Contract Zoning

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While the power to zone the urban land of America may help to achieve a rational and humane method of regulation of land in our society, the ability to use that power effectively may be limited. Because ownership of and investment in land is to a large extent in private hands, the zoning power is often viewed as a threat to present investment and opportunities for future profit-making. For example, the small entrepreneurs, who are predominate in the construction industry, may be and often are financially ruined if the zoning power is exercised even once against their financial interests.

Because the powers given to municipal legislative bodies, planning commissions and zoning boards of appeal directly affect hundreds of billions of dollars in private investment, it is only natural that in a democratic society the power would be subjected to controls. And, as is usual in American society, much of the effort to ensure that such power will be exercised with a minimum amount of arbitrariness or favoritism has come from the state courts.

Over the years, the courts have developed various doctrines by which they have sought to channel the power along rational and fair lines. For example, the adoption of a zoning ordinance, as an exercise of the police power, must protect or advance the public health, safety, and welfare. A zoning ordinance, though purporting to achieve these purposes, will be struck down as arbitrary or unreasonable if it is clear that the zoning ordinance will not further these goals. Somewhat more specific is the standard rule that amendments to zoning laws which rezone small areas of land, will be struck down as "spot zoning" if there was no mistake in the original zoning ordinance or no change of conditions in the area, and the change is not "in accordance with a comprehensive plan."

In recent years a new element has been added in the development of judicial control. Various state courts have begun to attack a relatively new practice in the field of zoning regulation. This practice, typically, involves the

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* See Kelly, Design and the Production of Houses, pp. 7-11 (New York, 1959).
* Gordon v. City of Wheaton, 12 Ill. 2d 284, 146 N.E. 2d 37 (1957).
rezoning of a piece of property to a zoning classification with less restrictions subject to an agreement by the owner of the property to abide by certain conditions. These conditions often place limitations on the uses and the physical development of the property that the other properties in the new district do not bear. The courts have attacked this as constituting "zoning by contract", "rezoning by contract", "rezoning subject to conditions", or, simply, "contract zoning". This article is a discussion and analysis of contract zoning.

It will first attempt to explain the economic pressures that have produced the practice and, then, to analyze preliminarily the nature of contract zoning. This is not an easy task for contract zoning resembles so many other aspects of zoning and, in some cases, is almost indistinguishable. In the second part of the article there is a critical examination of the reasons given by the courts for their condemnation of the practice. Of the five highest state courts that have considered this technique of zoning, three have held it unlawful. The general conclusion is that the arguments made by the courts do not warrant an outright condemnation of contract zoning. Its use in certain situations might be quite acceptable. In Part III, we seek to support this view through a detailed comparison of contract zoning with other possible methods of dealing with the general problem that contract zoning seeks to resolve. However, we have included in the discussion in this part a proposal which, if adopted by the state legislatures, would solve the problem more advantageously than does contract zoning.

In Part IV, we return to the present legal situation with a consideration and analysis of still further arguments against the practice. The latter are for the most part not discussed, if mentioned at all, in the opinions of the courts. The article will then conclude with a brief discussion of the general problem of contracts made by a municipality with private individuals with respect to the exercise of its regulatory (police) power.

I

In order to aid the reader to understand the following discussion of contract zoning, the facts of two cases, which

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* These terms will be used interchangeably throughout.

† The states that have attacked contract zoning are New Jersey, Florida and Maryland. New York and Massachusetts have upheld it. See ns. 9 and 10 for full listing of all relevant cases.
are typical of the situations which the courts have described as "rezoning by contract", are given.

In *Hartnett v. Austin*, Coral Gables, Florida had rezoned a parcel of property from single-family residential to commercial use at the request of a holder of an option to purchase. He desired to use the land for a parking lot for a large shopping center situated nearby. The effectiveness of the ordinance, however, was made dependent upon the execution and recording of an agreement in which the property owner promised to observe certain conditions. A "bay-point" type wall, 40 feet inside the property line, was to be erected and the resulting strip of land was to be kept landscaped at the owner's expense. In addition, there were requirements that there was to be no access to certain abutting streets, that the owner should furnish adequate police protection within the rezoned area, and that provision was to be made to prevent the glare of car lights on certain neighboring residential streets.

In *Baylis v. City of Baltimore*, neighboring property owners in a residential district challenged a zoning ordinance which permitted the use of a house as a funeral parlor. The initial request was simply for a change in classification. The planning commission had recommended rejection of the request for rezoning. The board of zoning appeals advised that the rezoning should pass as long as the property was used only as a funeral home. After much discussion between city officials and the owner, a zoning ordinance was passed. The city council reduced the area to be rezoned and made the effectiveness of the ordinance conditional on the execution of an agreement which required that entrances and exits to the property be on a named street, that adequate off-street parking be provided, and that the zoning classification of the property would automatically revert to its previous classification if the property were not used as a funeral home. In both cases the courts held the zoning amendments and the agreements invalid.

Though the practice of passing zoning amendments with limitations on uses and with other controls has seemingly become widespread, the challenges to the propriety of the action are not as yet numerous, but the issue will probably be presented to many state courts shortly.

An examination of the cases where contract zoning has become an issue reveal two basic patterns in the underlying

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6 93 So. 2d 86 (Fla. 1956).
8 Supra, ns. 6, 7.
fact situations though the courts have not shown any awareness of them. Each of them is the result of defects in the present methods of zoning controls, and contract zoning is an ad hoc attempt by municipal officials to solve the problems caused by these defects.

The two cases, whose facts are given above, are each representative of one of the basic patterns. These then are the situations:

(1) Hartnett raises essentially the problem of zoning controls when the land lies near the border of two very different use classifications. A parcel of land in a residential zone lies close to a commercial area. The development of the surrounding area is such that commercial activities — retailing, for example — have become very profitable. However, this profitableness has made land in the commercial zone either very expensive or non-existent. This creates great pressure on the neighboring residential land. The owner of a parcel in the residential area or a prospective purchaser, desirous of taking financial advantage of the increased commerce, asks for rezoning of the parcel. Honest public officials may want to accommodate the owner either because they simply feel the parcel should properly be used for commercial purposes, or because the city can use the added taxables or business.⁹


In these three cases New York and Massachusetts, the states which have most recently faced the issue, have upheld the legality of contract zoning. They were the only ones to do so.

The cases listed immediately below are also of the Hartnett type fact situation. Carole Highlands Citizens Ass'n, Inc. v. Bd. of Com'rs of Prince Georges County, 222 Md. 44, 158 A. 2d 663 (1960); Rose v. Paupe, 221 Md. 369, 157 A. 2d 618 (1960); Houston Petroleum Co. v. Automotive Products Credit Ass'n, 9 N.J. 122, 87 A. 2d 319 (1952). See also Gregory Manor v. City of Clifton, 53 N.J. Super. 482, 147 A. 2d 595 (1959) and Beckman v. Township of Teaneck, 6 N.J. 530, 79 A. 2d 301 (1951).

In Pressman v. City of Baltimore, 222 Md. 330, 160 A. 2d 379 (1960), the court found that the rezoning was not made conditional upon compliance with any agreement by the developer, and, consequently, there was no contract zoning as in the Baylis case. The developer, out of consideration for the public good, had agreed to fulfill various "requests" of the city. Perhaps, the Maryland Court is retreating from the position it took in the Baylis case for the facts of the case make is clear that an agreement was made. Discussions had been going on between the city and the developer when the Baylis decision came down. Recognizing that a written agreement and a conditional rezoning would be invalid, no doubt an "understanding" was reached whereby the city decided to rely on the honor of a responsible developer to perform the agreement. The Baylis case itself acknowledged that these agreements
(2) In the second pattern the problem is that of the declining residential area. There is a deteriorating residential area, which public officials believe should eventually be devoted to commercial uses, or if the area is already a slum, they may simply believe that the public good requires the removal of all slums. Perhaps a full rehabilitation program is financially unfeasible for the community at the time, and, as a result, officials welcome even small physical improvements as a gain in their efforts to redevelop the area. The Baylis case is an illustration of this type of pattern.\(^{10}\)

In both situations, however, the officials must also consider the effect of the change on the nearby residential areas.\(^ {11}\) Homes may have been built in reliance on the present zoning scheme, and the commercial development may have an adverse effect on their value. Even if the physical condition of the residential area is not the most desirable, the area may still form a socially stable community. Political wisdom, if not sincere concern, dictate that any change take account of the complaints, anger and possible political retribution of the neighboring residents.

In an attempt to reconcile these conflicting pressures, the city officials cast about for a compromise that will make possible a complete accommodation or, at least, a politically acceptable solution. The results of a search for a compro-

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\(^{11}\) Though the typical case involves conflict on the boundary between a residential and commercial zone, in Rose v. Paupe, supra, n. 9, the conflict was between a summer cottage resort area and the owner of a strip of waterfront. The latter wanted to build a pier for small pleasure craft. Though it was not quite clear what was the zoning classification of the strip, the pier appeared to be a forbidden use. The case analytically is still a contract zoning situation for the city had agreed to rezone the property with the publicly stated stipulation that the rezoning would be revoked if the owner attempted to make any use of the property other than the proposed one. Once again there is the attempt by public officials to solve land use control problems in border-line areas of zoning districts.
mise can be seen in the typical cases, whose facts are given above. In exchange for allowing the proposed commercial use, the council requires that measures be taken to minimize the undesirable aspects of the proposed use. Thus aesthetic, traffic, and other controls are imposed. But the commercial development will proceed. In this way an acceptable political compromise is achieved.12

In seeking to find a legal method to implement their compromise solution, officials have theoretically five possible techniques, other than contract zoning, by which the proposed deviation from the present zoning requirements can be achieved. They are: (1) an outright change to an existing classification which allows the commercial use, but without any conditions; (2) the granting of a variance; (3) the creation of a new zoning classification containing the necessary conditions followed by a rezoning of the property involved into the new classification; (4) establishing "statutory" exceptions; and (5) the granting of "administrative" exceptions.13

The facts of Sylvania Elec. Products, Inc. v. City of Newton, supra, n. 9, the most recently decided case, gives an excellent picture of how city officials attempted to accommodate all the interests involved.14

Exactly what is an exception in zoning is unclear. Rathkopf speaks of "conditional uses" or "special exception permits" and describes it as follows:

"It permits the inclusion into the zoning pattern (either in all zones or in certain particular zones) of uses considered by the legislative body to be essentially desirable (or essential) to the community, its citizenry or to substantial segments, thereof, but where the nature of the use or its concomitants (traffic congestion, density of persons, noise, effect on values, safety or health) militate against its location at every location therein or in any location without restrictions or conditions tailored to fit the special problems which the use presents." 1 RATHKOPF, 54-1. According to Rathkopf, the board of zoning appeals can grant the exception subject to appropriate conditions and safeguards. This description of an "exception" may have characteristics of contract zoning, but is distinguishable.

But, as we shall see presently in the text, for dealing with the problem described above, it has certain drawbacks. Essentially, contract zoning deals with a problem which by its very nature cannot be solved by a previously proposed statutory scheme. See Reus, Jr. v. City of Baltimore, 220 Md. 566, 155 A. 2d 513 (1959); and Devereux Foundation, Inc., Zoning Case, 351 Pa. 478, 41 A. 2d 744 (1945).

Another approach to the term "exception" is found in the statutory scheme of New Jersey tested in Ward v. Scott, 11 N.J. 117, 93 A. 2d 385 (1952), R.S. 40 :55 — 39 (d), N.J.S.A. provides that the board of adjustment may recommend to the governing body of the municipality that a "variance" be granted "in particular cases and for special reasons." It would seem that where the power to grant such variances under this broad statute has been granted to zoning board of appeals, it has been held to constitute an illegal delegation of power without standards. 1 RATHKOPF, 54-14.

Subsection (c) provided that board of adjustment could grant a variance where there was "exceptional and undue hardship" upon the property owner. This latter subsection constitutes what is generally called a variance. The former, though called a variance by the majority,
These methods of achieving the desired result will be compared in the discussion in Part III of the merits of contract zoning. For various reasons, all but the last technique are either legally suspect, or unsuitable for achieving the goal sought as compared to contract zoning. And since the fifth alternative is not authorized under most present day zoning laws and would not be desirable under certain circumstances, officials have developed the following procedure. A zoning amendment is passed placing the property into an existing, but less restrictive district, but conditioning the change on the agreement of the property owner to subject "the property to restrictions of use or area greater than those generally imposed by the zoning ordinance upon the district into which the land has been rezoned." It is this solution that the courts have labelled "rezoning by contract". (The courts have used the term both to describe the acts done and to connote disapproval.)

Logically, the next question to be asked is how does contract zoning differ in the abstract from some of the other techniques of bringing about deviations from the existing statutory zoning scheme? The courts have not dealt with this question though, necessarily, their condemnation requires that contract zoning differ from acceptable zoning practices. Implicit in the nature of contract zoning, however, is the following possible, but rather theoretical, analysis.

First of all, the imposition of conditions does not distinguish contract zoning from other methods of changing present zoning restrictions. Conditions are often imposed before favorable action is given on a request for a change in the present land use controls. For example, the power to grant variances upon conditions is clearly accepted. More properly was described by the dissenting justices as constituting an exception.

The two definitions or types of exceptions differ essentially in that the first is given in conformity with a previously laid out statutory scheme, while the second is, like a variance, an ad hoc act in derogation of the existing zoning classification. In accordance with this distinction, we shall designate the first type a "statutory" exception and the second an "administrative" exception. The similarities and differences between these approaches and contract zoning will be discussed in a little more detail in n. 23.

See also Delafons, Public Control or Private Development — A Report on Land Use Controls in America (1960). Copies of this work can be found at Harvard University Planning Library.

14 The New Jersey statute, supra, n. 13, with its liberal provisions for allowing deviations in individual cases from the zoning laws appears to be the only one granting such great discretion to its municipal officials.

15 2 Rathkopf, 74-9.

16 1 Rathkopf, 49-1 to 49-23.
A possible distinction is that while the grant of a variance constitutes almost a legal right, the enactment of a zoning amendment is a pure act of discretion. On authority this contention would appear faulty. It is generally held, despite some statements to the contrary, that the granting of a variance is not required, even if the petitioner makes a demonstration of "particular and undue hardship" because of the existing zoning law. The showing is only a necessary precondition to the obtaining of a variance. The board of zoning appeals may in its discretion grant a variance. But these statements must be qualified.

For it is the rule that if no use may be made of a parcel of land under the restrictions of the present zoning law, the ordinance is unconstitutional as applied to that piece of property. Consequently, variances may often be granted in order to avoid such constitutional challenges to the zoning ordinance (though how often this happens is not known). Similarly, while the board of zoning appeals demands landscaping, fencing and other moderate conditions in order to minimize the harmful effects of the deviation on the surrounding area, the conditions that may be put upon the grant of a variance are not unlimited. If the conditions are too severe or if the variance is simply refused, the property owner may resort to an outright attack on the present zoning law, and if he is successful, he will obtain judicial approval to use his property as he desires. Thus the power to grant a variance may not wholly be a statutory gratuity, but a constitutional necessity.

The granting of variances then, with or without conditions, would not really be an act of discretion. Where there is essentially no alternative but to grant the variance in one form or another, then while it may not be a legal right of the property owner to get a variance, it surely begins to resemble a legal right.

On the other hand, the amending of a valid zoning ordinance is a completely discretionary act on the part of the municipal legislature. As one court said, "The city council cannot be compelled to pass a rezoning ordinance, however...

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20 Averne Bay Const. Co. v. Thatcher, supra, n. 18.
21 See Bassett, ZONING (1936) 122.
fair, reasonable, and desirable it may be, as that represents an exercise of legislative discretion.”

When, therefore, the municipality passes a zoning amendment that it is within its sole power to pass, it can be said to be giving a "consideration" for which it may ask in return certain promises from the person desirous of a change in his property's present classification. This explains why the courts may conceive of the passing of a zoning amendment subject to conditions as constituting "contract zoning." (Emphasis added.) The same distinction might also be drawn between contract zoning and a statutory exception.

Of course, on close examination the analysis breaks down. The granting of a variance is, in practice, as well as in the generally held theory, almost always an act of discretion. Few refusals to grant variances are upset by the

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23 See n. 13) is commonly called a “conditional use.” On analysis, the distinction between this technique and contract zoning becomes quite clear. The “conditional use” exception also deals with certain special problems (e.g., gas stations in residential areas); but these situations occur with enough frequency that a prior statutory scheme can be set up to deal with the problem. It thus lacks that element of uniqueness that is characteristic of both contract zoning and a variance. Also, it lacks the element of discretion on the part of the public body because upon a proper showing of compliance with the terms or conditions of the authorizing statute, the petitioner is entitled as a matter of right to the exception. Shell Oil Co. v. City of Manchester, cited loc. cit. supra, n. 15. Even if there is discretionary power to impose conditions in the granting of an exception, courts have held the discretionary power to be limited to the explicit terms of the statute. Service Realty Corp. v. Planning and Zoning Bd. of Ap., 141 Conn. 632, 109 A. 2d, 256 (1954).

If an “administrative” exception (see n. 13), is the granting of a variance without a showing of “particular and undue hardship” for "special reasons" by the municipal legislature, then indeed contract zoning might properly be called a type of “exception”. The refusal to grant such an exception would probably not be challenged successfully. There would be then the element of discretion on the part of the legislature. In addition, a statute which authorizes an exception for “special reasons” cannot be said to have laid down a statutory scheme. If the statute withstands constitutional challenge, it would certainly seem to allow for dealing with the ad hoc determinations that are characteristic of contract zoning cases.

The difference between contract zoning and an “exception” as herein defined lies in the fact that such an “exception” can be used to deal with a much greater range of problems, whereas the technique of contract zoning requires the passage of a zoning amendment whose validity depends on meeting broad, but more certain tests. The latter, as explained in the text in the latter part of section II, has certain limiting elements. The former thus raises more serious problems than does contract zoning. Exceptions may put too broad discretion in the legislative branch. The result might be unjustified or discriminatory deviations from the existing zoning scheme. The power to grant exceptions would be subject to only minimal judicial control because the standard of for "special reasons" even in the context of general purposes of zoning is just too flexible.
courts which have explicitly stated that variances should be granted frugally.\textsuperscript{24} A constitutional attack on the zoning ordinances on the grounds that the statute is confiscatory is not likely to succeed.\textsuperscript{25} And the power to impose conditions, though not unlimited, is still very broad.\textsuperscript{26} So variances are really not much different from contract zoning. In both situations the property owner is allowed to deviate from the present zoning law if the appropriate public body is satisfied that the change is desirable or acceptable.

An attempt to distinguish various zoning techniques from contract zoning on the basis of whether there the change is an act of discretion is too theoretical to be useful even if it is successful. Such an analysis does not explain why courts have been striking down these agreements. In their opinions, the courts only rarely disclose the real considerations underlying their decisions, but it is those that concern us.

Let us proceed, however, to examine critically the reasons that are given by the courts for their attacks on contract zoning. Then we shall try to examine the unexpressed, but more basic policies or fears that lie behind the assault on contract zoning.

II

The first attack against the procedure called contract zoning is simply that it is not expressly authorized by the zoning enabling acts or ordinances of the municipality. Most of the courts that have attacked contract zoning make the point — though with more or less emphasis. In a New Jersey case the court found the procedure unauthorized and described the actions of the public officials as “an arrogation of authority in defiance of the statute and the ordinance.”\textsuperscript{27}

The author of the only legal writing on the question of contract zoning devoted a great portion of his series of short articles to the argument that since there was no express statutory authorization, the practice was illegal.\textsuperscript{28} Yet in the same article he acknowledges that, on the basis

\textsuperscript{24}Talmadge v. Board of Zoning Appeals, 141 Conn. 639, 109 A. 2d 253 (1954).
\textsuperscript{25}A zoning ordinance is not unconstitutional because it reduces the value of or profits from a parcel of land. There must be an extensive diminution of property values before a statute will even be considered to constitute a confiscation of property without due process of law. Headley v. City of Rochester, 272 N.Y. 197, 5 N.E. 2d 198 (1936).
of virtually the same zoning enabling act, while Maryland had found the procedure unauthorized, New York had reached the opposite conclusion.\footnote{Id., March 8, 1961.}

The New York case is *Church v. Town of Islip*.\footnote{Id., March 9, 1961.} In finding that the town board had implied authority under the zoning enabling act to rezone a parcel of land subject to compliance with certain requirements, an appellate court said that the practice "is (not) contrary to the spirit of zoning ordinances and is (not) beyond the statutory power of local legislative bodies."\footnote{8, 9, 10, 1961. See also Crolly & Norton, *Zoning by Contract with Property Owners*, N.Y. Law Journal, April 6, 1955. Hereafter these articles will be cited as "Crolly" followed by the date. All the articles will be found on page 4 of the respective issues.}

And the Maryland court, which could not find any statutory authorization for the practice of contract zoning, said in its opinion that "[t]here is authority to the effect that reasonable conditions and restrictions may be imposed by a board in connection with a special exception or variance, at least where the power to do so is expressed, or may be fairly implied."\footnote{8 App. Div. 2d 962, 190 N.Y.S. 2d 927 (1959).} Why the authority cannot be implied in the case of zoning amendments is not explained.

It is not enough in resolving the question of statutory authorization to demand express authorization.\footnote{Baylis v. City of Baltimore, 219 Md. 164, 168, 148 A. 2d 429 (1959) (Emphasis added).} Nor is it enough to say that "the test of validity of a municipal zoning change is one of legislative power. It should not be one of practice or expediency as stressed by the town in the *Church* case."\footnote{In 1956, four years before the *Church* case was decided, a bill was passed by the New York legislature to give town boards the power to pass zoning amendments subject to conditions. The bill, however, was vetoed. From these facts a more respectable argument that contract zoning was not authorized could be made. Crolly, March 8, 1961. However, the Court of Appeals in the *Church* case ignored the legislative history and found the power in the existing zoning enabling act.} Policy considerations, favorable to contract zoning or not, must be taken into account in determining whether contract zoning fits in with the overall pattern of the zoning enabling law, especially where it is clear the statute does not deal specifically with the problem.\footnote{For similar reasons, the technical argument made by the dissenter in *Sylvania Elec. Products, Inc. v. City of Newton, ..., Mass. ..., 183 N.E. 2d 118 (1962) must also fail. He argued that because the agreement provided for restrictions on land use, they were restrictions imposed for zoning purposes, and since they could be imposed by means of the zoning law, they must be imposed by the zoning law. The conclusion does not follow from the premise unless one reads the Massa-}
The next line of attack against contract zoning is that it is a "bargaining away" of the police power of the community. The thesis that this cannot be done in its most general form has been stated in hundreds of cases. A general treatise puts it this way:

"A municipality has no power to make any agreement or deal which will in any way control or embarrass its legislative power and duties. Neither the police power of the State itself nor that delegated by it to a municipality is subject to limitation by private contract; nor is the exercise of such power to be alienated, surrendered or limited by any agreement or device."

More specifically, the cases do not explain what unjustifiable consequences the courts fear will ensue from the agreements in contract zoning. The idea seems to be that by passing a zoning amendment subject to the acceptance of certain conditions by the property owner, the city has struck a bargain by which the city has lost all its power to legislate in the future with respect to that piece of property. If the city intends in good faith to honor the agreement, it is barred from later exercising its zoning power in ways that will affect adversely the legality of the use permitted by the agreement.

"[The city in order to] respect and not to impair its obligation to such property owner, must refrain from restoring the property to its former zoning even though it realizes that a mistake was made by such conditional rezoning."

But is it true that the agreement prevents the city from exercising legitimately its police power with respect to such property in the future? Certainly no express provisions of the agreements mentioned in the cases so require; nor may they be fairly implied.

Zoning laws in this country are normally not retroactive in effect. The mere passage of a zoning law has no effect on existing uses except to make them non-conforming. The property owner need not halt his present use and

chusetts statute very literally. Restrictions on the use of property have been imposed in Massachusetts by private deed both before and after the zoning enabling statute was passed. There is no evidence that the Massachusetts legislature sought to exclude the use of this method of land control by municipalities when it passed the zoning enabling law.

The policy argument offered by the dissent to support its narrow reading of the statute is discussed shortly in the text.

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8 Atlantic Coast Line R. Co. v. City of Goldsboro, 232 U.S. 548, 558 (1914).
37 Crolly, April 6, 1955.
38 Crolly, March 9, 1961.
has no complaint simply because his property is rezoned. That the rezoning was proper according to established judicial tests is all the landowner may ask.\textsuperscript{39}

Assume, however, that the city seeks to bring to an end the use it authorized by the zoning amendment and agreement. This may be achieved by use of the general procedures for the elimination of non-conforming uses,\textsuperscript{40} or even by a more drastic attack on this use alone for:

"The reservation of essential attributes of sovereign power is read into contracts as a postulate of the legal order. All contracts are made with reference to the possible exercise of the police power of the government and with the possibility of such legislation as an implied term of the law thereof. . . ."\textsuperscript{41}

Supreme Court cases give strong support to this statement. One example of a case where the court allowed a city to violate the terms of a contract is Denver & R. G. R.R. Co. v. City and County of Denver,\textsuperscript{42} where the breach came in the form of legislation directed solely at the railroad.

The facts of the case are these. The railroad had by virtue of an authorizing ordinance placed a railroad track in a street. The Court agreed that the ordinance had become a contract, and thus the railroad had a vested property right. Some years later the city ordered removal of a portion of the railroad track. The Supreme Court held the order was a valid exercise of the police power; no compensation need be paid. The case is clear precedent for the revocation of the rezoning and the agreement in a contract zoning case upon a showing that the public welfare so requires.

But the Supreme Court cautioned that the exercise of the power must neither be unreasonable nor arbitrary. Similarly, the property owner in a contract zoning situation would be entitled to have a strong showing of public need and reasonableness, especially if the ordinance applies to him alone.\textsuperscript{43} It would not be sufficient grounds for a


\textsuperscript{40} See City of Los Angeles v. Gage, 127 Cal. App. 2d 442, 274 P. 2d 34 (1954) and cases cited therein.

\textsuperscript{41} 16 C.J.S. 1287, Constitutional Law, § 281.

\textsuperscript{42} 250 U.S. 241 (1919). See also Boston Beer Co. v. Massachusetts, 97 U.S. 25 (1877).

revocation that the public officials simply regretted their prior approval for political reasons.

The New York Court of Appeals' answer to the argument that the town's action in *Church v. Town of Islip* involved a contracting away of the police power was that the argument was *de minimis* in the circumstances of this case.44

Neither in theory nor in any practical sense had the town diminished its ability to act for the welfare of its residents. The contract zoning cases do not involve situations such as that which existed in the New York case of *Bartholemew v. Village of Endicott et al.*45 There the village made a contract whereby it agreed to "confine its electric operations and sales to the portion of the village" already being served by the municipal system. In this case, the court held, the village is completely abdicating its normal role of providing public services and leaving its citizens who are not part of the municipal power network to fend for themselves. In the case of contract zoning there is no such wholesale attempt by the officials to abdicate their responsibilities to the community.

Still another argument that has been made against contract zoning is that since the conditions imposed on the property are *extra* the zoning law and can only be found in a recorded agreement, there is no notice to the public of the restrictions that the property bears.46 In practice, the argument fails. The prospective purchaser of neighboring land who desires to use such property for residential

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44 See *N.Y. 2d 254, 259, 203 N.Y.S. 2d 866 (1960).*

45 See also the very interesting case of *Schwab v. Graves, 221 App. Div. 357, 223 N.Y.S. 160 (1927) appeal dismissed,* 247 N.Y. 553, 161 N.E. 188 (1928). The court held invalid a contract between Cheektowaga, a town east of Buffalo, and the latter city. The contract provided that in exchange for allowing the city to build an incinerator in the town, Buffalo would release a substantial debt of the town. Prior to the execution of the agreement, the town had an ordinance forbidding such a building within its border. The case on its face seems an outrageous attempt by public officials to use its regulatory power to settle a public debt in total disregard of the public welfare. However, close examination of the facts casts doubt on the judgment because the contract provided for stringent controls over the proposed use. In addition, the town was to have use of the facilities. See also *Atlantic Beach Assn. v. Hempstead, 3 N.Y. 2d 434, 165 N.Y.S. 2d 737 (1957).*

46 "[A] municipal ordinance should be clear, definite and certain in its terms . . . [because there] is the necessity for notice to those affected by the operation and the effect of the ordinance... "Restrictions 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." *Hartnett v. Austin, 93 So. 2d 86, 88, 89 (Fla. 1956).* This is also the policy argument of the dissent in *Sylvania Elec. Products, Inc. v. City of Newton,* *supra,* n. 35.
purposes will be on notice of a potentially undesirable use nearby. For, under the procedure of contract zoning, formally the property will have been rezoned, and the zoning map will show the property to be in a commercial district. Thus no real purpose would be served by the presence of the contract conditions in the zoning map. The fact that there are still further restrictions imposed under a contract with the city may be analogized to and often is the same as the uncountable number of private covenants running with the land made by private persons and whose existence is also not reflected in the zoning map.

If the courts are concerned about notice to prospective buyers of the rezoned parcel, this problem has been adequately dealt with in the contract zoning cases. The officials have required a recording of the agreement in the county clerk’s or similar office where any future purchaser can always check the chain of title for any further restrictions on the use of the property.

Probably the most substantial and severest criticism of contract zoning made by the courts is that it constitutes illegal “spot zoning.”

Zoning in our time has become synonymous with districting. Zoning ordinances are based on the theory that the public welfare requires that there be a segregation of incompatible land uses. Consequently, a municipality must rationally segregate uses among different classifications and then rationally distribute the land in the community among each of the categories of uses. After passing a zoning ordinance, a municipality must not allow a property owner to then use his land for a use other than one permitted in his district by the zoning ordinance. To allow an unauthorized use would be a violation of the basic purpose and theory of zoning. In addition, unjustifiable discrimination would result against those who are not allowed to escape the requirements of the ordinance, i.e. to those without political influence, or to those who expended funds in reliance that the zoning ordinance would be rigorously enforced to keep out objectionable uses. Many years ago, Bassett, a leading authority, pointed out that such discrimination would have gravely weakened the cause of zoning politically. Thus uniformity within each zoning district has always been a requirement of zoning enabling acts.

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47 See Crolly, April 6, 1955.
49 Bassett, op. cit. supra, n. 21, 50.
The courts have been quick to condemn any evasion of this requirement by public officials. The simple process of an amendment to the zoning map, which changes the classification of a particular parcel of property has been recognized by the courts to be at times a subterfuge to avoid the requirement. The courts have attempted to identify the characteristics of legitimate amendments involving small parcels of land ("spot zoning"). Zoning amendments, it is usually said, must be made for the general welfare; they must not be just a "special privilege" for the property owner.

The similarity between contract zoning and "spot zoning" has not been missed by the courts. Here, too, uniformity in a district is being destroyed. And so it is not unexpected to find in every case involving a contract zoning fact situation the usual arguments that are made for uniformity in zoning districts and against unwarranted changes in zoning classifications. Contract zoning subverts the basic zoning plan; in the course of time, it will produce conditions as chaotic as those that existed before zoning.

In fact, contract zoning seems to be but an aggravated form of this disease because when a municipality has rezoned a property without conditions, its actions at least appear to constitute a judgment that changed conditions in the neighborhood of the property require a reclassification for the general welfare. When rezoning is made subject to conditions, however, the board's actions begin to look not like an act of sound judgment of what the public good requires, but a bargain that is feasible politically, but still made for the benefit of a private individual. The conditions appear to have been added only for the purpose of meeting any political or legal challenge.

"The action of a municipality in rezoning downward a parcel of property of an owner who in aid thereof makes such an offer or agreement can never be based upon a free and independent exercise of judgment and discretion of the governing body."

More expansive is the following statement by the court in Hartnett v. Austin:

"In exercising its zoning powers the municipality must deal with well-defined classes of uses. If each parcel..."
of property were zoned as the bases 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.... This is so because all genuine standards would have been eliminated from the zoning ordinance. The zoning classification of each parcel would then be bottomed on individual agreements and private arrangements that would totally destroy uniformity. Both the benefits of and reason for a well-ordered comprehensive zoning ordinance would be eliminated."

But, as already has been pointed out, one class of contract zoning cases involves changes made in borderline areas between two quite different zoning districts. Near the property in question are usually residences on one side and commercial buildings on the other. From the point of view of the old zoning classification, an inconsistent use is being allowed into a residential area, and the uniformity of uses is being destroyed. Seen, however, from the point of view of the uses in the surrounding commercial area, there is no destruction of uniformity for the use to be made of the property is quite consistent with the requirements of the commercial district.

The issue of uniformity then resolves into the more accurate question — to which uniformity does one look? Should there be conformity to the requirements of the old residential or of the neighboring commercial classification? It is not necessarily the old zoning classification, for if it were, no amendment of the zoning ordinance involving relatively small areas would ever be permissible since the change would permit uses not allowed in the old zoning classification. But that is not the law; even in states which have outlawed contract zoning, not all changes of classifications of comparatively small parcels of property constitute illegal "spot zoning."

The validity of zoning amendments has been tested constantly by the courts according to certain traditional, but rather vague, formulas. It is usually said that there must be proof of either changed circumstances or that an error was made in the original zoning classification. Usually, a reference is made to the zoning enabling acts’ re-

\[ Supra, \text{note 52, 89.} \]
\[ Huff v. Bd. of Zoning Appeals, 214 Md. 48, 133 A. 2d 83 (1957); Chayt v. Maryland Jockey Club, 179 Md. 390, 18 A. 2d 856 (1941). \]
\[ 1 \text{ Rathkopf, 27-1.} \]
quirement that any change must be "in accordance with a comprehensive plan."\(^{57}\) How courts apply these formulas is far from clear. One renowned academic has written:

"[B]y what standard can a court decide whether in fact the change is an improper one or whether it successfully meets constitutional and statutory tests of validity?

"An element apparently common to all the cases dealing with this problem is consideration of whether the zoning action under attack conforms to some sort of general plan — that is, whether it may be defended as logically related to something broader than and beyond itself. This general plan, or comprehensive plan, with which the amendment must conform, is many things to many courts. It may be the basic zoning ordinance itself, or the generalized ‘policy’ of the local legislature or planning authorities in respect to their city’s development—or it may be nothing more than a general feeling of fairness and rationality."\(^{58}\)

If it is proper at times to change zoning classification though it destroys uniformity with the old districts, there is no reason why rezoning by contract automatically fails to meet the requirement of uniformity. Both involve essentially the same legislative act — an amendment to the zoning ordinance. The standards for judging the change in zoning classifications in a contract zoning situation can be the same ones, be they strict or flexible, used to test whether an unconditional zoning amendment constitutes illegal "spot zoning."\(^{59}\) In other words, if a change to a less restrictive classification in the contract zoning situation, considered without the conditions, would be warranted, then \textit{a fortiori} the restrictions imposed by the pub-

\(^{57}\) Standard State Zoning Enabling Act § 3. Hereafter, the act will be cited as the "Standard Act". The act may be found in RATHKOPF, ZONING AND PLANNING (3d ed. 1962) § 100-1 et seq.


\(^{59}\) In land use planning, commercial districts are considered "less restrictive" for two reasons. First, a residence may be permitted in a commercial zone, but not the converse. Thus the alternative uses open to a property owner in a commercial district are much greater. Euclid v. Ambler Co., 272 U.S. 365 (1926). But the first reason may not always apply. Zoning ordinances often exclude residential uses from commercial districts. The second reason applies almost universally. It is simply the fact that if a vacant parcel is used for commercial purposes, the return on an investment is generally higher, and, in this sense the zoning of property for commercial uses is "less restrictive" of the property owner's common law right to use his property as he desires.
lic body to minimize the conflicts among districts would not violate any requirement of uniformity with the old zoning classification.\textsuperscript{60}

Even if the municipal officials may have considered only the property owner's proposed use in agreeing to the rezoning, if the court finds every permitted use of the new zoning classification would be justifiable for the property in question, then by one typical test, there is no invalid "spot zoning." If, however, not every use would be acceptable, this means that while there may have been some changes in the general conditions in the area, they have not been sufficient to justify a change in zoning classification.\textsuperscript{61}

Similarly, other tests of the propriety of a zoning amendment should be applied to a contract zoning case. For example, generally, if conditions in the rezoned property are indistinguishable from those existing in other property in the area, the rezoning is invalid as an arbitrary discrimination.\textsuperscript{62} Thus in the \textit{Baylis} case the funeral home was to be in a general residential area, which though probably deteriorating, was still overwhelmingly residential so far as the facts show. The deterioration was probably general and so the proposed amendment should not be an \textit{ad hoc} solution for a particular, but indistinguishable, parcel of property. Rather a general reconsideration of land use control in the area should be undertaken. The court would seem to be correct in condemning the officials' action as invalid "spot zoning." This would tend to be generally true of the class of cases, Group (2), whose facts resemble the situation in the \textit{Baylis} case.\textsuperscript{63}

\textsuperscript{60} In \textit{Church v. Town of Islip}, 8 N.Y. 2d 254, 203 N.Y.S. 2d 866 (1960) the New York Court of Appeals implicitly used this analysis — for it said that a rezoning of the property for commercial purposes without any conditions would have been valid. See the comment on the case in 18 Wash. & Lee L. Rev. 129. In the recently decided Massachusetts case, \textit{Sylvania Elec. Products, Inc. v. City of Newton}, .... Mass. ..... 183 N.E. 2d 118 (1962) the court relies partly on the reasoning given above, but still emphasizes that the property was in form placed in a limited manufacturing district without any conditions. The property owners became legally bound to comply with certain conditions, other than that imposed by the zoning ordinance, only subsequently and by their own voluntary act. Yet the court acknowledges that the inducement for the rezoning was the "agreement" reached previously with the property owner. The latter is a large, nationwide electrical manufacturer whom the city council no doubt trusted to carry out a plan under which legally valid restrictions would be imposed on the property.


\textsuperscript{63} See n. 10.
However, in Hartnett the result would seem wrong if based on the theory that contract zoning is illegal "spot zoning." The property was a vacant lot next to a large shopping center. The building of a residential structure, though possible, would not be very desirable. Nor was there any evidence that the surrounding residential area was deteriorating, or that a general rezoning of the area was needed. The area was probably a large, post-war development. But for the land in question the most appropriate use would be a commercial one. Of course, the fact that a parking lot was the intended use, though less obnoxious than other possible commercial uses, is irrelevant in determining the legality of the zoning change under the analysis given above. All the potential commercial uses must be theoretically acceptable.

In summary it is clear that because a zoning amendment is made conditional on a property owner's agreement to accept certain use restrictions or other conditions, it is not necessarily unlawful "spot zoning." The fact that there is a contract between the city and the property owner is irrelevant to the issue whether there has been a proper or justifiable deviation from the uniformity of the old zoning district.

It would be appropriate to take notice at this point of an argument made by the courts which essentially restates the general argument that contract zoning is invalid "spot zoning" by referring to one of the vices of "spot zoning."

It is argued that rezoning by contract upsets the expectations of persons under the older more restrictive zoning classification. These persons may have expended substantial amounts of money in reliance on the present zoning scheme, and they have a right to have their expectations respected. Again, it is clear that it is not the contract in contract zoning that destroys their expectations, but it is the passage of the zoning amendment which makes this new use possible. But as the Oregon Supreme Court said,

"Property owners have no vested right by reason of the enactment of an ordinance establishing use districts. No contractual relations are thereby created. Property is held subject to a valid exercise of the police power."

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64 Hartnett v. Austin, supra, n. 52, 89.

And if a municipal legislature has the power to put through a zoning amendment without conditions, the neighboring residents, in a contract zoning case, have no cause for complaint because conditions are imposed. For "[S]urely they are intended to be and are for the benefit of the neighbors," as they are imposed to minimize any adverse effects on these residents.

If the foregoing analysis of contract zoning is correct, it would then seem that the courts are not without standards by which to judge the propriety of a contract zoning situation. The standards, however, are not different from those in any other case involving rezoning of small parcels of land. The argument made in the Baylis case that, unlike variances, there are no limits to the use of this technique is untrue. The zoning ordinance would not be reduced to a series of "deals" made according to the ability of each property owner to bargain effectively.

Properly viewed then, the contract in contract zoning is an act of political accommodation of conflicting pressures in the community. On the one hand, there is the pressure for commercial developments to provide services to the citizens and added taxables. On the other hand, there is the adverse effect on residential areas that the change may have. The resolution of these pressures in the form of contract zoning raises very difficult legal or policy considerations, but it is not that involved in a charge of illegal "spot

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Church v. Town of Islip, supra, n. 60, 259.

Before closing this section, another issue raised by Crolly should be mentioned. (March 10, 1961). The problem is when and how may the agreement be released or modified? Crolly cites as an example of the problem, Vasilakis v. City of Haverhill, 339 Mass. 97, 157 N.E. 2d 871 (1959). In that case the court held that once a zoning variance is granted on a stated condition, the owner is bound and must abide by such condition, which prohibited a certain use though a subsequent zoning ordinance made use legal in the district. The case, though it seems very unjust, does provide an answer to the problem. When the conditions in the neighborhood (e.g. the entire area is now predominantly commercial) have so changed that the purpose of the agreement would no longer be served by its continued enforcement, then a court should by sound principles of equity and construction of the agreement hold the agreement terminated, unless the agreement expressly otherwise provides.

See also Hubbard v. Raynor, N.Y. Law Journal, Jan. 13, 1959 (Suffolk County) (Unreported). Here, too, proper construction of the agreement would solve the problem that arose when property owner was not able to use his property as he had originally intended. He sought then to use his property as a gasoline station, which was a permitted use in the new zoning district, but would have been a violation of the express purpose of the agreement. The court properly held that he could not so use his property. The agreement should be construed as restoring the property to its old classification if the proposed employment of the property is not carried out.
zoning." These considerations will be discussed shortly. (See Part IV.)

But our analysis of the relationship of contract zoning and "spot zoning" leads to one definitive conclusion. With regard to the Baylis type of case, contract zoning is not an acceptable formula for allowing the intrusion into the midst of a residential area of a completely non-conforming and inappropriate use. To do so would undermine the very theory on which zoning rests. Without questioning the motivations of any public official, we can say that a piece-meal approach to rehabilitation of decaying residential areas is no longer acceptable. A general deterioration in a residential neighborhood calls for a comprehensive municipal program of renovation or renewal of the area including, perhaps, the designation of the area as desirable for commercial, industrial or other uses. The whole concept of zoning is predicated on the theory that there should be municipal planning in the distribution of the community's land among various uses. Public officials should not be allowed to abdicate their obligations in this respect by approving patchwork restoration projects without any consideration of a general program of redevelopment of the decayed area. Nor should they be permitted to favor one property owner among many similarly situated.

The reasoning of the courts has on the whole failed, however, to justify any wholesale condemnation of contract zoning. Furthermore, the facts of the cases lead one to feel that most of the agreements that the courts have struck down seem to have been fair, reasonable, and moderate. They appear to have been good faith attempts to resolve defects in present day zoning laws.

III

Much support for the use of contract zoning in the Hartnett type case can be derived from the fact that contract zoning is one of the two most acceptable techniques under the existing theory of zoning to solve the general predicament exemplified by the facts of that case.

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68 There is a strong element of anomalousness in the condemnation. Most of the tests of the legality of a rezoning look essentially to the result of the change, not the means of bringing it about — if they are reasonable. The questions usually asked are: how does the change affect the neighboring land? Or is the change "in accordance with the comprehensive plan?" If the procedural requirements of the enabling statute are substantially observed, the courts try to deal with the merits of the proposed change.
Let us examine the possible use of the five alternative methods, listed in Part I, of changing zoning controls. We may quickly rule out the first two possibilities.

The first would be an outright change of classification without the imposition of any conditions. Such a solution would be politically unacceptable. The officials would have to rely on the property owners abiding by the agreed upon conditions. This, certainly, would not satisfy the protesting neighboring property owners, and, probably not the public officials. For it would leave the property owner subject only to the general requirements of the new commercial zoning classification, which is not likely to contain the conditions the public officials feel are required.

The second method would be the granting of a variance by the board of zoning appeals. The grant of a variance normally can contain conditions. But the necessary showing of "a particular and unnecessary hardship," which is a prerequisite for the granting of a variance, could not be made here. A profitable or a reasonable use could probably still be made of the property under its present zoning classification.

A third possible answer is that the zoning ordinance might be amended to set up a new zoning classification. The property would then be in a district of its own with the needed conditions and use requirements. If officials intended to make the new classification generally applicable to the border area, then in order to take account of diverse physical conditions, the requirements of the new classification would have to be general. Consequently, the classification would be inadequate for the particular problem raised by the situation.

If the new classification were made specific enough to deal with the particular problem, it could not be applied generally. Then a whole series of classifications would have to be made up to deal with the thousands of possible problems in areas adjacent to the borders of dissimilar use classifications.

Clarity and, if possible, simplicity in statutes are desirable in order to give the general public notice of the course of conduct expected and to mitigate the possibility of invidious discrimination. The result of making new ad

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*1 Yokley, Zoning Law and Practice, (2d ed. 1953) § 144.
*2 Id., § 138.
*3 Bassett thought it was very important in the area of zoning that landowners should be able to obtain easily notice of the classification of their property, supra, n. 21, 51. A complex zoning scheme is not necessarily inconsistent with notice of classification. The important issue here is discrimination.
hoc classifications would be a zoning ordinance so detailed, so lengthy, so complex, and, consequently, so arbitrary that no court would allow it to stand. The multitudinous classifications of such a cluttered zoning statute must fall even if such a system could be said to contribute to the public welfare.

Contract zoning does not burden the zoning law with unnecessary details. Nor does it create such a great danger of unjustified discrimination. The desired simplicity of the zoning laws can be retained, while adequate notice is given the citizenry of what zoning controls there are on any piece of property. Furthermore, contract zoning, as analyzed here, would have to face the same tests that any other zoning amendment would. And those tests, while far from perfect, at least assure that favoritism to influential persons will be minimized.

It has been suggested that the employment of statutory exceptions might provide an answer to the problem of zoning in border areas. But this technique also has serious failings. Statutory exceptions are part of a general statutory scheme carefully thought out in advance, whereas the situation that contract zoning seeks to deal with is unique to each case and cannot practically be prepared for.

The public officials, in seeking to allow a change in use which they feel is justified, want to mollify the protests of opposing residents and voters. Such an act of political compromise is by its very nature unique to every fact situation. The amount and type of conditions needed to make a commercial development blend with a surrounding residential area are a function of such variables as the degree of protest, the nature of the proposed use, and the official’s conception of what the public good requires. In one case the problem may be reduced to a question of aesthetics. Shrubbery or fencing are required. In a second case, it may be conformity to a special kind of architecture in the area that is demanded. In still a third case, it is the noise or traffic of the proposed use. So various controls are imposed to minimize these objections. Access to the property from a residential street is forbidden. In a fourth case, it may be the size of the project or an undesirable use that is the cause of protest. Restrictions are placed then on the heights of buildings to be constructed, the area of the plot to be covered by the buildings, the times in which

72 For a similar case see Rockhill v. Chesterfield Township, 23 N.J. 117, 128 A. 2d 473 (1957).
73 A case that has both elements, gross discrimination and possible public benefit, is Marie’s Launderette v. City of Newark, 35 N.J. Super. 94, 113 A. 2d 190 (1955). The zoning ordinance was held unconstitutional.
certain activities may be carried on. Since such individualized treatment for each situation is required, a generalized statute to deal with the problem cannot be written.

Statutory exceptions have commonly been used to allow gasoline stations into various areas of the municipality where such a commercial use would not normally be permitted. But the great need for gas stations in all parts of the community has been accepted. Thus a statute is drafted which provides that when certain conditions have been met, an exception will allow the building of the station. Normally construction of the station must follow certain standards of construction and design set forth in the statute though the statute may authorize the imposition of still further detailed controls by municipal officials in each case. The problem of the need for gasoline stations in non-business areas is susceptible to a previously prepared statutory solution for the problem occurs often enough that it can be foreseen, and it is narrow enough for there to be a reasonable category of relevant requirements.

Though it is certain that complications on the borders of zoning districts with very diverse uses are bound to occur, the problems do not fall into a reasonable number of categories. Furthermore, it is almost impossible that the specific problems raised by each parcel of property can be foreseen. To do that we would have to know what every property owner, present and future, would like to do with his property.

It has been previously mentioned that an administrative exception might provide a better solution to the problem than does contract zoning. Under that scheme, the board of zoning appeals or the municipal legislature would be empowered to grant exceptions limited to dealing with the problems of residential area adjacent to business zones.


2 A possible example of such a statute can be found in R. D’ordine & Son v. Zoning Board of Review, 79 R.I. 489, 90 A. 2d 416 (1952). There would seem to be good reason to place the responsibility for administering such a statute with the board of zoning appeals, whose members, theoretically, have developed an expertise in dealing with the very analogous question of conditions imposed on the granting of a variance, or who may have more personal integrity. These assumptions, however, of expertise and probity may rest on very tenuous grounds in many cases. See infra, n. 86.

It will not do to argue that this function belongs with the board of zoning appeals because the issue partakes of an administrative question and, therefore, is an inappropriate issue for a legislature, who should concentrate on overall policy. Anyone in the least familiar with the problems and politics of municipal government knows that the difficult distinction of what is a legislative and what is an administrative question raised by the division of powers in the national government becomes an impossibly fuzzy issue at the municipal level of government.
The statute would have the usual requirement of a public hearing. In this way the public, i.e. the neighboring home owners, will have the opportunity to express their views. The statute would also demand that the situation on that parcel of land be unique. Specifically, it must be the only piece of undeveloped property facing the commercial zone. This requirement will assure that public officials do not attempt to evade their responsibility to rezone generally when circumstances require, and other nearby property owners will thereby be protected against discrimination.

Under this solution the zoning ordinance would not have to be amended, and the property would remain in its old district. No further deviation from the present statutory scheme than that expressly approved would be allowed. The hard questions of "spot zoning" that are raised by zoning amendments will be avoided.

The public could focus on the merits of the specific proposals of the landowner and can come up with a plan tailored to the needs of the situation. The property owner would have no real grounds for complaint if the public officials in an honest exercise of discretion do not grant the exception on his or any terms for he may always use his property for a present lawful use.7

Aside from this solution, contract zoning is the most effective and desirable way to solve the problem of accommodating neighboring commercial and residential uses. As the New York court said in the Church case:

"To meet increasing needs of Suffolk County's own population explosion, and at the same time to make as gradual and as little of an annoyance as possible the change from residence to business on the main highways, the town board imposes conditions."77

But even a flexible technique like an administrative exception would not be preferable to contract zoning in the following circumstances. A New Jersey statute, for example, allows the granting of what is essentially an administrative exception "in particular cases and for special reasons."78 The facts in a contract zoning situation would seem to be a "particular case." In addition, the Supreme Court of New Jersey held that this vague statute could be tested by the purposes enumerated in the zoning enabling act and the local ordinance.79 But the breadth of the pur-

76 Ibid.
78 Supra, n. 13.
79 Ibid.
pose in the typical zoning law is so great that it is equivalent to no standard. It lists every desirable goal of land use planning, but these goals are very general and may be contradictory.  

Contract zoning as analyzed above, seems to provide much more definite standards in comparison. An exception could be allowed under the New Jersey statute in any area for many different reasons. Under such a statute the requirement of uniformity would become meaningless. At least in the case of contract zoning the damage to uniformity would be limited to the fringes of a zoning district. A statute authorizing the use of administrative exceptions would have to be carefully drawn to limit its use to the problem of zoning controls in the area between two radically different use districts if we are to avoid the problems raised by the broad New Jersey statute.

IV

Assuming, however, that contract zoning is analyzed as a compromise of conflicting pressures on certain uniquely placed parcels of land that do not necessarily violate any express statutory requirement, or the theory or pattern of existing zoning enabling laws, that does not settle the question of the propriety of allowing public officials to contract with private parties to achieve the political compromise.

There are other considerations, and they make it impossible to treat the charge of contract zoning in the same summary fashion the New York court did. What are these considerations?

In most of the contract zoning cases, passing statements can be found to the effect that rezoning by contract is in essence the granting of "special privileges" to property owners for illegitimate reasons. Behind these cryptic statements lies the courts' fears of corruption or political favoritism. There is also the fear that officials will use considerations not appropriate to land use control programs. Thus in V. F. Zahodiakin Eng. Corp. v. Zoning Board of Adjust. an exception subject to conditions was approved allowing the plaintiff to remodel his buildings and use them for light manufacturing purposes though the surrounding area

80 Standard Act § 3, one example of possible cross purposes. One goal listed is "to avoid undue concentration of population". In New York City, however, this goal cannot be achieved in many areas if the city is going "to prevent the overcrowding of land" in order to have space for parks and other recreational activities.

81 S N.J. 386, 86 A. 2d 127 (1952).
was completely residential. The reason for the granting of the exception, though not explicitly stated, was that the officials probably wanted to increase the tax revenues and possibly the employment opportunities for the community's residents. Though these are desirable purposes in an overall zoning plan, such justifications are almost never acceptable for allowing light manufacturing in the midst of a residential area. The lack of acceptable purpose was further demonstrated by the way the case came up in court; the case came up ten years after the exception was originally granted when the corporation requested a continuation of the exception which was limited to ten years. At that time the area was still zoned and was in fact solidly residential. A zoning amendment of a relatively small parcel of land must be made in light of present or probable future land uses in the surrounding area, and this one was not.

The fear of irrelevant considerations, aside from outright corruption and political favoritism, in rezoning situations is probably decisive in the courts' thinking about contract zoning. This is rarely acknowledged by the courts because they can never really know what went on in the private offices of public officials in any particular case. This unstated anxiety that the real considerations behind the change are not disclosed also explains why the courts' opinions in rezoning cases are often unenlightening.

The general inability of the courts to articulate exact standards for determining the propriety of zoning changes is a factor that heightens their doubts about zoning amendments, and, naturally, makes them suspicious of contract zoning. Still another factor in the situation is that generally a strong presumption is raised in favor of changes in municipal zoning ordinances, or, more commonly, the party attacking them must bear the risk of non-persuasion. This adds to the courts' sense of helplessness in dealing with the situation. How important these two additional factors are cannot be ascertained, but they

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83 Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E. 2d 731 (1951); however, Maryland seems to take an intermediate position. See Wakefield v. Kraft, 292 Md. 136, 96 A. 2d 27 (1952). The presumption in favor of rezoning is not as great.
84 See Haar, Land-Use Planning (1959) 296-97 for a listing of sources dealing with the difficult problems of administration of zoning ordinances. The author believes that grave problems exist in this area of zoning today.
85 Perhaps the courts are also disturbed by the fact that it is the municipal legislature who is doing the bargaining rather than the board of zoning appeals. The courts may feel that if the latter were making the
certainly do add to the courts' general apprehension that they cannot control the possible dangers of favoritism, corruption and irrelevant considerations in the passage of zoning amendments. As things stand now,

“If the court to which the question is eventually taken believes the governmental action to be arbitrary and improper, that action is branded as spot-zoning. If not, it is called a planned readjustment.”

In addition to the possible evils of normal zoning amendments without conditions, contract zoning has additional elements that have already been mentioned. Contract zoning appears to resemble the very process the courts fear. Instead of making a considered judgment whether rezoning is proper, the official and the property owner seemed to have been closeted in a bargaining session, out of which has come a compromise which bypasses the present zoning scheme for illegitimate purposes.

But not all courts are so suspicious of the motives and actions of public officials. Even before the Church case upheld contract zoning in New York, there was a decision by its Supreme Court, the trial court of general jurisdiction, in a case that closely resembles a contract zoning situation. That case voiced a general willingness to trust public officials. The case involved the sale of unneeded public lands where the contract of sale was made condi-

deals they would be less subject to unjustifiable political or policy considerations. But one may have strong doubts as to the greater quality or integrity of the members of this public body. In some communities they are no doubt public-spirited citizens of the highest probity and caliber. In other municipalities they may well be political hacks who may have received this position for political services rendered, or for even more nefarious purposes. Moreover, they may be less accountable for their actions because of a long tenure that these positions sometimes have.

In the cases supporting and striking down the zoning amendment and the agreement, the municipal legislature was both supported and opposed by the planning commission or the board of zoning appeals. The opposition to the plan by the planning commission in Church v. Town of Islip, supra, n. 60, was not considered significant by the court in that case. But in Baylis v. City of Baltimore, 219 Md. 164, 148 A. 2d 429 (1959) the antipathy toward the plan of the planning commission may have raised doubts in the court of the motivations of the public officials involved. But we have no clear statement by the court of the importance it placed on the position of the planning commission involved. Nor do we have any information as to the quality or integrity of that body.

O'Shea v. Hanse, supra, n. 58, 1167.


The plaintiff had argued that this was a “zoning by contract” case. Analysis shows that it isn't. It is clear that the officials may sell the land; the only issue was whether the rezoning was proper. There were no conditions being placed on the private persons purchasing the property.
tional upon the rezoning of the property to commercial uses. The approval of the sale and the rezoning were to be made by the same public body. A suit was brought to enjoin the sale by a resident who argued that the body's interest in the consummation of the contract of sale would influence and deprive them of the fair exercise of judgment in the subsequent request for rezoning. The court found that the rezoning was in fact proper and added this statement.

"This court is aware that it has been fashionable for many years to excoriate public officials as being untrustworthy, to imply baseness to their motives, and to subject them to the severest criticisms for their public acts. Under such conditions it is amazing that responsible citizens continue to shoulder the burden of public office, and it is not unlikely that communities have been deprived of the services of many capable persons, because of this 'fashion.'" 89

Perhaps these differences in outlook reflect a judgment by the judiciary of each state of the public officials in the state. In any case, the issue of the propriety of zoning amendments and contract zoning rests in part on a basic judgment as to the quality and honesty of public officials.

There is still a second major consideration in determining whether the courts should find contract zoning authorized. So far the discussion has dealt only with the question whether any conditions lawfully may be imposed. There is also, however, the question whether there is or should be any limitation on the conditions that can be asked of the property owner. This further consideration has not been mentioned by the courts because of the nature of the suits that have been brought against contract zoning. The plaintiffs have been neighboring residents who did not want the rezoning under any circumstances. But what if the party bringing the suit is the property owner? What should be done if there is a legitimate request for rezoning, but the pressure put on the officials by the residents of the area is such that the public officials, though willing to approve the rezoning, are forced to demand the acceptance of burdensome and coercive conditions? In addition, the motives of the public officials may be even less justifiable. They may be seeking to exploit their power to refuse to act to extract from some property owner the cost of a public improvement. For example, desirous of getting an easement or a

89 Supra, n. 87.
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piece of land for a park, the public officials demand these things as a consideration for the rezoning.

This is the other side of the coin of favoritism — coercion. The power to rezone subject to conditions makes possible the coercion. Without the power, this compulsion could not exist. Though the community might then refuse to rezone at all, in which case the property owner may feel himself worse off, there is a great value in making clear to public officials that if they do act, it cannot be in an arbitrary manner.

When it is the neighboring property owners complaining of the rezoning, they may and probably do form a sizable group such that they exert enough political pressure to at least assure themselves of a fair hearing. When the situation is reversed, and it is the one property owner complaining, his political influence may be minimal. The very nature of contract zoning — the uniqueness of each situation — make it likely that the power to impose conditions will be directed against a small number of persons. The desirability of allowing contract zoning diminishes, even more, when we look at cases of coercion in the area of variances and subdivision control that closely resemble contract zoning cases.

In Assessors of Dover v. Dominican Fathers, etc., 90 in exchange for a variance the city demanded that a valuable tax exemption be given up. The court held the demand illegal. In Gregory Manor v. City of Clifton 91 the plaintiff alleged that he had given park land to the city in reliance on the city's agreement to rezone a portion of his land for a shopping center. He further alleged that the city would not approve the rest of his subdivision plan without the dedication of park land. As he had financial obligations to meet, he could not afford to take the time to challenge the legitimacy of the condition which he had a legal right to do. Plaintiff deeded the land without getting the rezoning he had desired. He sued for the return of the land or its value. The court found that the dedication of the park land could properly be asked and that no agreement to rezone in exchange for the park land was made. But if it were, it would have been illegal. The case shows the difficulty of proving coercion in many cases. In a third case, the city demanded either an easement without cost for a drainage pipe or that the property owner install the pipe in exchange for a requested rezoning. The court recognized that the conditions were highly coercive and illegal, but

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ruled that plaintiff had no cause of action for other reasons. ⁹²

Each of these cases ⁹³ illustrate that the danger of unjustifiable pressure is not unreal for in each of these cases the conditions imposed went far beyond those in the Hartnett or Baylis cases. On the other hand, it is true that the property owners in the contract zoning cases are not without any political influence. Since the proposed use of the property in a contract zoning case is normally commercial, city officials who are desirous of added taxables to meet ever increasing municipal expense budgets, will often place reasonable limits on their demands. But then again the officials may have no particular interest in the project; in that situation, there are still less controls on the demands that can be made.

It can be argued that the courts could also control the problem by distinguishing proper from improper conditions by seeing whether the conditions imposed do increase the compatibility of uses in the area. ⁹⁴ The courts could easily distinguish the Hartnett and Assessors of Dover cases, since the tax revenues the property yields has little to do with its physical desirability. But would it be unreasonable for public officials to say that parks near a commercial area or improved drainage in the area would make the commercial use more acceptable?

Because of the danger of favoritism without consideration of the community's need, on the one hand, and of unfair pressures on the property owners, on the other, it might be wise for courts not to accept contract zoning without statutory authorization. The situation would appear to be an appropriate one for the state legislature to weigh all the advantages and disadvantages of contract zoning.

CONCLUSION

Contract zoning was developed by public officials as a response to the cumbersomeness of the present system of zoning by districting. Perhaps, someday, zoning by performance standards will provide the needed flexibility to

⁹² Besselman v. City of Moses Lake, 46 Wash. 2d 279, 280 P. 2d 680 (1955). The plaintiff had no cause of action because the city decided not to rezone at all. Had the rezoning gone through and if the condition was later challenged by the property owner, this would have been an example of coercion in a contract zoning situation.

⁹³ See also the otherwise unreported case of Kulzer v. Boyenski, N.Y. Law Journal, Dec. 10, 1956, (Nassau County) where in exchange for a variance the town demanded that the property owner give up his right to just compensation if and when a proposed highway is built.

⁹⁴ The Court in Church v. Town of Islip, supra, n. 77 did this.
solve the problems that have given rise to contract zoning. Contract zoning, however, though it occupies a very small role in the scheme of land use control in America today, raises deeper questions than that of proper land use controls on the borders of zoning districts.

Whenever public officials, acting in their role as exercisers of the police power, contract with private parties, there is a desire to ensure that the power is exercised honestly, fairly, and for a legitimate need.

It might be worthwhile to compare briefly how these goals of official responsibility are achieved when a contract is made under an exercise of the power of eminent domain in the land use planning area. Many states have passed urban redevelopment statutes which have authorized the municipality or specially created agencies to condemn land and sell that land to private developers for urban renewal projects. Each of the statutes authorizes the agency to make any necessary contracts with the developer, and full power is given to the officials to draw up the terms of the general plan and the contract carrying out that plan. Such breadth of authority makes control by the courts of the contract improbable, if not impossible. The truth of this statement can be seen in the paucity of cases challenging the terms of an urban redevelopment contract.

In one of the few cases, Schenk v. City of Pittsburgh, a property owner whose land was about to be taken for an urban renewal project in Pittsburgh's Golden Triangle challenged the contract made by the public authorities on the ground that the contract did not provide effective protection for the public. He argued that the contract provided for immediate transfer of the land to the private developer without assurance that the project would be carried out. The court found generally that the public interest was protected by the contract, but dealt with the

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64 § 507, for example, does not require public bidding among re-developers for the land condemned. The amount of the subsidy is thus left to the public official's discretion. In neither New York nor New Jersey, which have had tremendous urban renewal projects, has there been any judicial decisions concerning the validity of the terms of the contracts made with the developers with the possible exception of the racial discrimination case discussed in n. 99.

97 364 Pa. 31, 70 A. 2d 612 (1950); See also Oliver v. City of Clairton, 374 Pa. 333, 98 A. 2d 47 (1953); Gohold Realty Co. v. City of Hartford, 141 Conn. 185, 104 A. 2d 365 (1954).
issue of controls over the Pittsburgh Redevelopment Authority's agreement with private developers, by stating that it was not for the courts to say how the contract can be improved.  

If this reflects the general attitude of the courts, then, inevitably, assurance that the public interest will be protected must rest on the political process. Possibly the courts would set aside a redevelopment contract involving fraud by or bribery of public officials or a clear violation of the statute. But the history of urban renewal has shown that this issue of official honesty or public need in the making of these contracts has initially not been raised in the courts. Part of the explanation for the difference between the contract zoning situation and the urban renewal contract is simple. The courts have always been much more active in controlling the exercise of the police power because of its regulatory nature and, consequently, its direct effect on the conduct of citizens. In dealing with the eminent domain power, however, the courts have usually thought of the municipality as dealing with its own property. If this power is abused, the harm is done to the community, not to an individual.

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86 Id., 615.


See also the history of the Cadman Housing Project in Brooklyn, New York, where though there was a clearly demonstrated need for middle-income housing in the area, it was not until a great effort by the Community Conservation & Improvement Council, neighborhood groups and private persons that public officials agreed that the project should provide middle income housing. New York Times Index — 1959, p. 160; 1960, p. 466.

For an interesting variation of this problem see Dorsey v. Stuyvesant Town Corporation, 299 N.Y. 512, 87 N.E. 2d 541, cert. den. 339 U.S. 981 (1949) involving the exclusion of Negroes from the Metropolitan Life Insurance Co.'s giant Stuyvesant Town housing project in New York City. The Court of Appeals held that the exclusion by the insurance company did not constitute public action and so did not violate the equal protection clause of the Fourteenth Amendment. It should be noted, however, that when the contract was made between the city and the insurance company, the city knew that the insurance company intended to discriminate. Though the court found this legally irrelevant, the situation created a political uproar, and shortly after the Metropolitan contract was signed, the city council passed a statute requiring any future project to rent on a non-discriminating basis.

Prior to all this, the project was unsuccessfully challenged on the ground that the enabling statute violated the state constitution on the grounds it allowed illegal gains by private persons. Murray v. LaGuardia, 291 N.Y. 320, 52 N.E. 2d 884, cert. den. 321 U.S. 771 (1943).
Both contract zoning and urban renewal contract cases reflect an ever present issue constantly faced by a democratic society. There is the push to limit the discretion of public officials by definite statutory standards for only in this way can the people be assured that there will be no arbitrariness and discrimination either in the form of favoritism or oppression. On the other hand, there is the need that the necessary power and discretion be given to responsible public officials so that they may meet the problems of our complex society swiftly and precisely. Perhaps these conflicting needs can be completely reconciled or reasonably balanced. In any case, contract zoning is an example in miniature of this basic conflict.