to grant or "cooperate" in approvals. Thus, in one recent case, a Florida court held that an agreement by a county to "support and expeditiously process" a rezoning application was unenforceable.[359] The issue of contract zoning is related to the issue of the government's power to grant, or as detractors would say, "sell to the highest bidder" its condemnation rights, and the condemnation issue of what use is public, as discussed in chapter 3.[360]

Another species of the development agreement is specifically designed to protect the developer from changes in land use ordinances over the course of a long-term project and has been specifically validated as not amounting to contract zoning. Thus California has enacted legislation vesting rights by enforceable development agreements between city and developer, limiting the power of the city to apply new ordinances to pending developments.[361] Such agreements have survived contract zoning challenges, provided that the city has not "surrendered control of all of its land use authority," in a case in which the court affirmed an award of $727,500 in damages to an apartment developer when the city reduced the approved density from 140 to 55 units by amending the zoning after entering into a development agreement with the developer.[362] At least ten other states have enacted similar development agreement legislation.[363] Florida has also enacted development agreement legislation but takes a different view regarding the issue of contract zoning. In one case, a Florida court invalidated as contract zoning, a development agreement in which the city had agreed to "support and expeditiously process" a rezoning application, even though the statute expressly permits development agreements establishing vested rights.[364]

F. FLEXIBLE ZONING.

§ 6.60 Role and Function

Page 6-72, note 1, add:

See also Town of Rhine v. Bizzell, 751 N.W.2d 780 (Wis. 2008) (discussing form based zoning and mixed use zoning).

§ 6.62 Contract and Conditional Zoning.

Page 6-75, note 1, add:

Md. Code Ann. art. 66B. § 4.01(c)(2). *See generally* Town of Rhine v. Bizzell, 751 N.W.2d 780 (Wis. 2008) (discussing and contrasting conditional-use district zoning and conditional zoning), quoting this Treatise.

Page 6-76, note 4, add:

Durand v. IDC Bellingham, LLC, 793 N.E.2d 359 (Mass. 2003) (not contract zoning when utility voluntarily gave eight million to town for high school so town would rezone property).

§ 6.63 Bilateral.

Page 6-76, note 1, add:

Mayor & Council v. Rylns Enters., 814 A.2d 469 (Md. 2002) (zoning agreement in annexation agreement held invalid) (subsequent statutory authorization enacted at Md. Code Ann. art. 66B. § 4.01(c)(2)).

§ 6.64 Unilateral.

Page 6-78, note 1, add:

McLean Hosp. Corp. v. Town of Belmont, 778 N.E.2d 1016 (Mass. App. 2002) (cannot dispute legality of agreements because received benefit of agreement); Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249 (Tex. App. 2004), *rev'd in part*, 198 S.W.3d 770 (Tex. 2006) (on other grounds) (upholds ordinance requiring fence on car wash as unilateral, strikes down reversionary clause).

§ 6.66 Site Plan Review.

Page 6-81, note 6, add:

Smith v. Town of Mendon, 771 N.Y.S.2d 781 (App. Div. 2004) (conservation easement in site plan review not an exaction), *aff'd* 820 N.E.2d 281 (NY 2004).

Page 6-81, note 7, add:

See also Castle Hill Apartments Ltd. Partnership v. Planning Board of Holyoke, 844 N.E.2d 1098 (Mass. Ct. App. 2006) (site plan review cannot be based on strictly on aesthetic grounds).

Page 6-81, note 10, add to Compare:

Stratosphere Gaming Corp. v. City of Las Vegas, 96 P.3d 756 (Nev. 2004)

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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT 0F THE STATE OF

IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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Petitioners/Plaintiffs,	MEMORANDUM IN SUPPORT OF DECLARATORY JUDGMENT
vs.	
BOARD OF COMMISSIONERS, KOOTENAI COUNTY, STATE OF IDAHO,	
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COMES NOW, Petitioners/Plaintiffs, LINDA CISZEK, et al (collectively "CISZEK") by and through their attorneys, Wetzel, Wetzel & Holt, P.L.L.C., and hereby presents this MEMORANDUM IN SUPPORT OF DECLARATORY JUDGMENT.

THE REMEDY

A petition for declaratory judgment is appropriate when the validity of a zoning ordinance is challenged. CISZEK challenges the validity of Kootenai County Ordinance No. 417 adopted August 13, 2008 rezoning Lots 1 and 2 of Block 3 and Lots 3 and 4 of Block 4 of Stepping Stones Subdivision, a copy of which is attached hereto as Exhibit "A". CISZEK complains that the method followed by the Kootenai County Board of Commissioners ("BOCC") in swap zoning two separate parcels of property is in excess of the authority of the BOCC and is confiscatory, arbitrary, unreasonable and capricious. A petition for declaratory judgment is the appropriate remedy in this case.[1] CISZEK must prove her case by clear and convincing evidence.[2] A zoning ordinance enacted without complying with the law is void.[3]

THE FACTS

On January 16, 2008 the Kootenai County Planning Department accepted[4] an application from Coeur d'Alene Paving ("CDA Paving") requesting a concurrent zone change for two properties which was later explained by CDA Paving as an application requesting that the BOCC

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[1] *Burns* v. *Madison County Board of County Commissioners*, 09.10 ISCR 528 (2009) amended opinion 09.15.ISCR 162 (2009). *Black Labrador Investing, LLC* v. *Kuna City Council*, 09.8 ISCR 363 (2009). *Neighbors for Responsible Growth* v. *Kootenai County*, 09.8 ISCR 389 (2009). *McCuskey* v. *Canyon County*, 123 Idaho 657, 851 P.2d 953 (1993). *Jerome County* v. *Holloway*, 118 Idaho 681, 799 P.2d 969 (1990). *Burt* v. *City of Idaho Falls*, 105 Idaho 65, 665 P.2d 1075 (1983). *Schneider* v. *Howe* 142 Idaho 767, 133 P.3d 1232 (2006).
[2] *Estes* v. *City of Moscow*, 96 Idaho 922, 539 P.2d 275 (1975). *Cole Collister Fire Protection Dist.* v. *City of Boise*, 93 Idaho 558, 468 P.2d 290 (1979).
[3] *McCuskey* v. *Canyon Co.*, v 123 Idaho 657, 851 P.2d 953 (1993).
[4] AR. V. 1 p. 2003.

rezone both properties at the same time by swapping the Mining Zoning on one parcel for the Agricultural Zone on the other parcel.[5]

The Planning Department forthwith set this swap zoning request for public hearing and sent out notices to various affected agencies. The official notice stated in part:

> The Applicant is requesting to change the zoning classification on approximately twenty (20) acres of land from Mining to Agricultural. This property is no longer contiguous to current mining activities, and also to change the zoning classification of approximately twenty (20) acres from Agricultural to Mining. This property is adjacent to current mining activity."[6]

The Planning Department also sent notices of the impending public hearing to surrounding property owners which explained the nature of the swap and published the same notice in the official newspaper.[7] The staff report prepared by the Planning Department and presented at the hearing before the Hearing Examiner also described the benefits of swapping zones.[8]

The first public hearing was held on March 6, 2008 before the Kootenai County Hearing Examiner. The Hearing Examiner recommended that the application be denied.[9] Following the recommendation for denial entered by the Hearing Examiner, the swap zone was set for hearing

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[5] AR V. 1 p. 0002, pp. 0005-0006.
[6] AR V. 1 p. 0072.
[7] The official public notice states in part: ".... Case No. ZON08-0001, a request by Coeur d'Alene Paving to change the zoning classification of approximately 20 acres from Mining to Agricultural and approximately 20 acres from Agricultural to Mining. (AR V. 1 p. 0087).
[8] CDA Paving's narrative states that they are swapping Mining and Agricultural zoning so that the Mining zoned property will be closer to the existing mining operations in the area and to surrender Mining zoned property back to Agricultural on property that is further away from current mining operations and if approved, the mining operations will continue to utilize the current access and not impact the private roads the area. (AR V.1 p.0097).
[9] The Hearing Examiner's recommendation for denial states in part that the proposed zoning amendment from Agricultural to Mining does not appear to be "reasonably necessary or appropriate", given the rural residential character and density of development of the adjacent property, and testimony received regarding the incompatibility of the requested rezone of Agricultural land to Mining with the adjacent residential uses. While the proposed zone change results in no net increase in lands zoned for Mining, it appears to directly benefit one property owner at the expense of others. .... The requested zone change appears to be inconsistent with the future land use plan contained within the Kootenai County Comprehensive Plan, which designates the area as Rural Residential. The proposed zone change also appears to be inconsistent with Comprehensive Plan Goal 9, as detailed in Section V of this report, based upon finding listed in 5.01 and 5.02 above, which do not find the request to be "reasonably necessary" or "in the best interest of the public." (AR V. 1 p. 0420 -0421).

before the BOCC on May 8, 2008. The public hearing took 4 hours and 45 minutes. Twenty six (26) people submitted comment sheets, 6 were in favor of the swap zone and 16 were against.[10] The BOCC voted 2 to 1 in favor of the swap zone and set the case for an additional public hearing since the action was a material change to the recommendation issued by the Hearing Examiner. The second public hearing before the BOCC was held June 26, 2008. At the public hearing 20 comment sheets were presented, 39 were opposed to the swap zone and 2 were in favor. Two comment sheets were group representations: One with 14 opposed and one with 13 opposed.[11] The BOCC deliberated on the outcome of the public hearing on July 10, 2008, and again voted 2 to 1 to approve the swap zone. On August 7, 2008 the BOCC signed the Order of Decision and Ordinance No. 417 rezoning the properties. Ordinance No. 417 was published on August 13, 2008.

THE SWAP

CDA Paving sought to rezone two parcels. Both parcels are approximately 20 acres each made up of 2 ten acre tracts. One parcel is located on Highway 53 and is adjoined by a residential neighborhood and a mining pit owned by CDA Paving. The parcel on Highway 53 is identified as Lots 1 and 2 of Block 3 of Stepping Stones Subdivision and has always been zoned Agricultural.

The other parcel is landlocked and surrounded by small residential tracts. The landlocked parcel is identified as Lots 3 and 4 of Block 4 of Stepping Stones Subdivision.[12] The landlocked parcel was zoned Mining at the time of the application but had originally been zoned Agricultural as part of the Stepping Stones Subdivision. All of the parcels are identified on the

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[10]AR V. 2 p. 0425.
[11]AR V. 2 p. 0456.
[12]AR V. 1 p. 0097.

Kootenai County Comprehensive Plan Map as Rural Residential[13] and the continuing development of the land in the area is residential.[14]

The landlocked parcel is isolated from CDA Paving's current mining operations and CDA Paving's testimony describes how difficult it would be to mine the parcel. CDA Paving testified that the parcel had no existing road access except an undefined easement that was never produced in the record. CDA Paving portrayed mining on this landlocked parcel as devastating.[15] Building an access road along this easement would greatly impact the established residential acreages that surrounded this parcel. The new road CDA Paving would construct in the alleged easement would empty out onto unpaved rural roads which had not been designed or built for heavy traffic. Additionally, CDA Paving testified that during the mining operations, mined material would be trucked along these rural roads to the current mining operation on Highway 53 to be weighed before shipment.[16] Because the public access roads that would be used for transportation of these heavy materials were not designed for heavy truck access and included a blind intersection,[17] the Lakes Highway District and the Idaho Transportation Department were also anxious to prevent using this potential route.[18] Finally, CDA Paving

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[13] AR V. 1 p. 0202, AR V. 2 p. 0412.

[14] TR. p. 0102 lines 14-22, p. 0046 lines 20-23, AR. V. 1 p. 0420-0421.

[15] Mr. Cozad testified: We could devastate the property. Tear down the trees for the easement and strip the land. (TR. p. 0143 lines 7 -13) He also testified that in order for us to mine this we have to go down. It's just gonna create a hole out in the middle of nowhere. (TR. p. 0005 lines 18-20).

[16] AR. V. 1 p. 0200, CDA Paving described this truck traffic as significant (AR. V. 2 p. 0413) and Ms. Young estimated that the average traffic would be 50 to 100 trucks per day (Tr. p. 0022 lines 19-23.

[17] AR. V. 1 p. 0200.

[18] Joseph Wuest of Lakes Highway District stated in the letter to the Commissioners:.... The Board has no objections to the request of Phil Weist of Coeur d'Alene Paving, to switch the zoning from Agricultural to Mining on two (2) twenty (20) acre parcels located between Ramsey and Atlas Roads on the south side of Hwy 53. If the zone change is not granted, ingress and egress for the current lots (lots 3 & 4 of Stepping Stones Subdivision) zoned for mining, would be via a private easement onto Atlas Road. The amount of truck traffic generated by the mining operation would greatly impact Atlas Road as it is not built to commercial standards and would not withstand the additional traffic. Therefore, Lakes Highway District is in favor of the zone change as this would allow the current access for the business to remain on Hwy 53. (AR V. 2 p. 0253). Donald Davis, Senior Transportation Planner of the Idaho Transportation Department sent an email supporting the proposed rezones stating: It has come to our attention through Lakes Highway District that the zone change request was not recommended for approval by the Hearing Examiner and is coming before the County Commission for public hearing this evening (May 8, 2008). The Idaho Transportation Department, District 1, expresses the same concern as did the Lake Highway District if the zone change is not approved. Mining operations on the parcels as presently zoned would result in truck/mining related traffic on various private

explained how disruptive the dust and noise would be to the surrounding neighbors[19] and the negative impact to the neighbors when the topsoil was stripped from this landlocked parcel in order to get to the depth where the mining materials were located.[20]

The zoning for the parcel on Highway 53 was Agricultural at the time of the application. This parcel is surrounded by residential neighborhoods except for the boundary that it shares with the current CDA mining pit. CDA Paving described this parcel as the perfect place to locate mining activities. Although this parcel also adjoins residential acreages, this site was promoted in the application and during the public hearings as a site where mining activities would affect fewer residential neighbors by a ratio of 2 to 11.[21] Even the dust and noise from mining activities would be better at this site because CDA Mining could access the mining materials from the existing pit on their adjoining site which would reduce the amount of topsoil stripping activity. Traffic would, of course, be reduced and the rural roads surrounding the landlocked parcel would not be impacted.

Actual testimony and evidence supporting the rezoning for the Highway 53 parcel to Mining is harder to find in the record. The narrative describes the benefits for Coeur d'Alene Paving if the swap zone for the Highway 53 parcel was approved as follows:

> By having this zone changed there will be contiguous mining parcels, the traffic will retain the same truck traffic routes through the existing pit. ... By having the mining parcels contiguous, the land use would have less impact on surrounding property owners. This zone change would allow for more materials in the marketplace at a lower price for the benefit of all through increased competition.[22]

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easements between the sites and Atlas Road then between Atlas and Coeur d'Alene Paving's main operation on State Highway 53. It seems, from the access and circulation standpoint, that it would be appropriate to keep the mining operation on contiguous parcels. (AR V. 2 p.0430).

[19] AR V. 1 p. 0005.

[20] AR V. 1 p. 0200. Sandy Young testified that they would begin mining at ground level by mobilizing heavy equipment onto the parcel and begin to mine to reach a depth of 40 feet which would take several years. TR. p. 0021 lines 24-25, p. 0022 lines 1-2.

[21] AR V. 1 p. 0199.

[22] AR. V. 1 p. 0005.

So, the swap was set. As Seth Molding stated at the public hearing " … in short, I think that Coeur d'Alene is running a bluff. They're not going to mine the property that is zoned mining and it only benefits them if they get the swap."[23] CDA Paving convinced the BOCC that the Highway 53 parcel had to be rezoned Mining because mining on the landlocked parcel would be very bad for everyone.[24] One zone change could not be considered without the other.

[23] TR. p. 0107 lines 24-25, p. 25 lines 1-2. See also testimony of Paul Franz TR. p. 0053 lines 11-15.

[24] Representing the Applicant, Sandy Young presented the reasons to support the rezones as follows: The request before you tonight is for a zone change that is two-fold. This request takes two ten acre parcels that are zoned agricultural and request to change their classification to mining and in exchange takes two ten acre parcels that are mining and converts them to agricultural land. …. My client, Coeur d'Alene Paving, wishes to expand their area of mining. … Option – so I'm going to kind of break it down into two options tonight. And option one is for them to um be granted the zone change so that they can move forward and the pit can continue in this area. The option two is to move to this 20 acres to the west and the south and to – to start mining those so already zoned mining – they can start their operations there tomorrow. The downside to that is that they start at grade. That's downside number one. Number two is they don't have access to these parcels from here. So they create a new access and they begin at ground surface. Beginning at ground level means mobilizing heavy equipment to the 20 acres and leaving that equipment in place as they begin to mine. Reaching a depth of 40 feet with today's demand would take several years. … just uh the visual obstruction of having heavy equipment at ground surfaces is certainly going to be more obtrusive than if they stayed in the pit on this site. … Mining that 20 acres um of course means the access is cut in… that traffic would … trucks carrying material would be coming out here onto Atlas … 50 to 100 trucks a day during a busy peak season day. Revising option one to grant the zone change to this contiguous portion – no new accesses need to be created. All mining operations remain in the pit. Noise levels and dust levels do not increase. They stay at the current levels. I'd gone into Building and Planning several times to look at the file and one thing I didn't find was any letter of comment from Lakes Highway District. And so I was at the Lakes Highway District's meeting… I brought up that fact to them. Why hadn't they commented on this when certainly after I had driven the site, I knew they would have a very definite opinion about that many trucks using Atlas Road… I did the same presentation for them, then they were surprised … they did not realize that that new access would need to be created and the trucks would access onto – directly onto Atlas Road. They are opposed to – to that idea and they wrote a stronger letter yesterday which I will submit to you that basically says they support this zone change. …. So then I called ITD and talked to Don Davis … He stated that he was fully in support of the zone change for that reason and he submitted written documentation today that shows IDT's support of the project. (TR. p. 0019 lines7-25, p. 0020 lines 1-25, p. 0022 lines 1-25, p. 0023 lines 1-20). The Hearing Examiner summarized the negative impacts that CDA Paving had described in the public hearing as follows: Mark Mussman introduced the case. …He testified that the applicants were seeking a zone change from Mining to Agricultural on 20 acres of land, and requesting at the same time that 20 acres of land zoned Agricultural be re-zoned to Mining. He testified that the Comprehensive Plan identified that future land use in the area to be rural residential. (AR. V .2 p. 0412). Phil Weist, applicant's representative, testified that the applicants were trying to essentially trade zoning designations so that an expansion of their mining operation could remain contiguous with the existing operation, and allow them to utilize their existing driveway access to Highway 53. … He testified that 11 properties will be negatively effected if the applicants expand their mining operations on the twenty acres currently requested to be re-zoned Agricultural, while only 2 property owner will be impact if the zone change is approved, thus allowing them to expand their mining operation to the area that is requested to be rezoned from Agricultural to Mining. (AR. V. 2 p. 0412). Craig Conrad, applicant's representative, also testified that the applicant's proposal would keep the mining operations closer to Highway 53, and generally keep the mining operations in a more concentric area, thus minimizing impacts. . … He also testified that if the mining expansion occurred in the area currently zoned Mining it would require excavation to begin at the level of existing homes in the immediate vicinity. (AR. V. 2 p. 0413). Todd Kauffman, applicant's representative, testified that expansion into the parcels that are currently zoned for mining would result in significantly amounts of excavated materials being transported around Atlas Road to Highway 53, to the existing mining operation in order to weigh the materials prior to shipment. (AR. V. 2 p. 0413). Phil Weist testified that 11 properties will be negatively effected if the applicants expand their mining operations on the twenty acres currently requested to be re-zoned Agricultural, while only 2 property owners will be impacted if the zone change is approved, thus allowing them to expand their mining operation to the area that is requested to be rezoned from Agricultural to Mining. (AR. V. 2 p. 0412) … Craig Conrad, applicant's representative, also testified in rebuttal. He stated if they don't get the zone change approved, they will expand their operation in the area currently zone Mining, which will impact more people, and be closer to neighboring houses. (AR. V. 2 p. 0423).

THE LAW

1. SWAP ZONING IS IN EXCESS OF STATUTORY AUTHORITY

There is no statement in The Land Use Planning Act (LLUPA) or in the Kootenai County Zoning Ordinance that directly authorizes swap zones as an approved method for rezoning property. There is no language that even infers that swapping the zone on two separate parcels of property is an approved method for zoning property. The Idaho Supreme Court has specifically stated that zoning districts can only be established by specifically prescribed procedures.

> The legislature clearly intended that the authority to enact comprehensive plans, establish zoning districts and adopt amendatory ordinances be exercised exclusively by city and county legislative or governing bodies and pursuant to specific prescribed procedures.[25]

The comprehensive statutory procedures mandated by LLUPA must be followed in enacting and amending local zoning ordinances.

Probably before the ink even dried on the final draft of the Constitution of the State of Idaho, Idaho could have been called a "Dillon's Rule" state.[26] There was never any question in the judicial branch of the government that legislative authority would be strictly construed and that local governments, cities and counties would only exercise such powers as were expressly granted to them or necessarily implied. The Idaho Courts have ruled consistently that:

> Legislative grants of power to municipal corporations must be strictly construed to operate as a surrender of the sovereignty of the state no further than is expressly declared by the language thereof.[27]

[25] *Gumprect* v. *City of Coeur D'Alene*, 104 Idaho 615, 661 P.2d 1214, p. 618 (1983).

[26] Dillian's rule is a limitation upon municipal powers. It provides that "a municipal corporation possesses and can exercise the following powers and no others: first, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation, not simply convenient, but indispensable" John F. Dillon, *Commentaries on the Law of Municipal Corporations*, § 237 (5th ed. 1911).

[27] *Boise City, Idaho* v. *Boise Artesian Hat & Cold Water Co.*, 186 F. 705 (1911).

> A municipal corporation possesses and can exercise only those powers granted in express words, those necessarily or fairly implied or incidental to the powers expressly granted, and those essential to the declared objects and purposes of the corporation.[28]

> Municipalities may exercise only those powers granted to them or necessarily implied from the powers granted, and if there is a fair, reasonable, substantial doubt as to the existence of a power, the doubt must be resolved against the city.[29]

There is no provision under the general laws governing counties or in LLUPA that expressly or implicitly grants authority to zone property by pre-agreeing to swap zones. In fact the extraordinary measures for public notice and public hearings provided for in LLUPA to zone and rezone property underscore the importance of public involvement and legislative discretion in zoning property. Kootenai County cannot just make up authority to rezone by swapping the zone on two separate parcels of property, no matter how convenient the authority might be under the circumstances. The BOCC acted without authority and the action is void.

2. SWAP ZONING DENIES DUE PROCESS

The testimony and the evidence recited at the public hearings demonstrate the vice of the swap zone process. The BOCC did not undertake to rezone each parcel to promote the health, safety, and general welfare of the people of the state of Idaho separately based upon the public benefit and burden of each parcel and each zone as required under LLUPA.[30] CISZEK was denied the opportunity to present evidence regarding the propriety of zoning the Highway 53 parcel Mining because every statement opposing the extension of Mining into this residential area was rebutted with evidence that mining activity on this parcel would be better than mining

[28] *State* v. *Frederic*, 28 Idaho 709, 155 P. 977 (1916).
[29] *Plummer* v. *City of Fruitland,* 140 Idaho 1, 89 P.3d 841 (2003) see also *O'Bryant* v. *City of Idaho Falls*, 78 Idaho 313, 303 P.2d 672 (1956).
[30] Idaho Code §67-6502.

activity on the landlocked parcel.[31] Mining activity on the landlocked parcel was not relevant to the decision of extending mining activity into the Highway 53 parcel. Zoning is not intended to be a *quid pro quo* decision. It is about measuring the rules and regulations established in the local zoning ordinance, comprehensive plan, and the policies and procedures set forth in LLUPA against each rezone to determine if the rezone requested for a particular parcel would not be detrimental to the neighboring property owners and would be beneficial to and promote the health, safety, and general welfare of the citizens of Kootenai County as a whole. Each rezone request is to be independently analyzed.

The swap zone process prevents an independent analysis because one rezone request is always compared against another rezone request and no rezone can occur unless both rezones occur. Under the facts at bar it is clear that the neighbors and the BOCC would want the landlocked parcel rezoned from Mining to Agricultural. A mining zone on a landlocked parcel surrounded by residences does not make any sense as CDA Paving pointed out over and over in their testimony. It is also clear that extending mining activity anywhere in this residential area no longer makes sense.[32] The BOCC discussed this fact and it is evident in the discussion of their motion to approve the swap zone that they were reluctant to add more mining in this area.[33] The BOCC never had the discretion to rezone the landlocked parcel independently. The BOCC clearly understood that in order to remove the Mining zoning from the landlocked parcel, it had to add a Mining zone to the Highway 53 parcel. In this zoning decision the BOCC had no discretion at all.

[31] Notice and an opportunity to present and to rebut evidence comprise the common core of procedural due process requirements constitutionally mandated in all cases in which zoning authorities are requested to change land use. *Gay* v. *County Com'rs of Bonneville County,* 103 Idaho 626, 651 P.2d 560 (1982). *Cooper* v. *Board of County Com'rs of Ada County,* 101 Idaho 407, 614 P.2d 947 (1980).

[32] PTR. p. 0003 lines 1-2, p. 0004 lines 13-15.

[33] PTR. p. 0004 lines 3-25, p. 0005 lines 1-25.

A swap zone is like a "Blue Light Special". It is only available to property owners who have the advantage of: 1) owing two parcels of land; 2) owning parcels with different zoning classifications; and 3) if the property owner is really lucky, at least one parcel she owns has an outdated zoning classification. Then the property owner has the zoning special of the century. The property owner does not have to suffer the uncertainty of having each property rezoned independently, the property owner just trades. The uncertainty of rezoning is gone because the discretion of the BOCC is limited to only one choice and it is the choice that the property owner controls. What a special! But courts have recognized that this "zoning special" denies due process. As stated in a New Mexico case:

> A contract in which a municipality promises to zone property in a specified manner is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures. Our statutes require notice and a public hearing prior to passage, amendment, supplement, or repeal of any zoning regulations. (citation omitted) The statutes also grant to citizens and parties in interest the opportunity to be heard at the hearing. By making a promise to zone before a zoning hearing occurs, a municipality denigrates the statutory process because it purports to commit itself to certain action before listening to the public's comments on that action. Enforcement of such a promise allows a municipality to circumvent established statutory requirements to the possible detriment of affected landowners and the community as a whole.[34]

In support of this statement, the New Mexico Supreme Court cited an Idaho case, *County of Ada* v. *Walter*, 98 Idaho 630, 533 P.2d 1199 (1975), noting that the Ada County Zoning Ordinance was designed to protect the rights of all affected property owners and the general welfare of the State of Idaho. Our Supreme Court in *Ada* held that "commissioners do not have the authority to enter into an agreement which would constitute a change in zoning."[35]

CISZEK really had nothing she could say about this "Blue Light Special." CISZEK'S

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[34] *Dacy* v. *Village of Ruidoso,* 114 N.M. 699, 845 P.2d 793 at 797 (1992).
[35] *County of Ada Board of County Com'rs* v. *Walter,* 96 Idaho 630 at 632, 533 P.2d 1199 (1975).

testimony that mining should not be extended into Highway 53 parcel was meaningless because she had no opportunity to persuade the BOCC to rezone one property but not the other property. The BOCC had agreed in advance that it must rezone both properties as part of the swap zone. The BOCC had no discretion under this agreement to consider each parcel independently. CISZEK was effectively prevented from presenting evidence on each parcel independently. CISZEK'S right to due process under LLUPA was denied in this swap zone process. By accepting the rezone application and performing the rezoning of properties pursuant to the limited terms of the application, the BOCC also denied CISZEK equal protection under the law.[36] The process is illegal, arbitrary and capricious and the action of the BOCC is void.[37]

3. SWAP ZONING LIMITS LEGISLATIVE DISCRETION

The BOCC was deprived of legislative powers by pre-agreeing that it had the right to rezone one property "Agricultural" only if it agreed to rezone another property "Mining".[38] The often cited legal authority on this issue is *Houston Petroleum Co.* v. *Automotive Prod. C. Ass'n*, 87 A.2d 319 (1952) discussing the imposition of conditions proffered by the property owner for the purpose of obtaining a rezone. The court stated that the conditions sought to be imposed "...constituted an abuse of the zoning power by the City, and were therefore *ultra vires*, illegal and void." Relying on another well known case the court stated:

> The latest exposition of the law applicable to the foregoing conclusion is contained in V.F. Zahodiakin[39] ... that the zoning power may not be exerted to serve private interests merely nor may the principal be subverted to that end, that a purported contract so made was *ultra vires* and all proceedings to effectuate it were

[36] The equal protection clause is designed to ensure that those persons similarly situated with respect to a governmental action should be treated similarly. *Primary Health Network, Inc.* v. *State, Dept. of Admin.*, 137 Idaho 663, 52 P.3d 663, rehearing denied (2002).

[37] *Hartman* v. *Buckson* 467 A.2d 694 (Del.Ch. 1983). *The League of Residential Neighborhood Advocates* v. *City of Los Angeles*, 498 F.3d 1052 (2007). *Montgomery County* v. *Revere* 671 A.2d 1 (Md 1996).

[38] The enactment of zoning plans and ordinances is legislative action. *Cooper* id. at 409

[39] *V.F. Zahodiakin, etc., Corp.* v. *Zoning Board of Adjustment of City of Summit*, 8 N.J. 386, 86 A.2d 127 (1952).

> *coram non judice* and utterly void.[40] ... A municipality cannot act as an individual does. It must proceed in conformity with the statutes or in the absence of statute agreeably to the common law, by ordinance or resolution or motion....Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations.[41]

The authority to zone property is recognized as part of the police powers of municipalities.[42] A municipality may not contract its zoning power any more than it can contract its police power. The court in *V. F. Zahodiakin* eloquently explained this point:

> Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts. The use restriction must needs have general application. The power may not be exerted to serve private interest merely, nor may the principle be subverted to that end.[43]

Under the terms of CDA Paving's application for a rezone that the BOCC accepted, the BOCC agreed that it could not grant a rezone for one property and deny the rezone for the other property. This private agreement between the BOCC and a property owner limited the authority of the BOCC to independently analyze and approve or deny a request to rezone property. The BOCC impermissibly limited its legislative authority to rezone property by private agreement. Courts reviewing a zoning decision which is produced by an agreement by a governmental body with a private landowner to rezone property uniformly hold that the zoning decision impermissibly limits legislative authority and is void.[44]

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[40] Citing *Beckmann* v. *Township of Teaneck*, 6 N.J. 530 (1951) and *Anschelewitz* v. *Borough of Belmar*, 2 N.J. 178, 65 A.2d 825 (1949).

[41] *Houston* id. at 322.

[42] *Dawson Enterprises, Inc.* v. *Blaine Co.*, 98 Idaho 506, 567 P.2d 1257 (1997). *Gumprecht* v. *City of Coeur d'Alene*, 104 Idaho 615, 661 P.2d 1214 (1983)

[43] *V. F. Zahodiakin* supra at 8 N.J. 386, 86 A.2d 127, 131.

[44] *Atlantic Beach Property Owners' Association, Inc., et al.* v. *Town of Hempsted*, 3 N.Y.2.ed, 144 N.E. 2.ed (1957). *State Ex Rel. Zupancic* v. *Schimenz*, 174 N.W.2d 533 (1970), *Ford Leasing Develop. Co.* v. *Board of County Com'rs* 528 P.2d 237 (1974).

> A municipality has no authority to enter into a private contract with a property owner for the amendment of a zoning ordinance ….. Any contrary rule would condone a violation of the long established principle that a municipality cannot contract away the exercise of its police powers.[45]

The BOCC is a public body organized for the governing of the county and the securing of the common interest of the people of Kootenai County and the State of Idaho. These are public officers and their statutory powers cannot be abrogated or curtailed by private agreement. Consequently, the ordinance approving the swap zoning of the properties at issue is void because it limits the power of the BOCC to rezone property in the county in the interest of the whole community. An agreement to swap zones is an illegal bargaining away of the zoning power of the BOCC.

> Certain core governmental powers, like the power of eminent domain and the police power, are reserved to the sovereign and cannot be abdicated or surrendered by contract, and any attempt to do so is simply unenforceable.[46]

Numerous courts have criticized contract zoning and declared it invalid per se.[47] The New Mexico Supreme Court presented a lengthy analysis of contract zoning:

> While these courts have advanced several grounds for disapproving contract zoning, the most common rationale is that contract zoning is inherently flawed as a "problematic blend of contract and police powers. (citation omitted) Their opinions typically condemn contract zoning as an illegal bargaining away or abrogation of the police power.[48]

Haymon v. *City of Chattanooga*, 513 S.W.2d 185 (1974). *Carlino* v. *Whipain Investors*, 453 A.2d 1385 (Pa. 1982). *Attman/Glazer P.B. Company* v. *Mayor and Aldermen of Annapolis* 314 Md. 675; 552 A.2d 1277 (1989). *Rodriguez, et al.* v. *Prince George's County*, 79 Md. App.537; 558 A.2d 742 (1989). *Alderman* v. *Chatham Co.* 366 S.E.2d 885 (N.C. App. 1988). *Chung c. Sarasota Co.*, 686 So.2d 1358 (Fla. App. 2 Dst. 1996). *Dacy* v. *Village of Ruidoso*, 114 N.M. 699, 845 P.2d 793 (1992). *League of Residential Neighborhood Advocates* v. *City of Los Angeles*, 498 F.3d 1052 (2007).

[45] *Morgran Co., Inc.* v. *Orange County* 818 So.2d 640 at 643 (2002) citing *Harttnet v Austin* 93 So.2d 86 (1956).

[46] Eugene McQuillin, *The Law of Municipal Corporations* section (2009 Revised Volume) § 29:11, p. 365. Daniel R. Mandelker Land Use Law (Fifth Edition) The Zoning Process § 6.62-6.64.

[47] Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreement, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L.Rev. 976, 892-982 (1987).

[48] *Dacy* v. *Village of Ruidoso* 114, N.M. 699, 845 P.2d 793 at 797 (1992).

The BOCC bargained away its police powers and by doing so acted without authority. The approval of Ordinance No. 417 was *ulta vires,* arbitrary, capricious, an abuse of discretion, and contrary to public policy. Ordinance No. 417 is void.

ATTORNEY FEES

The BOCC was correctly advised by legal counsel that conditions could not be put on a zone change.[49] The same legal authorities that propound that conditions cannot be placed on zone changes also condemn contracts or promise to zone as illegal.[50] It is therefore very difficult to understand why the BOCC would believe that rezoning by swapping zones would be legal. The BOCC and county attorneys had been warned by respectable attorneys that a swap zone was illegal.[51] The BOCC and its legal staff should be thoroughly cognizant that statutory authority is required before a novel procedure such as swap zoning can be implemented. Swap zoning is not authorized in Kootenai County Ordinances or Idaho statutes or discussed in any cases cited from Idaho courts. In all of the research completed by Mr. Duncan and Mr. Wetzel which was presented to the BOCC, they could not find any reference in zoning treatises, statutes or case law to rezoning through a procedure of exchanging zones. No reference was ever found in the extensive review of the law required in this Memorandum. It is inexcusable for the BOCC to assume that a zoning procedure, however convenient, can just be made up out of thin air. It is unjust that ordinary citizens like CISZEK are required to incur substantial attorney fees and costs

[49] PTR. p. 0005 lines 13-16, p. 0006.

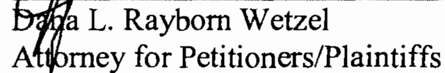
[50] 83 Am. Jur. 2d *Zoning and Planning* § 42. 10 Corpus Juris Secundum *Zoning and Land Planning* § 76.2. 2 Anderson, *American Law of Zoning* §§ 9.21-9.20 (3rd ed.). 10 Eugene McQuillin, *The Law of Municipal Corporations* § 29:11, p. 365, (2009 Revised Volume). Daniel R. Mandelker, *Land Use Law* § 6.62-6.64 (Fifth Edition). Salsich Jr. & Tryniecki *Land Use Regulation: A Legal Analysis & Practical Application of Land Use Law* (Second Edition, Section of Real Property, Probate and Trust Law American Bar Association) pp. 186-188. V. 65 p. 957-1038. 70 ALR3d. §§ 3, 4, 5, pp.139-150, James D. Lawlor, J.D. Annotation: *Validly, Construction, and effect of Agreement to Rezone, or Amendment to Zoning Ordinance, Creating Special Restrictions or Conditions Not Applicable to Other Property Similarly Zones.*

[51] TR. p. 0118 line 25; p.0119 lines 1 -25 p. 0121 lines 22 -25; p. lines 1 – 11. p. 0125 lines 2 -12.

to correct an action taken by the BOCC that had no basis in fact or law. CISZEK is entitled to attorney's fees under Idaho Code §12-117.[52]

DATED this 4th day of August, 2009.

WETZEL, WETZEL
& HOLT, P.L.L.C.



Dana L. Rayborn Wetzel
Attorney for Petitioners/Plaintiffs

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52 In re Daniel W., ___ Idaho ___ 183 P.3d 765 (2008). The purpose of 12-117 is to deter groundless or arbitrary action and to provide a remedy for persons who have borne unfair and unjustified financial burdens defending against groundless charges or attempting to correct mistakes agencies should never have made. Canal/Norcrest/Columbus Action Committee v. City of Boise, 136 Idaho 666, 671 39 P.3d 606, 611 (2001). Rincover v. State, 132 Idaho 547, 549, 976 P.2d 473, 475 (1999). Bonner County v. Bonner County Sheriff Search and Rescue, Inc. 142 Idaho 788, 134 P.3d 639 (2003).

CERTIFICATE OF MAILING AND/OR DELIVERY

I hereby certify that on the 4th day of August, 2009, I served the foregoing document upon:

✓ U.S. Mail
___ Hand Delivered
___ Overnight Mail
___ Facsimile 446-1621

Jethelyn H. Harrington
Kootenai County Department of Legal Services
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Attorney for Defendant

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Michael Ryan Chapman
Chapman Law Office, PLLC Services
P.O. Box 1600
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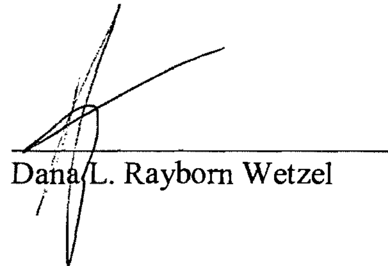
Attorney for Coeur d' Alene Paving



Dana L. Rayborn Wetzel

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STATE OF IDAHO }SS
COUNTY OF KOOTENAI
FILED: 8-5-09
AT 2:00 O'CLOCK P M
CLERK, DISTRICT COURT
DEPUTY

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE

STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LINDA CISZEK, *et al.*, Petitioners/Plaintiffs, vs. BOARD OF COMMISSIONERS, KOOTENAI COUNTY, STATE OF IDAHO, Respondent/Defendant, and, COEUR D'ALENE PAVING, INC., Defendant.	**Case No. CV-08-7074** **ORDER TO AMEND BRIEFING SCHEDULE**

WHEREAS, the parties having filed a Stipulation to Amend the Briefing Schedule in the above captioned matter, and the Court having reviewed said stipulation, as well as the existing court file, and the Court being fully advised in the matter,

IT IS HEREBY ORDERED that the briefing schedule in Case No. CV 08-7074 be amended and set out to a time convenient to this Court.

DATED this 5 day of ~~July~~ August, 2009.

Charles W. Hosack, District Judge

CLERK'S CERTIFICATE OF SERVICE

I hereby certify that on this 5 day of ~~July~~ Aug, 2009, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

[ ] U.S. Mail
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[ ] OVERNIGHT MAIL
[ ] TELEFAX (FAX)

Steven C. Wetzel
Kevin B. Holt
WETZEL, WETZEL & HOLT, PLLC
1322 Kathleen Avenue, Suite 2
Coeur d'Alene, ID 83815
Fax: (208) 664-6741 Fax

[ ] U.S. Mail
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[ ] OVERNIGHT MAIL
[ ] TELEFAX (FAX)

Jethelyn Harrington, Civil Deputy
Kootenai County Prosecuting Att.
Civil Division
P.O. Box 9000
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Michael R. Chapman
Chapman Law Office, PLLC Services
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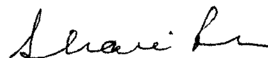
Fax: (208) 667-7625 Fax

2038

Daniel English, Clerk of the District Court



Deputy Clerk

STATE OF IDAHO)
County of Kootenai) SS
FILED 8-5-09

AT 2:00 O'clock PM
CLERK, DISTRICT COURT

Deputy Clerk

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

LINDA CISZEK, et al,

Petitioners/Plaintiffs,

v.

KOOTENAI COUNTY BOARD OF COMMISSIONERS, et al,

Respondent/Defendant,

And,

COEUR D'ALENE PAVING, INC.,
Defendant.

CASE NO. CV2008-7074

AMENDED ORDER ESTABLISHING BRIEFING SCHEDULE

The above matter having been assigned to Judge Hosack to address the matter on Appeal, and the Notice of Settlement and Filing of Transcript and Agency Record having settled the transcript on May 7, 2009; and parties having stipulated to amend the previously entered Briefing Schedule, now, therefore;

IT IS HEREBY ORDERED that Petitioner shall file their opening Brief no later than September 10, 2009, at 5:00 p.m.

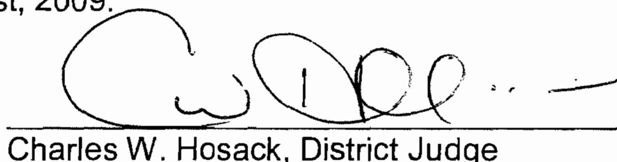
IT IS FURTHER ORDERED the Respondent shall file their reply Brief no later than October 8, 2009, at 5:00 p.m.

IT IS FURTHER ORDERED that any final Brief from the Petitioner shall be filed no later than October 29, 2009, at 5:00 p.m.

IT IS FURTHER ORDERED that in addition to any original brief or memorandum lodged with the Clerk of Court, counsel shall also provide the Court with a copy that is labeled the Court's copy. To the extent counsel rely on legal authorities not contained in the ***Idaho reports***; a copy of each case cited shall be attached to the Court's copy of the brief or memorandum.

IT IS FURTHER ORDERED that upon completion of all briefing, this matter shall be set for hearing at a time convenient to both the Court and counsel.

DATED this 5 day of August, 2009.



Charles W. Hosack, District Judge

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Clerk's Certificate of Mailing

I hereby certify that on the 5 day of August, 2009, that a true and correct copy of the foregoing was mailed/delivered by regular U.S. Mail, postage prepaid, Interoffice Mail, Hand Delivered or Faxed to:

Fax Steven Wetzel (fax: 208-664-6741)

Fax Michael Chapman (fax: 208-667-7625)

Fax Kootenai County Department of Legal Services (fax: 208-446-1621)
2038

DANIEL J. ENGLISH
CLERK OF THE DISTRICT COURT

BY: Shari Ker
Deputy Clerk

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