

2002

Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning

Erin Ryan

Repository Citation

Ryan, Erin, "Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning" (2002). *Faculty Publications*. 254.
<https://scholarship.law.wm.edu/facpubs/254>

Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts

Erin Ryan[†]

"Dealing" [in land use conflicts] has a number of potential benefits. It allows for individualized decisions that take into account the unique features of a particular parcel or project and the availability of measures capable of mitigating adverse land use effects. A carefully tailored set of land use requirements based on a bargaining process may be fairer than traditional regulation: rather than simply treating roughly similar land equally, it takes into account specific characteristics and problems that justify variations from a potentially overbroad norm. Furthermore, the bargaining process may be more efficient because it facilitates cost-efficient outcomes and substitutes a potentially cheaper decision-making process that fosters prompt and amicable compromises while avoiding the costs attendant to protracted administrative and judicial appeals.

Yet dealing is not without its perils. Unfair or inefficient outcomes may result from imbalances in power or skill that either distort the dealings of participating parties or result in failures to consider the interests of affected nonparticipants. In extreme cases involving government parties, power imbalance may result in the creation of "naked preferences," that is, the treatment of one group or person different from another solely because of a raw exercise of political power in the absence of a broader and more general justification or public value.¹

[†] Law Clerk, The Honorable James R. Browning, United States Court of Appeals for the Ninth Circuit; J.D., 2001, Harvard Law School; M.A., 1994, Wesleyan University; B.A., 1991, Harvard University. This article is the product of a fellowship with the Harvard Negotiation Research Project through a generous grant from the Hewlett Foundation. I would like to thank Bob Mnookin, Jerold Kayden, and especially Bob Bordone for their support of this project. Thanks also to the members of the Harvard Negotiation Law Review who helped prepare this article for publication.

1. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 960 (1987).

I. INTRODUCTION

Municipal land use bargaining may imply as many problems as it heralds promise, but it is widely acknowledged as the universal language of land use planning. Planners and scholars agree that public-private negotiation plays a central role in the vast majority of local land use decision-making.²

At least in part, this is a result of the peculiar attributes of the resource at issue. Land is, perhaps, the ultimate nonfungible. Land-forms and land values are forever in flux—at the mercy of both natural cycles that erode and accrete and economic changes that render a given parcel more or less valuable in relation to external factors. Each parcel of land possesses unique characteristics not only in its physical attributes, but also by virtue of its location, and its proximity to other unique parcels. Unlike almost every other thing of value, it is impossible to relocate spatially. Rules of general application fit poorly to so variegated and unstable a resource.

Moreover, land uses implicate the conflicting strands of property rights far more profoundly than do uses of personalty, since free disposition of one's own land extends perilously into the realm of neighbors' quiet enjoyment of their own. Although private rights in property ownership are a foundational value of our legal system, private rights in land use are considerably more constrained. County and municipal governments designate the outer limits within which landowners may freely exploit their property without unduly burdening the surrounding community.³ Zoning, by which a community segregates incompatible land uses, is the primary mechanism.⁴

The continuing contest of public and private interests in land use is, without exaggeration, epic. Police power-based zoning ordinances exist to protect public health and welfare, while takings limitations exist to protect property owners from government abuse.⁵ But in the clash of these competing values lies the classic opportunity for negotiation to resolve disputes, and even to create unexpected value in creatively tailored outcomes.⁶ Public and private parties to land use

2. See, e.g., Mark W. Cordes, *Policing Bias and Conflicts of Interest in Zoning Decisionmaking*, 65 N.D. L. REV. 161, 164 (1989).

3. See *infra* text accompanying notes 43-49.

4. Nicolas M. Kublicki, *Land Use By, For, and Of the People: Problems with the Application of Initiatives and Referenda to the Zoning Process*, 19 PEPP. L. REV. 99, 106 (1991) ("Zoning is the process whereby municipalities minimize the incompatibilities between different land uses.")

5. See *infra* text accompanying notes 14-18.

6. See generally ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000).

disputes have been drawn to the bargaining model in the time-honored search for mutually agreeable solutions based on beneficial exchange. And in the absence of substantive agreement on where private must yield to public interests (and vice versa), negotiated decisionmaking also provides a deliberative means of pursuing just ends.

Nevertheless, constitutive rules are needed to mark the outer boundaries of permissible bargaining to avoid outcomes overly solicitous of either public or private interests. The doctrines of reserved powers and unconstitutional conditions provide important constraints against state abuses, curbing government abdication of public responsibilities and exploitation of private individuals, respectively.⁷ The Supreme Court has entered the fray by establishing additional constraints through its takings jurisprudence. Concerned that planning practices had leaned too far in favor of public interests in land use, the Court has used several recent takings cases to voice protections for landowners in disputes with local government.⁸ However, these new rules make value-creating negotiation⁹ nearly impossible in land use conflicts, a result that arguably leaves all parties "worse off" than before.

This article explores the phenomenon of negotiation-based decisionmaking in local land use conflicts and questions the value of constraints created by the Supreme Court's new takings jurisprudence. Ultimately, it proposes a return to a bargain-based environment according to a mediation model, in which abuses are constrained through procedural attention to the meaningful representation of all interests at the negotiating table.

Part II reviews the general practice of land use planning and analyzes the land use dispute as a site of contest between public and private interests. Part III explores how the bargain-based model has assumed prominence among local land planning agencies seeking the uncertain equipoise between public and private interests. Part IV discusses the response of the Supreme Court via its takings jurisprudence, and Part V reviews evidence of the actual impact of the takings decisions on local planning practice. Part VI analyzes the

7. See *infra* text accompanying notes 88-92.

8. See *infra* text accompanying notes 111-28.

9. In value-creating negotiation, parties explore their broad interests and craft a resolution around trades that optimize the benefits yielded to all. This enables them to "expand the pie" of contested value before dividing it among the disputants. See generally MNOOKIN ET AL., *supra* note 6.

problematic anti-bargaining implications of the new takings decisions, and Part VII recommends a return to bargain-based models, constrained by a theory of representation that would counter the reserved powers critique of municipal bargaining.

II. THE CONCOMITANT NATURE OF PUBLIC AND PRIVATE INTERESTS IN LAND USE

The fundamental conflict that drives takings, zoning, and indeed most land management disputes is the perpetual tension between public and private interests in land use. This tension has been recognized at common law since the time of the Justinian Code,¹⁰ and constitutionally since ratification of the Bill of Rights.¹¹ While private ownership of real property is a bedrock principle in the liberal tradition,¹² a frequently overlooked but critical distinction exists between land *ownership* and land *use*: though the former is accepted to be an inherently private phenomenon, the latter is not. This is demonstrated by the subjugation of private land use to the sovereignty of the public police power, from which has evolved modern regional planning and zoning.

Land Use and the Police Power. Municipal¹³ land use disputes arise in light of the vexing intersection between constitutionally protected private property rights in land and constitutionally designated responsibilities for land use management by the state. Whereas the Fifth Amendment to the U.S. Constitution makes clear that "private property [shall not] be taken for public use, without just compensation,"¹⁴ the Tenth Amendment reserves to the states all powers not explicitly delegated to the national government.¹⁵ These include the traditional "police power" of the state to legislate for the protection of

10. See Erin Ryan, *Public Trust and Distrust: The Theoretical Implications of the Public Trust Doctrine for Natural Resource Management*, 31 ENVIRONMENTAL LAW 477, 478 (2001) (discussing the *jus publicum* of ancient Rome, which protected public rights of access to navigable waterways regardless of ownership).

11. The Fifth and Tenth Amendments contemplate both public and private interests in land use. See *infra* text accompanying notes 14-16.

12. See JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 21-28 (1690) (Macpherson, ed. 1980).

13. Local governments involved in land use disputes include county, city, town, and village governments. For simplicity, I use the word "municipal" to refer to all local governments below the state level.

14. U.S. CONST. amend. V.

15. U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.")

the public health, safety, morals, and general welfare,¹⁶ which has long been invoked in the resolution of land use disputes.¹⁷ In 1876, the Supreme Court affirmed that although the state may not control rights that are exclusively private, it may require "each citizen to so conduct himself, and so use his own property, as not unnecessarily to injure another,"¹⁸ signifying the paradoxical nature of property ownership as a private right that necessarily implicates public responsibilities.

Today, local governments vigorously wield the police power to protect various public interests in land use. Regional planning designates the limits within which landowners may freely exploit their property without unduly burdening their surrounding community. But given the contest between public and private interests at issue in land use, private property rights in land have never been absolute. Common law private and public nuisance doctrines have recognized state-enforceable limitations on private property rights where their exercise would produce harmful externalities.¹⁹ Private parties have also used covenants and equitable servitudes to enforce land use restrictions on particular parcels.²⁰

Even before the rise of twentieth century zoning laws, many municipalities adopted local building and land use restrictions to protect public welfare and preempt incompatible uses. As early as 1838, Michigan law authorized municipalities to "assign certain places for the exercising of any trade or employment offensive to the inhabitants,"²¹ and Boston imposed separate building height limitations in

16. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387, 390 (1926) (discussing the traditional scope of the state's police power and establishing the constitutionality of zoning as incidental thereto). The police power, though originating in common law, is explicitly conferred by most state constitutions as well. DANIEL POL-LAK, HAVE THE U.S. SUPREME COURT'S 5TH AMENDMENT TAKINGS DECISIONS CHANGED LAND USE PLANNING IN CALIFORNIA? 3 (California Research Bureau, CRB-00-004) (2000) (discussing the origins of the police power in California).

17. See, e.g., *Village of Euclid*, *supra* note 16, at 387 (invoking the police power as a legitimate means of settling land use disputes). Highlighting the peculiarly public nature of land use disputes, a duet of judges has observed that "[s]ettlement of land use controversies, unlike most private disputes, may have a substantial impact on nearby properties and the general welfare of the public at large." Hon. Richard S. Cohen, Hon. Douglas K. Wolfson & Kathleen Meehan DalCortivo, *Settling Land Use Litigation While Protecting the Public Interest: Whose Lawsuit is This Anyway?*, 23 SETON HALL L. REV. 844, 844 (1993).

18. *Munn v. Illinois*, 94 U.S. 113, 124 (1876).

19. See ROBERT PERCIVAL ET AL., ENVIRONMENTAL REGULATION: LAW, SCIENCE, AND POLICY 87-88 (3d ed. 2000).

20. Kublicki, *supra* note 4, at 107.

21. Mich. Rev. Stat. 171 (1838), *cited in* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS: CASES AND MATERIALS 87 (2d ed. 2000).

residential and commercial areas to minimize fire hazards.²² State courts routinely enforced local ordinances barring noxious uses in protected neighborhoods, including the slaughter of cattle,²³ the maintenance of commercial laundries,²⁴ and the selling of alcohol.²⁵ In 1899, Washington, D.C. restricted building heights to preserve the prominence of the U.S. Capitol's dome.²⁶

The Rise of Regional Planning. The precursor to modern zoning first appeared in Europe in 1891 when the German city of Frankfurt implemented a comprehensive plan that divided the city into different districts with varying building and use restrictions tailored to intended area uses.²⁷ Los Angeles followed in 1909 with a city plan that designated one residential and seven industrial districts.²⁸ In 1916, the rapid rise of American zoning was triggered by New York City's adoption of an ordinance designed to curb the increasing traffic congestion and decreasing light and air associated with proliferating skyscrapers, and to limit the incursion of sweatshop factories into the posh Fifth Avenue commercial district.²⁹ The successful implementation of the New York plan helped inspire promulgation of the Standard State Zoning Enabling Act³⁰ by the U.S. Department of Commerce in 1922, which provided a statutory model by which states might delegate zoning authority to local governments.

In 1926, in the landmark *Village of Euclid v. Ambler Realty Co.*³¹ case, the Supreme Court formally recognized municipal zoning regulations as constitutionally incident to the police power when enacted pursuant to validly implemented land use plans that advance a legitimate public interest.³² Zoning spread rapidly to municipalities both large and small, most of which followed the *Euclid* model of strict

22. *Id.*

23. *See, e.g., Cronin v. New York*, 82 N.Y. 318, 323 (1880).

24. *In re Hang Kie*, 10 P. 327, 328 (Cal. 1886).

25. *Shea v. City of Muncie*, 46 N.E. 138 (Ind. 1897).

26. ELLICKSON & BEEN, *supra* note 21, at 87.

27. *Id.*

28. *Id.*

29. *Id.* at 86-88. Notably, the ordinance was lobbied past city-wide apathy by three separate interest groups: Fifth Avenue merchants concerned with avoiding income losses associated with erosion of neighborhood glamour, real estate owners concerned with depression of property values near skyscrapers, and "reformers interested in broader concepts of city planning." *Id.* at 88.

30. U.S. Department of Commerce, Standard State Zoning Enabling Act (1926), reprinted in ALAN C. WEINSTEIN, ANDERSON'S AMERICAN LAW OF ZONING, vol. 5 (4th ed. 1997).

31. 272 U.S. 365 (1926).

32. *Id.* at 387, 390, 395-96.

segregation between residential and commercial uses.³³ (It has been noted, however, that the mass-production of the *Euclid* model arose not because of an inherent superiority, but rather because the model had withstood constitutional scrutiny by the Supreme Court.³⁴) In the 1950s, the federal government encouraged regional planning through urban-renewal grants to municipalities implementing “workable programs for community improvement,” often signified by comprehensive zoning plans.³⁵ In 1991, the federal government conditioned certain federal transportation funding on metropolitan-wide transportation planning.³⁶

Presently, all fifty states have enacted laws that enable (and many that require³⁷) municipalities to regulate land use via comprehensive plans designed to yield benefits considered otherwise unascertainable in light of cost externalization and collective action problems.³⁸ Houston, Texas is currently the only major U.S. city that does not regulate land use by zoning.³⁹

As zoning assumed status as the dominant form of land use planning by localities, the public interest in private land use was recognized more explicitly. As one scholar has noted:

Zoning splits property rights between the individual landowners and the local government by vesting a set of collective property rights in the community. These collective property rights allow the community some degree of control over the landowner's use of her own land. While traditional notions of nuisance grant the community some power to limit land use, zoning shifts certain additional property rights from the landowner to the community. Thus, under current zoning law, the community's interest in maintaining a particular atmosphere or growth pattern is protected by a property rule. A landowner cannot simply choose to violate a land use regulation and pay for the damage caused,

33. See ELLICKSON & BEEN, *supra* note 21, at 375 (observing that most jurisdictions hewed closely to the predominant model of zoning following *Euclid*, yielding “remarkably consistent, and boring, ‘cookie-cutter’ development pattern[s].”).

34. See CHARLES DONAHUE, JR. ET AL., *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* (3d ed. 1993). Increasing advocacy for mixed-use development plans suggests that the *Euclid* model of strict segregation may not be inherently superior after all.

35. See ELLICKSON & BEEN, *supra* note 21, at 61.

36. 23 U.S.C.A. §134 (2001) (codifying a section of the Intermodal Surface Transportation Efficiency Act of 1991).

37. See ELLICKSON & BEEN, *supra* note 21, at 67-68.

38. See, e.g., ELLICKSON & BEEN, *supra* note 21, at 41, 59.

39. Jane E. Larson, *Informality, Illegality, and Inequality*, 20 YALE L. & POL'Y REV. 137, 147 n.44 (2002).

as she could under a liability rule, but instead must obtain permission from the community before proceeding with any non-conforming use. As long as the land use regulation furthers a legitimate government interest, the community can refuse to grant this permission.⁴⁰

Even as takings jurisprudence reveals a shift in the judicially recognized balance between private and public interests in land use, courts have not questioned their essentially bicameral nature, and zoning has received general acceptance as a useful tool for protecting public interests. However, some critics question whether these benefits truly accrue to the community at large, arguing that zoning seeks primarily to protect property values and generally furthers the interests of powerful members of society at the expense of those with less.⁴¹

The Mechanisms of Zoning. Ideally, the public interest in land use is effectively channeled through the zoning process, which delineates collective land use choices and affords property holders boundaries within which to freely exercise private interests. Zoning operates primarily by segregating conflicting uses within a jurisdiction among designated districts.⁴² The process involves a regulatory two-step: promulgation of a comprehensive plan and the pursuant issuance of local zoning ordinances.

Generally, a county or municipality first formulates the *comprehensive plan*,⁴³ which articulates a general rationale and specifies benefits the locality seeks to enable through planning. Common objectives include the encouragement of appropriate statewide land use; the provision of adequate air, light and open space; the control of population densities; and the provision of a variety of land uses in order to meet the needs of all citizens.⁴⁴ The comprehensive plan may be compared to a set of community blueprints, designating the specific-use districts into which all jurisdictional territories are to be divided.

40. Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 16-17 (2000).

41. See, e.g., John F. MacDonald, *Houston Remains Unzoned*, 71 LAND ECON. 137, 140 (1995) (suggesting that "the demand for zoning arises from its use as a device for excluding lower-income people from certain areas").

42. Cordes, *supra* note 2, at 164; Kublicki, *supra* note 4, at 106 ("Zoning is the process whereby municipalities minimize the incompatibilities between different land uses.").

43. The comprehensive plan is sometimes referred to as the "general plan."

44. Cohen et al., *supra* note 17, at 846.

Local *zoning ordinances* are then crafted to implement the details of the plan within the specified districts.⁴⁵ In a zoned locality, each parcel of land is governed by the applicable zoning ordinance, which may dictate restrictions relating to permissible uses (i.e., commercial, light industrial, heavy industrial, single-family residential, multi-unit residential, etc.), building height, density, architectural style, rent control statutes, open space preservation, environmental protections, or any other regulations that would permissibly advance the goals of the comprehensive plan.⁴⁶ To withstand constitutional scrutiny, a zoning regulation must yield a legitimate public benefit without unduly burdening any individual citizen,⁴⁷ and its enactment must afford due process to directly affected parties.⁴⁸

Zoning ordinances often require that landowners seek permission from the zoning authority to ensure that any significant changes are consistent with the comprehensive plan. Thus, a landowner may require a *subdivision approval* before dividing a given parcel for development, or a *building permit* before initiating new construction. Also, the zoning model anticipates the need to provide greater flexibility within the confines of the comprehensive plan after its adoption. Mechanisms for adjustment include the issuance of *variances* and *special use permits*, allowing straightforward exceptions to the zoning ordinance; *conditional use permits*, allowing exceptions on condition of the applicant's performance of remedial obligations; and *exactions*, which require that developers provide or finance some public amenity in exchange for receiving a use permission that the government could otherwise withhold.⁴⁹ According to these requests for *rezoning*, the zoning authority might seek alteration of the ordinance to allow the proposed use.

The Special Case of Regulatory Exactions. Exactions, by which a municipality conditions a permit for a land use that would compromise some public good on the developer's agreement to provide an

45. See Kublicki, *supra* note 4, at 106. For a general exposition of the zoning process, see, for example, Kublicki, *supra* note 4, at 106-14.

46. See, e.g., POLLAK, *supra* note 16, at 4.

47. *Nectow v. City of Cambridge*, 277 U.S. 183, 185 (1928) (holding that legitimate zoning regulations must bear a substantial relation to the public welfare and not overly burden any individual citizen).

48. Cf. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (requiring the balancing of legitimate state interests against individual due process rights).

49. See, e.g., POLLAK, *supra* note 16, at 4 (discussing the basic tools of zoning); Vicki Been, "Exit" As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine, 91 COLUM. L. REV. 473, 474 (1991) (discussing exactions in particular).

offsetting public benefit, represent the most significant bargaining mechanism in the local land use planning arena. Professor Vicki Been explains that "exactions are an outgrowth of the centuries-old practice of levying 'special assessments' upon real property to pay for public improvements, such as paved streets, that provide a direct and special benefit to the property."⁵⁰ Special assessments were generally levied after the improvements were installed, but after widespread assessment delinquency during the Great Depression left many municipalities unable to recoup the costs of public infrastructure, mechanisms were sought to shift the initial costs of public improvements (and the correlating risk of failure) to private developers.⁵¹ Communities initially required construction of *on-site dedications* of land for public streets and utilities, but gradually sought dedications for public schools, police and fire stations, and park space.⁵² When lands within a subdivision were poorly suited for the public needs generated by the development, municipalities began to seek *off-site dedications*, or *fees-in-lieu-of-dedication* if the developer preferred to contribute funds toward public goods rather than providing them outright.⁵³

Ultimately, communities sought to internalize the costs of development by imposing *impact fees*, which assess developers for the costs of municipal services generated, and *linkage* requirements, a hybrid of impact fees and off-site dedications. As described by Professor Been,

Linkage programs condition approval of certain central city developments (usually commercial or office space) upon the developer's provision of facilities or services for which the development will create a need, or that development will displace. These programs have been adopted in a variety of cities for such needs as low-income housing, mass-transit facilities, day-care services, and job-training and employment opportunities.⁵⁴

Set-asides and *inclusionary zoning* are species of linkage programs that address the need for low-income housing generated by new development by requiring a developer to make a certain percentage of development units affordable to low- or moderate-income residents (or to pay in-lieu-of fees to an affordable housing fund).⁵⁵

50. Been, *supra* note 49, at 479.

51. *Id.*

52. *Id.* at 480.

53. *Id.* at 480.

54. *Id.* at 480-81.

55. *Id.* at 481.

Some observers view the exaction mechanisms as creative means of mitigating the negative externalities associated with uncontrolled development,⁵⁶ but others view them as illegitimate government overreaching.⁵⁷ These scholars fear that unconstrained municipal discretion to trade building entitlements for desired goods represents a betrayal of the fundamental purposes and effectiveness of regional planning.⁵⁸ Indeed, the Supreme Court has suggested that certain instances of such bargaining may constitute illegal extortion.⁵⁹

Nonetheless, the varieties and complexities of exaction devices demonstrate the sophistication with which municipal planners have learned to approach the problem of appropriately allocating the costs and benefits associated with development between the private and public parties of interest.

III. BARGAINING AS A RESPONSE TO THE ELUSIVE PUBLIC-PRIVATE BALANCE

Despite acknowledgement of the concomitant public and private interests in land use, the confounding problem of trying to reach the appropriate balance between them represents the essential struggle of the land use planning project. Seeking this elusive equipoise, local planning agencies nationwide have adopted practices that enable them to weigh the application of formalized rules against the unique circumstances of each proposed land use. Some scholars view this as a backwards devolution from organized planning to ad hoc case-by-case adjudication.⁶⁰ Others view it as the most fair and efficient response to a project that defies rigid rule-application due to the uniqueness of land parcels, proposed uses, and municipal development

56. *Id.* at 482.

57. *Cf.* Fennell, *supra* note 40, at 26 ("the fact that a community is willing to sell the right to violate a given regulation provides a strong indication that the regulation does not constitute a true exercise of the police power").

58. *See* Jerold Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the Municipal Art Society and Nollan Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3, 7, 47 (1991) (arguing that exaction bargaining unconstrained by nexus and proportionality serve to undermine and delegitimize the zoning enterprise); Jonathan M. Davidson et al., "Where's Dolan?": *Exaction Law in 1998*, 30 URB. LAW. 683, 693 (1998) ("Such a waivable policy induces skepticism about the reality of the suggested public purposes supposedly being advanced by the ordinance.").

59. *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994) (noting that the absence of nexus in the context of a regulatory exaction "converted a valid regulation of use into an out-and-out plan of extortion").

60. *See, e.g.,* Cohen et al., *supra* note 17.

priorities.⁶¹ In any event, most agree that today, the raw material of most land use planning is the process of negotiation.⁶²

Fortuitously, the choice of a bargaining model, even if rendered unintentionally, represents a highly rational strategy for pursuing the public good under conditions of substantive uncertainty about its content. As Professor Carrie Menkel-Meadow has observed, "[a]s many social and political theorists have abandoned any hope of agreeing in advance on the common good, procedural ideals of issue by issue deliberation and negotiation have supplanted substantive conceptions of the common good."⁶³ In the absence of a surer sense of where to strike the public-private balance, the negotiating table offers a route to—if not the correct answer—at least a workable local consensus.

Zoning as Dealmaking. Early zoning theory anticipated that land use decisions would primarily occur through the initial allocation of uses by the comprehensive plan and implementing ordinances, with only minor adjustments over time afforded by variances.⁶⁴ However, nearly a century of zoning experience indicates a very different practice. Planning professionals agree that despite the overall boundaries established by a regional plan, zoning plans exist in perpetual flux.⁶⁵ As Professor Robert Ellickson notes,

[b]y around 1980, virtually all planning professionals had come to realize the limits of rationality and the unpredictability of modern civilization. They thus developed something of a consensus that plans should concentrate on influencing short-term and middle-term events. This meant that the planning period should not stretch beyond 25 years (at the very most), and that any detailed planning should concentrate on what would unfold during the next five years or so. Most planners also came to believe that plans should be continually revised to take account of new information and events. In sum, flexible, middle-range planning has come to replace long-range, end-state planning.⁶⁶

61. See, e.g., Fennell, *supra* note 40, at 4.

62. See, e.g., *id.* at 26-27; Cordes, *supra* note 2, at 166-67; Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 849 (1983).

63. Carrie Menkel-Meadow, *The Lawyers' Role(s) in Deliberative Democracy* 9 (forthcoming).

64. Cordes, *supra* note 2, at 166.

65. Cf. ELLICKSON & BEEN, *supra* note 21, at 61.

66. *Id.*

The significant result of this constant flow of new municipal priorities and development opportunities is that the actual practice of land use decisionmaking has grown increasingly discretionary.

Indeed, current practices demonstrate that land use decisionmaking has shifted significantly from the planned toward the particularized, affording a more ad hoc response to individual development proposals. Professor Mark Cordes has observed:

It is now widely recognized that current zoning practice little resembles [the early] notion of planned development, but instead places an emphasis on flexibility and change though the use of variances, special use permits, and rezoning. In particular, these devices are often used to delay concrete decisions as a response to an actual development proposal. For example, municipalities often subject numerous uses within a particular district to the special-use process, frequently providing only very generalized standards for issuance of a permit. This in effect provides municipalities with significant flexibility and discretion in responding to particular proposals. . . . Under this approach rezoning decisions are basically used to make particularized decisions regarding the suitability of a proposed use and thus in effect administer land development on a case-by-case basis.⁶⁷

Like Ellickson, Cordes posits that this shift from planned to particularized decisionmaking in local land use matters is

partially attributable to the inadequacies of traditional planning theory in a fluid society. Static end-state zoning is necessarily speculative in nature and thus at best can only approximate possible development needs and patterns. By in effect delaying determinations of actual uses until concrete proposals are made, municipalities can assess the potential impact of uses in a concrete situation. Moreover . . . delayed and flexible decisionmaking also provides municipalities with significant leverage over potential development in order to obtain developer concessions.⁶⁸

As Cordes describes, case-by-case land use decisions often occur in a "dealmaking" context, in which land is rezoned in exchange for concessions by the landowner. The problem this poses for courts, he argues, is how to properly control the ad hoc decisionmaking that has come to characterize the zoning process.⁶⁹

67. Cordes, *supra* note 2, at 166-67.

68. *Id.* at 167.

69. *Id.*

Many commentators have recognized the explicit dealmaking environment of land use allocation decisionmaking,⁷⁰ and practitioners presume it as the norm.⁷¹ One scholarly assessment of local practice observes,

Local governments exhibit a marked talent for evading close examination of the conformity of their regulations to preexisting plans. A venerable avoidance technique is vagueness; if the local government adopts a sufficiently vague plan, any land use ordinance arguably conforms. In addition, local governments have continued to develop new devices to retain "flexibility." All of these put the locality into the desirable position of being able to bargain ad hoc with individual developers. Variances and conditional use permits—greatly expanded since SZEAs—were also traditional; and in more recent years we have seen more elaborate devices such as "floating zones," "planned unit developments," and "development rights transfers," all of which tacitly admit that a locality has no fixed plan for appropriate development, but instead wants to deal with individual projects as they arise.⁷²

For some, the heavy reliance on bargaining practices promises outcomes better tailored to the specific needs of the parties and more closely approaching the Pareto frontier of efficiency.⁷³ For example, Professor Lee Anne Fennell argues that bargaining over land use allocations is essential because zoning ordinances rarely provide the most efficient initial allocation of entitlements between a landowner

70. See, e.g., Fennell, *supra* note 40, at 26-27 (recognizing the bargaining environment generated by the modern zoning model); Terry Lewis et al., *Spot Zoning, Contract Zoning, and Conditional Zoning*, 2 FLORIDA ENVIRONMENTAL AND LAND USE LAW, chapter 9, § IV(E) (The Florida Bar FL-CLES-7-I, 1994) (noting that the key to implementing efficient development proposals "is negotiation between a government and the developer."); Rose, *supra* note 62, at 849 (discussing use of bargaining in land use development proposals); Wegner, *supra* note 1, at 958 (discussing the problems of municipal land use bargaining).

71. Anecdotal evidence suggests that negotiation between developers and municipal planning staffs represents an important component of the early process of deciding permits and variances. See, e.g., interview with Damon Y. Smith, former planning staff for the City of Cincinnati, in Brookline, MA (March 9, 2001); interview with Jerold S. Kayden, Professor of Land Use Planning at the Harvard Graduate School of Design, in Cambridge, MA (April 10, 2001); oral communication with Lawrence E. Susskind, Professor of Urban and Environmental Planning at MIT, in Cambridge, MA (April 6, 2001). Nevertheless, recent Supreme Court takings jurisprudence has effectively muted some of the bargaining that formerly occurred in local planning offices. See, e.g., telephone interview with Liz Newton, Assistant to the City Manager for the City of Tigard, OR (home to the famous *Dolan v. City of Tigard* case, 512 U.S. 374 (1994)), (March 28, 2001).

72. Rose, *supra* note 62, at 879-80.

73. See, e.g., Fennell, *supra* note 40, at 20-21.

and the community.⁷⁴ This is inevitable, since zoning ordinances are promulgated based on the subjective views of a political majority about the desirability of various land uses:

If the initial allocation of property rights were set at the social optimum (taking into account the preferences of everyone in the relevant community, including the individual landowner), land use bargains would be wholly unnecessary; there would be no mutually advantageous trades available. Where the initial allocation diverges from the optimum, Pareto improvements can be achieved through bargaining [I]ndividual landowners would wish to purchase relevant portions of the collective property rights created through zoning whenever they stand to gain more from the exchange than the community stands to lose. Under such conditions, the land use "winner" can compensate the "losers" and still come out ahead. The need for such transactions is palpable, because the initial allocation of collective property rights under zoning is not generated by market forces and often bears little relationship to the actual and evolving demands of the population. Because information about true preferences is unavailable, even the most public-minded regulatory body would be unable to determine the optimum initial allocation of property rights.⁷⁵

To Fennell, the problem with the modern zoning model is not that it deviates too far from the uniform planning model, but that it erects too many obstacles to the free-market movement of entitlements between municipalities and landowners. As zoning generates "a desire for land use transactions without allowing those transactions to occur freely," Fennell argues that the modern land use planning project represents a fundamentally unstable arrangement.⁷⁶

Nevertheless, those who allege that the modern zoning model enables too *much* bargaining have proved more vociferous over the years. As decisionmaking appears more and more ad hoc, interested parties validly worry that their interests will not be fairly represented at the decisionmaking table. Generalized rules are presumed to be preferable because they guarantee fairness in the disposition of like cases, and the more particularized the decisionmaking process, the harder it is for judicial review to assure that fairness has been done. The trade-off is poignant: the more particularized the decision, the more likely it is to produce optimal results in the individual

74. *Id.* Her efficiency calculation assumes that the community does not internalize the costs and benefits experienced by the individual landowner.

75. *Id.* at 21-25.

76. *Id.* at 26.

case—but the more difficult it becomes to ensure state behavior that conforms to constitutionally accepted norms of civic responsibility and equal protection.

Concerns of this sort ultimately led to the judicial repudiation of certain bargain-based zoning practices.

Critiquing the Dealmaking: the Rejection of Spot and Contract Zoning. Zoning law's basic constraint against the improper public usurpation of private interests in land use allocation is that the zoning ordinance is applied equally to all landowners. Accordingly, standard zoning enabling acts require that zoning ordinances apply uniformly to all property within a district, in accord with the comprehensive plan, and that ordinances may be invalidated if they exceed their scope of authority or are promulgated according to defective procedures.⁷⁷ Critics argue that bargaining between municipalities and landowners can trigger one or both of these prohibitions, yielding presumptively invalid "spot" or "contract" zoning.

Spot zoning, the oldest recognized form of zoning corruption, involves the "singling out [of] a small parcel of land for a use classification totally different from that of the surrounding area, for the benefit of the owner of such property and to the detriment of other owners."⁷⁸ As noted by the Alaska Supreme Court, "[s]pot zoning is the very antithesis of planned zoning."⁷⁹ Historically, spot zoning concerns centered on municipal favoritism (or bribery), but the technique also represents a viable form of targeted persecution. Identified instances of spot zoning are always presumptively invalid, but the cited rationale varies with the jurisdiction. Some courts view the rule against spot zoning as rooted in the substantive due process requirement that government action be rationally related to a legitimate state interest; others understand it as a check on discrimination, rooted in equal protection principles.⁸⁰ Still others view the defect as stemming from the fact that spot zoning does not serve any of the permissible purposes for which the zoning power may be exercised.⁸¹

More troubling for advocates of municipal bargaining is the judicial rejection of "contract zoning," a roughly self-descriptive practice.

77. Lewis et al., *supra* note 70, at ch. 9 §1(C)(2), at 9-3.

78. *Griswold v. City of Homer*, 925 P.2d 1015, 1020 (Alaska 1996) (internal quotation marks omitted).

79. *Id.* at 1020.

80. See *ELICKSON & BEEN*, *supra* note 21, at 358.

81. *Id.*

Contract zoning involves a deal that creates an impermissible reciprocity of obligation between a private interest and a government entity.⁸² It has been variously defined as the “required exercise of the zoning power pursuant to an express bilateral contract between the property owner and the zoning authority” and as “the lack of a valid basis independent of the contract on which to justify the zoning amendment.”⁸³ Hostility toward the practice is grounded in the public policy concern that government not “barter away or delegate to a private entity [its] responsibility to exercise the police power to promote the public health safety, and welfare.”⁸⁴

The problem with a deal arising under contract zoning is that it would bind the government to specific terms that may ultimately prevent it from carrying out its public duties, while conferring on private parties the special status found impermissible in spot zoning. In *Midtown Properties, Inc. v. Madison Township*,⁸⁵ a New Jersey district court judge expressed the limits of a zoning board’s power to negotiate settlements of zoning disputes in these terms:

We would be permitting special rules to be established for plaintiff as against all other developers. We would be allowing these parties to circumvent our state laws and the township’s own ordinances and regulations by not having to apply for tentative approval; giving of statutory notice to interested persons; holding of public hearings; filing of preliminary and final sketches; making of uniform regulations; by-passing the Planning board’s hearings and recommendations; and destroying the township’s overall or master plan for the development of the township.⁸⁶

Contract zoning has been variously rejected as glorified spot zoning and for contravening the general zoning procedural requirements of notice and hearing.⁸⁷

The primary objection to contract zoning arises under the reserved powers doctrine, which serves to protect the public interest against co-option lest municipal government succumb to capture by private interests. The Supreme Court first promulgated the reserved powers doctrine in the 1880 case of *Stone v. Mississippi*,⁸⁸ holding

82. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW §894 (1975).

83. Lewis et al., *supra* note 70, at § III(A).

84. *Id.* at § III(C).

85. 172 A.2d 40 (N.J. Super. Ct. Law Div. 1961), *aff’d* 189 A.2d 226 (N.J. Super. Ct. App. Div. 1963).

86. *Id.* at 46.

87. Lewis et al., *supra* note 70, at § III(B).

88. 101 U.S. 814, 820 (1880) (finding no contract violation when the legislative grant of a twenty-five year charter to operate a statewide lottery was subsequently

that the state legislature lacked power to cede its police power because to do so would exceed its authority from the people, and that notwithstanding compromises possible of other government powers, prerogatives associated with the police power always must be observed. Professor Judith Welch Wegner observes that

the coalescence of certain factors [in the case law] suggests an incompatible blending of contract and police powers that may give a court grounds for invalidating a resulting relationship: the absence of reasonable clear governmental authority, marginal or unwarranted private expectations, and a strong, circumstance- and time-dependent public interest that has been effected adversely.⁸⁹

Under the reserved powers doctrine, the government may not "contract away" its police power, but "must retain the right to modify regulatory requirements as needed to respond to important public health and safety concerns. It may not waive that right in return for private concessions, at least where not explicitly authorized by statute and where private expectations to the contrary are unfounded or ill-defined."⁹⁰

The reserved powers problem represents a cogent critique that cuts to the very legitimacy of government. In order to justify the enormous powers entrusted to government to vindicate public interests (at the expense of private sovereignty) in land uses, zoning practice must be tailored to preserve the legitimate and effective exercise of the police power.

From the opposite corner arises the critique that municipalities should be prevented from conducting such bargaining under the unconstitutional conditions doctrine, which prevents trades between an individual and the government that implicate a constitutional protection afforded the individual. Where the reserved powers doctrine is concerned with impermissible abdication of government responsibilities, the unconstitutional conditions doctrine protects individuals from exploitation in bargaining with the state. The concern is that, in light of the enormous power imbalances that exist between the state and any private individual, the individual may be coerced to give up a constitutional right in the guise of a consensual exchange.

invalidated by state constitutional and statutory provisions outlawing lottery operations, because the state lacked authority to enter the original contract under the reserved powers doctrine).

89. Wegner, *supra* note 1, at 967.

90. Judith Welch Wegner, *Utopian Visions: Cooperation Without Conflicts in Public/Private Ventures*, 31 SANTA CLARA L. REV. 313, 337 (1991).

In this sense, the unconstitutional conditions doctrine creates a presumption that all such bargains are invalid under the contract law principle of duress. To the individual who would argue that she retain her autonomy to bargain with her rights if she chooses, the strongest policy rationale answers that the doctrine is less about paternalism and more about constraining government abuse. If a state actor knows that such a deal will be unenforceable, the incentives to wrongfully wield authority abate. Professor Fennell explains that the doctrine is thus best understood not in reference to protecting the individual's best interest in any given case, but as a legitimizing constraint on state action:

Much analysis of the unconstitutional conditions doctrine has focused on whether the government's bargain would leave the individual better or worse off than she otherwise would be—in other words, whether it is a true 'offer,' as opposed to a 'threat.' . . . It is more accurate and fruitful to think of the Constitution as placing structural constraints on the kinds of decisions officials and entities are permitted to make about individuals' lives, and to view the unconstitutional conditions doctrine as an extension of these structural constraints. Applied to the bargaining setting, these structural constraints limit the sorts of things that a particular governmental entity can legitimately give and receive in trade. . . .

Considered in this light, the unconstitutional conditions doctrine encompasses three distinct types of wrongful governmental action: (1) receiving forbidden goods, (2) bargaining with currency illegitimately appropriated from the other party; and (3) bargaining with currency illegitimately appropriated from segments of the community that are not represented at the bargaining table.⁹¹

She further cautions that the problems at the heart of unconstitutional conditions—though implicated in private-public dealmaking—are endemic not to bargaining but to government, and the potential for abuse by state actors:

A doctrine which focuses attention on bargains qua bargains serves the practical function of promoting vigilance against government malfeasance in a setting where it is especially likely to be implicated. It is important to note that the bargaining contest merely offers a focal point for detecting otherwise illicit government conduct.⁹²

91. Fennell, *supra* note 40 at 43-45.

92. *Id.* at 45.

However persuasive its foundations, application of the doctrine is porous in practice. Although we continue to reject bargains involving voting rights, we don't object when the traded right is to trial by jury—as demonstrated by the hegemonic status of plea bargaining in the criminal justice system. Arguments for application in the realm of land use planning are few, and weak.⁹³

The Rehabilitation of Contract Zoning? Some would argue that the general rejection of contract zoning in the 1950s and 60s has been circumvented by the subsequent widespread adoption of conditional zoning agreements, under which—without legally committing itself to a zoning change—the municipality secures a property owner's promise to provide a remedial exaction or limit the proposed use in some way as a condition of approval. Whereas contract zoning binds the government to a certain course of action by virtue of its promise to rezone, conditional zoning “contemplates a preceding act by the property owner as a prerequisite to the approval a rezoning petition,”⁹⁴ thus enabling the government to retain and satisfy its police power responsibility to see that the zoning change is consistent with the public interest.

Conditional zoning has gained wide acceptance to ameliorate the rigidity of *Euclid*-style zoning.⁹⁵ For example, grouping all bargain-based land use mechanisms together under the heading “incentive zoning,” Professor Jerold Kayden describes the practice and the support it enjoyed before the new takings jurisprudence:

Through the land use regulatory technique formally known as “incentive zoning,” cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training. Since its inception some thirty years ago, incentive zoning has enjoyed broad support from developers and their attorneys, avoiding the legal challenges commonly brought against land use regulations requiring the provision of public amenities.⁹⁶

More modest bargain-based zoning mechanisms operate under the comparatively neutral nomenclature of conditional use permits and development agreements.⁹⁷ Many argue that the dichotomy drawn

93. Cf. *id.*; Kayden, *supra* note 58, at 41-43 (dismissing the unconstitutional conditions doctrine as a constraint on municipal land use bargains).

94. Lewis et al., *supra* note 70, at § IV(B).

95. *Id.* at § IV(E).

96. Kayden, *supra* note 58, at 3-4.

97. See, e.g., Wegner, *supra* note 90 at 338.

between contract and conditional zoning creates a distinction without a meaningful difference.⁹⁸

Municipal Bargaining as Mediation. Perhaps the most convincing theoretical analysis of the necessary role of bargaining in local land use decisionmaking is from a 1983 analysis by Professor Carol Rose. Working from an antifederalist perspective emphasizing local participation over representative deliberation, Professor Rose has proposed that mediation provides the most workable model from which to understand and theorize about local land use dispute resolution:

[Local zoning proceedings] are far more realistically perceived as mediative than quasi-judicial. This is true with regard to the quintessential small change, the variance; adjustment boards treat requests for special zoning treatment as potential sources of disputes, taking into account neighborhood protests and imposing conditions in order to reach accommodation. More sophisticated devices such as "planned unit developments" do the same (although sometimes on a larger scale): local boards attend to disputes and attempt to find packages of conditions that will lead to accommodation. . . . Even where the courts reject these "dealing" qualities and attempt to treat piecemeal changes quasi-judicially, they seem unable to avoid mediative forms, with the concomitant expansion of issues and accommodation-centered goals.

A mediation model is more realistic and less distorting than plan jurisprudence in deciphering not only the procedures of piecemeal changes, but also the relationships among planning, general ordinances, and piecemeal changes. In particular, if piecemeal changes are treated as mediations, their "dealing" aspects are not an undesirable aberration but natural parts of the dispute resolution. In keeping with the open norms of mediation, an appropriate solution is not always a single answer complying with fixed standards, but rather a mix of accommodations. Examples of these wide-ranging accommodations abound in modern land use practice. . . . To be sure, as Lon Fuller has argued, government mediation differs from the usual form: the government mediator has the authority to impose a

98. See ELLICKSON & BEEN, *supra* note 21, at 372 ("Most recent decisions abandon the prohibition on contract zoning, at least for those contracts now euphemistically styled as 'conditional' zoning."); see also Wegner, *supra* note 1, at 977-80 (grouping contract and conditional zoning techniques together under a theory of "contingent zoning").

solution, and thus would seem free to favor one side over another. But this may not make a great deal of difference in practice. . . even the mediator with a direct interest in the outcome is expected to hear all parties and come to an acceptable compromise.⁹⁹

Mediation practice has developed considerably since Rose wrote, offering a potentially useful font of resources—including best practices and ethical guidelines—that potentially bear on more modern problems in municipal land use bargaining. Professor Lawrence Susskind has made particularly skillful use of mediation practice in the related realm of negotiated rulemaking.¹⁰⁰

The Spectrum of Potential Bargains. Thus, the tools of zoning offer private and public parties of interest to a proposed land use a series of bargaining alternatives.

When a developer seeks permission to build in contravention of a municipal zoning ordinance, bargaining options may be represented along a continuum between rigid adherence to the plan and free-market flexibility to bargain. At the adherence end of the spectrum, the municipality could (and indeed should) simply deny the request to protect against the harms implied by violating the land use plan. This is the response dictated by the traditional (but generally repudiated) zoning model discussed above.

Alternatively, the municipality and the developer could negotiate a solution whereby the project would be allowed subject to the developer's remedying the harm. Although the scope of what would constitute an adequate remedy is left to the parties, we might consider this form of bargaining constrained by a nexus, or relationship, in the medium of exchange. Some relationship would exist between the proscribed harm and the consideration provided by the developer in exchange for the discretionary permit.

At the most flexible end of the bargaining spectrum, the municipality could decide that although the development implies real harm for some public good that may be fundamentally irremediable—it might nevertheless grant an exception allowing the project if the developer makes available resources to provide some unrelated public good that the community values more than it does prevention of the

99. Rose, *supra* note 62, at 889-92.

100. Lawrence Susskind, *The Risks and the Advantages of Agency Discretion: Evidence from EPA's Project XL*, 17 UCLA J. ENVTL. L. & POL'Y 67 (1999). See also Jody Freeman & Laura I. Langbein, *Regulatory Negotiation and the Legitimacy Benefit*, 9 NYU ENVTL. L. J. 60 (2000) (discussing participant experiences in negotiated rulemaking).

avoidable harm. Taking a step further in this direction, if it really values the proposed benefit more than it does prevention of the avoidable harm, the municipality might trade its permission for the provision of an unrelated public benefit even if the initial harm could be remedied. These are the conditions of full-free market bargaining, under which all parties are at liberty to alienate rights and entitlements as they please.

In 1986, municipalities and landowners operated along various points of this continuum, variously constrained by local regulations, the boundaries of one another's willingness to deal, the peculiar circumstances of each individual proposal, good faith and common sense.

Enter the takings revolution.

IV. THE SUPREME COURT RESPONDS: THE REINVENTION OF TAKINGS

In recent years, responding to concerns that landowners were unduly suffering at the hands of municipal planners, the Supreme Court has reinvigorated takings remedies as a means of strengthening private property rights against regulatory interference. In a noteworthy departure from other areas of jurisprudence where it has strengthened public interests at the expense of private interests,¹⁰¹ the Court has shifted the rules for resolving municipal land use disputes from a set more respectful of the police power to a set significantly more solicitous of private rights.

Many observers have condemned the new takings jurisprudence for its weakening of a community's ability to regulate for the public

101. For example, compare the Supreme Court's rebalancing of private rights and police power interests in its habeas corpus jurisprudence in *Brown v. Allen*, 344 U.S. 443, 447 (1953) (expanding access to habeas in holding that federal claims adjudicated in a state court could be raised for federal de novo review on habeas) (abrogated by the Anti-terrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2259(d)) with *Wainright v. Sykes*, 433 U.S. 72, 87 (1977) (curtailing access to habeas in holding that state level procedural defaults including, failures to properly raise constitutional claims, may be treated as deliberate waiver preempting federal habeas review); and in its abortion rights jurisprudence, compare *Roe v. Wade*, 410 U.S. 113, 163 (1973) (establishing the three-trimester rule for balancing the woman's private right to bodily autonomy against the state's interest in fetal life, under which the private right is paramount until the second trimester) with *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 872 (1992) (replacing the Roe trimester rule with a balancing test that increases the state's power to restrict first and second trimester abortions).

health and safety;¹⁰² just as many have praised the Court for bolstering the special deference that has historically adhered to rights in real property.¹⁰³ Indeed, a rule that would satisfy both sides is probably impossible to create. However, the immediate effect of the new rules, established in a several important cases since 1987, is to drastically reduce the permissible scope of bargaining in land use dispute resolution. Whether or not *any* party of interest truly stands to benefit remains unclear.

The Historical Roots of Takings Doctrine. As the zoning model of land use regulation assumed prominence, governments at all levels struggled to balance the tension between those aspects of land ownership recognized as inherently private and the collective responsibilities associated with land use choices by communities; the zone of conflict between them is nowhere more observable than in the lawsuits that arise between private and public parties to takings disputes. In the regional planning context, a taking complaint arises when a landowner alleges that government action infringes on her property rights beyond the bounds permitted by legitimate zoning authority.¹⁰⁴

In wrestling with these difficult cases, courts have proposed an evolving directive as to where the balance should be struck. Although early understandings of the takings clause presumed its application only to physical invasions of land,¹⁰⁵ the Supreme Court first recognized in *Pennsylvania Coal Co. v. Mahon*¹⁰⁶ the possibility that a statute could so restrict land use as to constitute a taking of property rights requiring compensation. In *Pennsylvania Coal*, the Court held that a statute prohibiting coal mining in a manner that

102. See, e.g., Robert A. Williams, Jr., *Legal Discourse, Social Vision, and the Supreme Court's Land Use Planning Law: The Genealogy of the Lochnerian Recurrence in First English Lutheran Church and Nollan*, 59 U. COLO. L. REV. 427, 470-71 (1988).

103. See, e.g., Robert M. Washburn, *Land Use Control, the Individual, and Society: Lucas v. South Carolina Coastal Council*, 52 MD. L. REV. 162, 164 (1993).

104. Some complaints allege that the comprehensive plan itself constitutes a taking. See, e.g., *Buckles v. King County*, 191 F.3d 1127, 1138 (9th Cir. 1999).

105. *Mugler v. Kansas*, 8 S. Ct. 273, 276 (1887) (holding in that regulatory interference with economic use of land does not constitute a taking when regulation is a valid expression of the police power); see also William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process*, 95 COLUM. L. REV. 782, 785-92 (1995) (discussing the limited historical basis for the rule of compensating takings and the early practice of applying the rule only for physical invasion); PERCIVAL ET AL., *supra* note 19, at 780-81.

106. 260 U.S. 393, 415-16 (1922).

could damage homes on the surface effected a taking because it effectively abolished the value of the underlying mineral rights.¹⁰⁷ *Pennsylvania Coal* represents the first successful “regulatory taking” claim and an early high point of the Supreme Court’s interest in private property rights against public claims—an apex only notable in light of the changes that immediately followed.

The 1922 *Pennsylvania Coal* decision preceded the Court’s 1926 validation of zoning laws in *Euclid*, and perhaps coincidentally, the Court shortly thereafter retreated from the strong implications of the *Pennsylvania Coal* view. Only a few years later, that case was not even cited in a 1928 decision rejecting a similarly-reasoned taking claim and affirming that even regulations resulting in the destruction of property will not effect takings if they are designed to protect against certain kinds of public harm. In *Miller v. Schoene*,¹⁰⁸ the Court reiterated the legitimacy of the police power to vindicate the public welfare, noting that “where the public interest is involved, preferment of that interest over the property interests of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property.”¹⁰⁹ Over the next half-century, regulatory takings claims were subject to a form of rational basis scrutiny affording deference to local land use regulation.¹¹⁰

For a moment in 1987, it may have seemed that the cycle had fully turned when the Court decided *Keystone Bituminous Coal v. DeBenedictis*.¹¹¹ Evaluating facts nearly identical to those in *Pennsylvania Coal*, the Court reached the opposite conclusion—finding no taking because the challenged mining restrictions responded to a significant threat to public safety.¹¹²

First English and the Advent of Temporary Takings Liability. However, 1987 proved a watershed year in takings jurisprudence less

107. *Id.*

108. 276 U.S. 272, 280 (1928) (upholding against a taking claim a state law used to require the destruction of a diseased tree on private land to prevent the spread of the disease to trees on neighboring lands).

109. *Id.* at 279-280.

110. See, e.g., *Goldblatt v. Town of Hempstead*, 369 U.S. 590, 594 (1962). Cf. *Nolan v. California Coastal Commission*, 483 U.S. 825, 843-45 (1987) (Brennan, J. dissenting); see also *ELLICKSON & BEEN*, *supra* note 21, at 341 (noting great judicial deference to zoning decisions based on their “legislative” nature).

111. 480 U.S. 470 (1987).

112. *Id.* (distinguishing *Pennsylvania Coal* by finding no evidence that the challenged law had unduly interfered with *Keystone Bituminous*’s “investment-backed expectations”).

for resolving the hanging *Pennsylvania Coal* issue and more for challenging the settled parameters of the public-private balance in takings disputes. Although *Keystone Bituminous* vindicated the public interest over the private, two other 1987 decisions were designed to temper what the Court perceived as unauthorized public overreaching. In *First English Evangelical Lutheran Church v. County of Los Angeles*,¹¹³ the Court articulated a stunning new reach for regulatory takings. Using a case ultimately dismissed on remand for its weak facts, the Court established municipal liability to compensate temporary takings through damages despite a state law limiting remedies to invalidation of the regulation effecting a taking. Recognizing that invalidation of a zoning ordinance could potentially render any regulatory act a temporary taking, the Court nevertheless held that the Constitution requires "that the government pay the landowner for the value of the use of the land during this period."¹¹⁴ *First English* raised the possibility not only that retracted municipal regulations could generate takings claims, but that municipalities could be subject to monetary damages even after their retraction. The decision poses a considerable deterrent to municipal experimentation with land use regulations that could later be declared takings.

The Nollan "Nexus" Principle. Then, in *Nollan v. California Coastal Commission*,¹¹⁵ arguably the most important of the 1987 trilogy, the Court tightened its scrutiny of conditional use permits and regulatory exactions, requiring a firm nexus between harm and remediation. In *Nollan*, landowners brought a takings suit after unsuccessfully seeking permission to expand development on the property in contravention of a coastal zoning ordinance. Finding that the new construction would obstruct visual access to the seashore, the Coastal Commission had offered the desired permit in exchange for an easement that would allow the public access across a portion of the Nollans' property connecting two public beaches. Writing for the Court, Justice Scalia observed that the government could reasonably require an exaction that substantially furthered the interest frustrated by the permitted use—for example, the construction of a public viewing platform to allow visual access to the beach over the top of the development.¹¹⁶ However, as the proposed condition lacked an

113. 482 U.S. 304, 318 (1987).

114. *Id.* at 319. Nevertheless, the claim in question was ultimately rejected on remand, as the challenged regulation was found to promote the legitimate interest of public safety and was also a reasonable temporary measure. *First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App. 3d 1353, 1367 (1989).

115. 483 U.S. 825, 839 (1987).

116. *Id.* at 836.

“essential nexus” to the harm threatened by the disfavored use, the Court found it unauthorized by the zoning law, and that absent legitimate police power authority to prevent the development, the government had indeed effected a taking.¹¹⁷ Although the Commission could have withheld the permit altogether, the Court reasoned, it could not condition the permit on a concession by the applicant unconnected to the justification for a legitimate prohibition.¹¹⁸

As Justice Scalia explained in a later decision, the *Nollan* nexus principle was articulated to protect property owners against municipal “extortion”¹¹⁹ by constraining the scope of permissible bargaining in land use disputes. And indeed, the new doctrine significantly modified the available options to municipal parties entertaining applications for controversial land use permits. On the spectrum of potential bargaining, the nexus rule continues to allow for some municipal bargaining, but eliminates the third and fourth set of possible deals (the free-market bargains). Requiring nexus clearly constrains potential abuse, but reducing the permissible scope of bargaining also limits the creativity with which landowners and municipalities can approach complex land use problems.

Since 1987, the Court’s takings jurisprudence has grown increasingly solicitous of the private interests in land use. Most famously, in 1992, the Court revisited the problem raised in *Pennsylvania Coal* and *Keystone Bituminous* of defining regulatory takings. In *Lucas v. South Carolina Coastal Commission*,¹²⁰ the Court found a taking where a developer was denied permission to build in a coastal erosion zone, clarifying that takings liability will be found whenever land use regulations effect a full deprivation (or “total wipeout”) of economically viable uses of a parcel of land.¹²¹ Despite lingering questions about the meaning of “full deprivation” and the severability of land

117. *Id.* at 837.

118. *Id.*

119. *Dolan v. City of Tigard*, 512 U.S. 374, 387 (1994). (“The absence of a nexus left the Coastal Commission in the position of simply trying to obtain an easement through gimmickry, which converted a valid regulation of use into an ‘out-and-out plan of extortion’”) (citations omitted).

120. 505 U.S. 1003, 1019 (1992).

121. The events that followed the *Lucas* case are apocryphal. In 1993, the South Carolina Coastal Council agreed to permit the development, but Lucas pursued temporary takings compensation in state court. In 1993, the Council settled the lawsuit by agreeing to purchase the parcel for \$850,000, plus \$725,000 in interest, attorneys’ fees, and costs, for a total settlement of \$1,575,000. The following year, the state resold the parcel to a developer who built in the restricted erosion zone. In 1996, severe coastal erosion undermined the house in the Lucas lot and an adjacent home. Nevertheless, other South Carolina homeowners are seeking to overturn state anti-erosion land use regulations. *PERCIVAL ET AL.*, *supra* note 19, at 803.

parcels for the purposes of this analysis,¹²² the *Lucas* decision signified the seriousness with which the Court meant to reallocate the costs of public land use regulation away from private property holders. Commentators warned municipalities that the Court's clear message was that the public-private balance in land use interests had leaned too far in favor of the public.¹²³

The Other Shoe Drops: Dolan and "Rough Proportionality." Two years later, the Court dealt the final blow to municipal land use bargaining. In *Dolan v. City of Tigard*,¹²⁴ the Court again narrowed the permissible circumstances under which land use permits could be conditioned on related concessions, adding to the *Nollan* requirement a stricter standard of proportionality. On the spectrum of potential bargaining, the new rule serves to considerably reduce potential bargains even in the nexus set, by eliminating possibilities for parties to trade on the different values each assigns to goods of the negotiation.

In *Dolan*, when a hardware retailer sought permission to pave a large parking lot and expand the business into the restricted floodplain of a local river, the municipality approved the development subject to conditions imposed by its comprehensive plan. In light of the increased storm-water runoff implied by the paved lot and the increased traffic promoted by the expanded business, the municipality proposed conditioning the permit on the dedication of a portion of the property lying in the floodplain for improvement of a storm drainage

122. See, e.g., *id.* at 800-02. One problem with the *Lucas* decision is referred to as the "denominator problem," because the Court left unclear how to evaluate when a total wipeout has occurred. If a regulation extinguishes all economically viable use from 75% of a large land parcel, does that represent a "total wipeout" of the economically viable use of that part of the land, or has no taking occurred because there is still economically viable use of the remaining 25%? See, e.g., *Lucas*, 505 U.S. at 1061-77 (Stevens, J., dissenting).

123. Despite the universal anticipation of large-scale changes immediately after *Lucas*, commentators more recently note that little has changed. See, e.g., PERCIVAL ET AL., *supra* note 19. However, in recent treatment of comparable takings claims, the Federal Circuit appears to be leaning again toward a standard of greater municipal deference in its increasingly stringent evaluation of "reasonable, investment-backed expectations" in analyzing claims of undue economic deprivations. Several recent decisions consider whether market conditions at the time of investment reflected zoning ordinances such that reasonable investment-backed expectations should be considered to reflect applicable land use restrictions. See, e.g., *Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cl. 1999) (holding that the denial of a permit to develop wetlands was not a taking because the owner did not have "reasonable, investment-backed expectations" to develop the wetland in light of the regulatory climate in place when the developer acquired the land).

124. 512 U.S. 374, 391 (1994).

system, and of an additional strip adjacent to the floodplain for a pedestrian/bicycle pathway. Though the Court conceded that an "essential nexus" existed between the legitimate state interest and the permit condition exacted by the city, the Court nevertheless found that the exaction failed the "required degree" of connection between the exaction and the projected impact of the proposed development. Notably, the city could have simply *denied* the permit; it was the act of *conditioning* the permit on an unsubstantially related concession that failed the Court's scrutiny. Writing for the Court, Chief Justice Rehnquist called this new requirement the test of "rough proportionality."¹²⁵

After the case was remanded to the state court, Dolan amended her complaint to include a temporary takings claim. She argued that not only was the regulatory exaction unconstitutional, but that the city's wrongful withholding of the building permit over the course of negotiation (and litigation) over the proposed use constituted an unconstitutional temporary taking for which the city owed her compensation. The City eventually paid \$1.5 million in compensation.¹²⁶

Suitum: Transferable Development Rights under Nexus and Proportionality? A final takings case of note in the land use context is *Suitum v. Tahoe Regional Planning Agency*,¹²⁷ in which the Court held that failure to sell transferable development rights (TDRs) will not prevent ripeness of a taking claim. This decision is noteworthy in a discussion of bargaining because the sale of transferable development rights suggests an elementary form of bargaining that may uniquely satisfy the tests of nexus and rough proportionality. Although the *Suitum* decision primarily addresses the question of finality (finding sufficient finality for ripeness when no further questions exist as to how the challenged regulation will affect the specific property), the odd constellation of opinions suggests an interesting possible municipal defense to takings claims. In his concurrence, Justice Scalia argued that the matter of TDRs was irrelevant to the matter of whether a taking had occurred; their issue simply went to the evidentiary matter of whether just compensation had been paid. However, since only three justices signed that concurrence, it is possible that a

125. Three years later, in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 702-03 (1999), the Court limited application of the *Dolan* "rough proportionality" test to disputes concerning exactions, holding it inapplicable in the context of outright permit denials.

126. PERCIVAL ET AL., *supra* note 19, at 820.

127. 520 U.S. 725, 733-34 (1997).

majority of the Court believes that the issuance of TDRs could automatically defeat a takings claim, since their subsequent sale always renders at least some economically viable use of a property.¹²⁸

V. THE AFTERMATH: THE IMPACT OF TAKINGS DECISIONS ON PLANNING

Following the Court's decision in *Dolan*, commentators of all stripes hailed the significance of the decision and predicted a dramatic impact on local planning practice.¹²⁹ Five years later, however, the actual impact of the new rules remains unclear. Many commentators and practitioners suggest that only marginal changes have occurred.¹³⁰ Why the disjuncture?

Four possibilities arise: (1) no changes were necessary because most planners were already engaged in bargaining practices the Supreme Court would find acceptable under the new rules; (2) planners haven't changed their practices because they aren't sure how to change them to be in conformity with the new rules; (3) changes haven't occurred because the new rules are impossible to follow and planners are disregarding them; and (4) planners have not changed their practices because they don't care about breaking the law. Overwhelming evidence (some reviewed above) suggests that the first alternative does not represent reality, and the fourth alternative seems equally unlikely. The truth probably lies somewhere between the second and third proposition.¹³¹

Anecdotal Evidence. Anecdotal evidence is decidedly mixed as to how the new rules have impacted practices at the ground level. Liz Newton, Assistant to the City Manager of Tigard, Oregon (the defendant municipality in the *Dolan* case) reports that in Tigard, the planning process has become more formal but less creative—staff reports are longer, permit applications are scanned with a fine-tooth comb, and where once Tigard planners “followed the spirit of the law, now they hang on every letter.”¹³² The rules have added to the cost of development in Tigard because the City now requires that developers provide all the studies necessary to document proportionality.

128. Cf. PERCIVAL ET AL., *supra* note 19, at 828.

129. See POLLAK, *supra* note 16, at 1.

130. See oral communication with Susskind, *supra* note 71.

131. Professor Lawrence Susskind, among the most esteemed experts in the field of government land and environmental disputes resolution, suggests that local planners have continued to operate without regard to the rules, in part because they are difficult to understand and even more difficult to apply in the complex decisionmaking arenas in which planners operate. *Id.*

132. See interview with Newton, *supra* note 71.

Newton reports that after *Dolan* was decided, she took calls from planners all over the country, most of whom told her that they simply planned to “tighten up their codes” and avoid any action that could potentially lead to litigation.¹³³

According to Newton, Tigard planners felt particularly betrayed after the decision because they believed they had acted in complete concert with the law. Oregon is renowned for its regional planning programs, and all 241 cities and 46 counties are governed by comprehensive plans that are reviewed by the state.¹³⁴ The dedications that Tigard planners had asked for (and that became the subject of litigation in the *Dolan* case) were part of a comprehensive plan that had long been approved by the state; out of respect to landowners, dedications were to be required only at the time of a development permitting, when a landowner would be expecting a new source of profit.¹³⁵ (She suggests that this is why the *Dolan* claim “sailed through the state courts without a hitch” before being taken up by the Supreme Court.)¹³⁶ Unsure of how they could have done things differently, the response of Tigard planners has been simply to act conservatively, hold their heads down, and hope for the best.¹³⁷

Damon Smith, a former planner with the City Planning Office in Cincinnati, Ohio remembers planners feeling very concerned and “on edge” after the *Nollan* and *Dolan* cases were decided.¹³⁸ “Everyone thought they would change the planning landscape,” he recalls, but in the end, no real changes came to pass in terms of land uses and dealmaking.¹³⁹ The only difference, he ultimately concludes, was that the bargaining was driven underground after *Dolan*: rather than meeting with the zoning authority to discuss mutually agreeable solutions to a proposed land use requiring permission, developers facing the possibility of a denied permit would now meet directly with planning staff, with whom they would create an informal joint proposal that they would later propose to the zoning authority on their own initiative.¹⁴⁰

Indeed, some states legally differentiate between (preferred) proposals for deals volunteered by a developer and (suspect) deals

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See interview with Smith, *supra* note 71.

139. *Id.*

140. *Id.*

originating from the municipality,¹⁴¹ although the practice of “underground bargaining” renders unclear any meaningful line between the two.¹⁴² The shift to underground bargaining described by the Cincinnati planner is particularly troubling because it implicates the very equal protection values that opponents of spot and contract zoning sought to protect, since the practice favors repeat players with special access to planning staff and knowledge of the underground bargaining ritual. The farther the bargaining process moves from the official authority, the more removed the process becomes from the public scrutiny that would expose favoritism or corruption.

Anecdotal evidence thus suggests a mixed impact by the takings rules. It is reported that municipalities have enacted more exacting procedures to document nexus and proportionality that are costly and expensive,¹⁴³ and simultaneously reported that dealmaking is as much in evidence as it ever was,¹⁴⁴ in most respects unchanged.¹⁴⁵ Of course, the two are not incompatible truths. A study in California was recently undertaken to provide answers to these questions; its more rigorously gathered results confirm the anecdotal evidence.

The California Planning Study. In the most comprehensive primary analysis to date, the California Research Bureau commissioned Daniel Pollak to research how the takings decisions are actually impacting the practice of land use planning in the particularly growth-embattled state of California.¹⁴⁶ Pollak surveyed the director of every city and county planning department in the state,¹⁴⁷ performed follow-up interviews, and conducted six detailed case studies to explore the impacts of the Supreme Court’s decisions, focusing on the following questions:

- *Visibility of takings issues:* Are concerns about takings a prominent feature of land use issues today? To what degree

141. See Wegner, *supra* note 1, at 992 (identifying Virginia, Iowa, and Minnesota as states that only allow contingent zoning deals when proposed by the landowner or are clearly “voluntary”).

142. Furthermore, it is unclear why the origin of the proposal alters objections founded on both the reserved powers and unconstitutional conditions doctrines. See Kayden, *supra* note 58.

143. See, e.g., interview with Newton, *supra* note 71.

144. See, e.g., interview with Smith, *supra* note 71.

145. See, e.g., oral communication with Susskind, *supra* note 71.

146. See POLLAK, *supra* note 16.

147. Pollak received responses from 37 out of 58 counties (63%) and 274 out of 472 cities (58.1%). He notes that although his data pool is large, it is not a random sample because it includes only data from those who chose to respond. *Id.* at 13.

have local governments taken notice of the Supreme Court rulings? Have the takings rulings created pressure on local governments to change their practices, decisions or policies?

- *Impact of takings on land use planning and regulation:* Have the takings rulings influenced how local governments plan and regulate land use? Have they made local governments more cautious? Has the fear of litigation created a chilling effect? How have local governments adapted to the changed legal climate?

- *Exactions:* Have the takings rulings had an impact on how local governments use exactions? Have the rulings in any way inhibited their use of exactions as a tool for financing public infrastructure and services?

- What are the *policy implications* of these changes?¹⁴⁸

Although the survey targets familiarity with legal concepts and processes, Pollak considered and rejected sending the survey to government planning attorneys, as the research sought to identify the impact of these legal concerns on ground-level land-use decisionmaking.

According to Pollack's results, the majority of planners claimed to be familiar with the *First English*, *Nollan*, and *Dolan* cases (but less so with *Lucas*, *Suitum*, and *Del Monte Dunes*), and county planners were more familiar with all cases than more local planners.¹⁴⁹ Takings disputes were twice as frequent at the county level than at the city level, and most often involved fees or exactions relating to open space, parks, trails, transportation infrastructure, and school fees.¹⁵⁰ Although 49% of counties and 22% of cities report receiving takings litigation threats at least once a year, very few have insurance to cover liability arising from takings claims.¹⁵¹ Nineteen percent of cities and 35% of counties reported reducing their use of some forms of fees and exactions in response to takings law, mostly those involving roads and traffic-related infrastructure, open space, trails, or public access to natural resources.¹⁵² Fifty-five percent of cities and 89% of counties report that they have adopted new standards for creating written findings or an administrative record of land use decisions, and 45% of cities and 42% of counties reported having adopted

148. *Id.* at 2.

149. *Id.* at 13-14.

150. *Id.* at 5, Executive Summary.

151. *Id.*

152. *Id.*

new standards, guidelines, or policies for the use of fees and exactions.¹⁵³

Most interestingly, the problem of disentangling the public from the private interests that land use planning seeks to protect was reflected in the planners' attitudes toward the value of the new takings rules. Pollak observes:

We might expect planners to express their dissatisfaction with the current situation, since it imposes constraints on their powers to plan and regulate. However . . . a clear majority of respondents (74% of cities and 81% of counties) either agreed or strongly agreed with the statement ["The nexus and rough proportionality standards established by the *Nollan* and *Dolan* decisions, when followed carefully, simply amount to good land use planning practice."]. . . .

[However,] a minority (36% of both cities and counties) agree with the statement ["U.S. Supreme Court decisions on takings have helped to create a legal climate that reduces our city/county's ability to manage land development to serve the needs of our community."]. We might term this group the "worried planners." They tend to think that the takings issue has made it more difficult for them to do their job of serving the public interest.¹⁵⁴

Notably, these two groups of planners—representing those who believe that nexus and proportionality represent good land use planning and those who believe that the *Nollan* and *Dolan* decisions have helped to create a legal climate that inhibits their ability to serve the public interest—were not mutually exclusive:

It was quite possible . . . for a respondent to see the *Nollan* and *Dolan* precedents as good land use planning practice and still feel the legal climate surrounding the takings issue was harmful. Twelve counties, or one third, and 70 cities, or 26%, fit that description.¹⁵⁵

One possible inference from this paradox is that planners believe that bargains constrained by nexus and proportionality are generally good planning choices, but that the loss of flexibility to depart from that structure in some circumstances hampers their ability to solve the more complicated planning problems. Alternatively, it could be that the legal climate has simply shifted landowners' best alternative to a

153. *Id.* at 6.

154. *Id.* at 32-34, Full Study.

155. *Id.* at 34.

negotiated agreement (BATNA) toward court, making the negotiation process more antagonistic.

Despite its valuable portrait of the workings of California municipal planning (and its important recommendation that municipalities cooperate to insure against takings claims),¹⁵⁶ Pollak's study generally affirms the uncertainty surrounding the municipal response to takings questions that inspired the study in the first place. While many jurisdictions have not changed their regulatory behavior in response to the takings rulings, a sizeable minority have done so.¹⁵⁷ Pollak's rigorous statistical analysis revealed no significant correlation between community characteristics and survey responses,¹⁵⁸ other than the city/county divide.¹⁵⁹

Nevertheless, Pollak concludes that takings are a high profile issue in many communities, and that the Court's decisions are making an impact in many communities. The experience of increased cautiousness is "pervasive," even among respondents who "had difficulty putting their finger on the precise changes that had occurred."¹⁶⁰ Sixty-three percent of cities and 60% of counties have contracted with consultants to prepare studies on fees and exactions.¹⁶¹ Planners note increased costs of compliance (especially in increments of time and money for compiling proportionality data), much of which is passed on to developers.¹⁶² Pollak quotes land use planning expert William Fulton as reporting that he has not seen much change in the

156. Noting that nearly all commercial insurance policies available to cities and counties contain a standard exclusion that omits takings claims from coverage, Pollak suggests that cities follow the example of several large California cities that have organized under their joint powers authority the Big Independent Cities Excess Pool, which enables members to self-insure against takings liability. *Id.* at 77.

157. *Id.* at 77-78; 6-7, Executive Summary.

158. *Id.* at 115-29. Pollak did observe an increase in takings-related phenomena with increasing city population size (though not in counties), possibly the result of larger numbers of actors and development projects. However, the survey response rate also increased with city population size, indicating that this correlation may not be reliable.

159. See *supra* text accompanying notes 149-50. This may reflect the fact that counties are more likely to be in control of large tracts of undeveloped land and to represent more heterogeneous communities of interest, leading to conflicts over sprawl, open space, agricultural preservation, etc. POLLAK, *supra* note 16, at 76.

160. *Id.* at 79.

161. *Id.* at 80.

162. See, e.g., Clyde W. Forrest, *Planned Unit Development and Takings Post Dolan*, 15 N. ILL. U. L. REV. 571, 580-81 (1995) ("The expense and time delay of ad hoc studies to establish adequate findings of fact may kill worthwhile projects . . . It must surely be understood by developers that such evidence will now be required of them at their expense."); interview with Newton, *supra* note 71 (noting that Tigard, Oregon, has passed most of the costs for such data gathering on to developers).

substantive practice of land use planning because of takings, but noting that "it has changed the psychology when the planner and the developer are negotiating. It has given the developer more leverage."¹⁶³ (In other words, and as suggested above, it has changed the parties' BATNAs.)

Although recognizing that constraints on localities' abilities to finance public infrastructure through fees and exactions may strain local budgets and make it more difficult to simultaneously manage land use and accommodate growth, Pollak concludes that the takings issue can encourage beneficial rationalization of the planning process.¹⁶⁴ He takes encouragement from results indicating that "[t]he takings rules mean that decisions that are made in an ad hoc or improvisatory way will tend to be more vulnerable to legal challenge than those that are carefully formulated as part of a long-range policy."¹⁶⁵

But this reasoning brings us full circle to the more important question at hand: whether or not constricting "ad hoc, improvisatory" decisionmaking is an unqualified good. As Contra Costa County respondent Dennis Barry noted, the rules take the creativity out of planning, and he expressed nostalgia for the days before the new rules, when he could practice "the art of public administration, the ability to negotiate with applicants in administering regulations, not the cold hard science of *Nollan* and *Dolan*."¹⁶⁶ Indeed, Pollak's recommendations to planners based on the results of the study are that they avoid case-by-case decisionmaking and employ comprehensive fee structures over exactions as much as possible to avoid even the threat of costly but ultimately meritless lawsuits.¹⁶⁷ He concedes that a staggering problem for older municipalities near build-out in the wake of nexus and proportionality is the problem of cumulative impacts, whereby individual impacts too small to justify exactions aggregate over time to create significant demand for new infrastructure that must finally be realized when later development begins (but nexus and proportionality prevent assessing the cost from new development beyond its share).¹⁶⁸

Bargaining Nexus and Proportionality. The problem of cumulative impacts offers one lens through which to analyze the question of

163. See POLLAK, *supra* note 16, at 80.

164. *Id.* at 75-76, 81.

165. *Id.* at 8, Executive Summary.

166. *Id.* at 82, Full Study.

167. *Id.* at 89-90.

168. *Id.* at 83.

the permissible scope of bargaining under nexus and proportionality. Costs are difficult to allocate proportionately over time, especially when earlier cost-bearers are no longer available to absorb a cost that becomes manifest to a community only at the tipping point of the new development. What kinds of bargains should be allowed when a perfect mechanism of cost-allocation is not available? Consider the following hypothetical land use conflict:

Suppose a landowner seeks to subdivide property on which she lives to allow a developer to construct there a small set of luxury condominiums. She lives on part of a large parcel at the edge of a protected greenbelt, and she wants to sell the vacant land to finance her children's educations (or a church food pantry, or a free veterinary clinic, or to send a local fourth grade class to college . . .). The vacant area is the last undeveloped area in the district of the municipality zoned for single-family homes, and the surrounding community relies on public infrastructure already burdened to capacity. Because the developer wants to build multi-unit housing, he needs to obtain some kind of variance from the zoning board in order to build.

The zoning board does not object in principle to the condominiums, because there are not many of them, they are to be located in the farthest outskirts of town, and designs indicate that they will be mostly hidden from the view of other homeowners. The members of the board do not believe that allowing the construction would undermine the values articulated in the community's comprehensive plan. However, existing sewer infrastructure would collapse if subject to the additional strain of these new homes without improvement, and soil conditions (and local ordinances) render the area unsuitable for septic use. Absent the new development, the sewers can be maintained through the usual means afforded by local property taxes, but the board cannot allow the development to proceed without a plan for improving the lines that would connect the new condominiums with the municipal waste treatment plant.

Most community members are indifferent to the construction of the new units, but they are unwilling to pay more taxes to finance the needed improvements. Area environmentalists strongly oppose the construction of a new waste treatment site, as they believe that a significant expansion of infrastructure would ultimately encourage a relaxation of planning ordinances to allow incursion into the protected green space surrounding the community. Since this is the last undeveloped area in the district, the municipality cannot expect to gradually recoup investment in improved lines from later development projects.

Thus, the board is considering two options. First, it could simply deny the requested use, since they possess full authority under the zoning laws to decline permission for variances. Alternatively, it could approve the variance through a conditional use permit according to which the developer would agree to conduct or finance the necessary improvements required by the new units.

Naturally, the developer would prefer not to finance the improvements single-handedly, but he believes that area characteristics will render the luxury condominiums exceedingly valuable, probably enough so that he would earn a handsome profit even under the terms of the municipality's conditional use proposal. In any event, the deal would remain particularly appealing if the landowner discounts her selling price in light of the municipal exaction. Since a sale to a multiunit developer even at a discount will bring her a better price than a sale for the development of a single-family house, he thinks it likely that the landowner will bargain.

What should happen here? Before *Nollan*, it is likely that the board would not have skipped a beat in proposing the exaction as a condition of approving the requested use. Before *Dolan*, the proposal may still have survived a takings challenge, because the exaction arguably bears the *Nollan*-required nexus to the preventable harm. The municipality would take the position that the zoning ordinance requires single-family homes because, *inter alia*, the sewer system cannot support the increased burden of multiunit residential housing on small lots of land.

However, the proposal would almost certainly fail the scrutiny afforded by *Dolan*'s additional requirement. Although the nature of the exaction is tailored to remedy the harm implied by the nonconforming use, its scope lacks the rough proportionality required by the Supreme Court. The new units will only marginally increase the strain on existing infrastructure that has been brought to capacity over time with the construction of each new single-family home. Under the rubric of rough proportionality, the magnitude of the exaction must be proportional to the magnitude of the harm implied by the proposed variance. The "last developer in line" cannot be made to shoulder the entire costs of new infrastructure necessitated not just by the project in question but by years of growth in a community.¹⁶⁹

Does it matter that "but for" the contribution of this development, the admittedly useful improvements would be unnecessary? Thus far, the "but-for problem" has not received attention from the

169. *Id.* at 83-84.

Court. However, the tenacity of the *Dolan* opinion should give any municipality pause in testing judicial patience on the matter. As notably demonstrated in Dolan's temporary takings claim after her Supreme Court victory, the combustible pairing of nexus and proportionality with the *First English* precedent results in considerable municipal exposure to damages liability if a landowner seeking a questionable permit challenges a proposed exaction. Under the current regime, the municipality should always deny a controversial permit, because attempts to negotiate a creative exaction could, if invalidated, expose the municipality to liability for a temporary taking over the period during which development was delayed (or at least to the legal costs of defending itself). The negotiating environment created by these legal rules yields a strong incentive for municipalities to simply deny permits, even when a mutually beneficial trade could be engineered that would satisfy the landowner and mitigate the public harms associated with the project.

But what about the possibility of mutually beneficial trades? Should it matter if the municipality, landowner, and developer would each be happy with the bargain? According to the facts of the above hypothetical, a rationally acting developer would want to abide by the terms of the conditional use permit, if the alternative is that the permit be denied, since he stands to turn a profit. The landowner would want to sell the land for the highest price possible, which may be to the developer, even at a discount. (Of course, if the landowner could successfully invalidate the condition in court, receive a full price, and receive compensation for a temporary taking, she might prefer *that* alternative instead.) The municipality might be more neutral toward the deal than the other parties, but the deal would nevertheless please one community member without unduly harming others, slightly increase the local tax base, and yield beneficial improvements to the sewer system. Why shouldn't the parties be able to reach a deal that pleases everyone involved?

Perhaps it is because it would be impossible to create a legal rule that successfully limits bad bargains without preventing some beneficial bargains, and the harms of exploitative or irresponsible deals between government and individuals might outweigh the benefits of a few good deals. But this brings us back to the theme of this discussion: what is a bad bargain in the land use context? Are nexus and proportionality really the best tool to separate the bad from the good?

VI. MAKING SENSE OF THE JUDICIAL REPUDIATION OF BARGAINING

In fact, taken together, the nexus and proportionality doctrines stand for the proposition that *most* potential bargains are bad. Nexus and proportionality erect a jurisprudential barrier to value-creating exchange that would lie at the heart of successful negotiated resolutions to land use conflicts.

The nexus doctrine limits the set of possible municipal-land-owner exchanges to those in which the goods of the exchange are related across the medium of prohibitable harm, i.e. directly remedial measures. In other words, a locality may not trade away its ability to prevent a harm to extract benefits that it values more than the prevention of said harm. Under nexus, a city cannot bargain away its discretion to disallow construction of a mall in a residential area in exchange for the construction of a public pool, or its ability to prevent the siting of a toxic waste dump in exchange for the construction of low-income housing. The doctrine of rough proportionality further limits the set of possible exchanges to strictly proportionate, directly remedial measures.

These constraints eliminate the vast sources of difference that give rise to value-creating exchanges. Scholars of negotiation emphasize the importance of considering unrelated goods in formulating options for value-creating exchanges, often noting the proverbial tale of the two children who fight over an orange. Eventually they split it, each unhappy to receive only half, and one eats the fruit and throws away the peel while the other discards the fruit and uses the peel for baking a cake.¹⁷⁰ The moral of the story is that the two could have negotiated a better outcome by realizing how their interests differed and then crafting a bargain to exploit that difference.

In a realm of unregulated land use bargaining, differences that could yield value arise between parties' different resource needs, time horizons, or risk preferences. A community might indeed prefer tolerating a toxic dump in exchange for low-income housing that it desperately needs, or tolerate nonconforming uses in the short term to generate a tax base from which to realize desired planning goals in the future, and some scholars vigorously argue that such exchanges should be possible.¹⁷¹ As noted by the authors of *Beyond Winning: Negotiating to Create Value in Deals and Disputes*: "the truth is that differences are often more useful than similarities in helping parties

170. See, e.g., ROGER FISHER ET AL., *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 56-57 (2d ed. 1991).

171. Cf. Fennell, *supra* note 40, at 16-27.

reach a deal. Differences set the stage for possible gains from trade, and it is through trades that value is most commonly created.”¹⁷² The point is well-framed by Professor Jerold Kayden, who notes the irony of the facts in *Nollan*:

A ban on unrelated amenities interferes not only with the preferences of [communities], but potentially with those of property owners as well. Given the choice between the “unrelated” beach easement and the “related” viewing spot, for example, the Nollans might very well have selected the beach easement. In the typical incentive zoning transaction, the developer’s choice between related and unrelated amenities would reduce to an economic calculus in which developers, in return for a bonus, would prefer to provide an inexpensive unrelated amenity rather than an expensive related one.¹⁷³

And according to his analysis, nothing in the Constitution distinguishes the kind of bargaining that the Supreme Court has found acceptable under nexus and proportionality from the unrelated amenity bargaining it rejects.¹⁷⁴

The “nexus and proportionality” barrier to municipal land use bargaining is controversial for several reasons. As a preliminary matter, the doctrines pose a striking theoretical repudiation of the way that most land use dispute resolution takes place. As discussed above, the bulk of land use planning now occurs in particularized decisionmaking regarding unique parcels of land, and the decision-making process is frequently characterized as one of dealmaking. It seems unlikely that the Court anticipated the scope of these doctrines’ impact without calling more attention to that in its decisions, raising the possibility that its members had not understood the full implications of their decision (or more likely, the actual nature of planning practice). But a jurisprudence that speaks to a system other than what planners use cannot provide adequate guidance or constraint. Writing four years before even *Nollan* was decided, Professor Rose asserts that

the jurisprudence of land decisions is bound to fail unless it takes account of how these decisions are actually made. Given the constitutionality of local land use controls, and the likelihood of their continued and even expanded use, such a jurisprudence should attempt to clarify and refine actual practice. This

172. MNOOKIN, ET AL. *supra* note 6, at 14.

173. Kayden, *supra* note 58, at 48.

174. *Id.* at 47-49. This discussion sets aside (for the moment) the problem of how power imbalances between parties can impact the fairness and results of an unregulated bargaining process, addressed *infra*, in text accompanying notes 181-82.

in turn suggests not only an inquiry into local institutional legitimacy, but also a direct approach to the 'dealing' characteristics of local land controls.¹⁷⁵

That the nexus and proportionality may be speaking to some system of land use planning other than the one we have lends credence to the two explanations proposed above for the lack of meaningful change in planning practice since *Dolan*.¹⁷⁶

Taking the argument one step further, Professor Fennell maintains not only that the *Nollan* and *Dolan* rules seem directed to a model of land use conflict resolution not actually in use, but that they are theoretically inconsistent with the rest of the regulatory landscape. She argues that the application of nexus and proportionality to bargains in the exaction context cannot be squared with the thus-far intact authority of municipalities to regulate land use without the constraints of nexus and proportionality, creating a system fundamentally unfair to landowners and generally bad for communities:

[*Nollan* and *Dolan*] require the government to identify and quantify development-specific negative externalities when it seeks to obtain a concession of property from a landowner. However, the Court has not required the underlying land use regulations—the subject of such bargains—to exhibit a proportionate relationship to the harms they claim to prevent This limitation is understandable; wholesale application of *Dolan* to regulatory takings jurisprudence would abruptly dismantle nearly seventy-five years of zoning law. Yet *Dolan*'s proportionality rule, thus limited, represents a logical anomaly. Land use bargains are constrained by proportionality requirements, while land use decisions made by local governmental bodies are not.

The result is a conceptual disconnect that has become increasingly problematic in the years since *Nollan* and *Dolan* were decided. The current state of land use jurisprudence, which couples relatively open-ended regulatory power with tight restrictions on regulatory bargains, represents the worst of both worlds. It leaves landowners exposed to excessive land use regulations while constricting their ability to bargain for regulatory adjustments. Without meaningful constraints on the underlying land use regulations, limits on land use bargains cannot provide landowners with protections against over-regulation. Instead, these bargaining limits add insult to injury by

175. Rose, *supra* note 62, at 847.

176. See *supra* text accompanying notes 130-31.

preventing mutually beneficial land use deals and generating vast inefficiencies that harm landowners and communities.¹⁷⁷

If the Supreme Court intended to level the playing field between government and property owners, she argues, the new rules only worsen the imbalance, because they constrain only the flexibility of the landowner (the government can always set the baseline rules in whatever array will serve advantageous for future bargains, through such practices as “downzoning.”¹⁷⁸).

Fennell’s critique is particularly potent if the Court’s true objective in *Nollan* and *Dolan* was to protect private property rights against undue public incursion. If so, their response to this substantive end was a procedural device that, at least according to Fennell, has backfired. She argues that, although property-rights advocates have been hoodwinked by the property-rights rhetoric in *Dolan*, the decision significantly harms their interests by restricting their rights to freely alienate. The proscription on bargaining, she warns, ultimately comes down to one less stick in the bundle.¹⁷⁹ Fennell’s own proposal for righting the broken scale is to return private rights to negotiate within a bargaining model that protects against public exploitation through an in-kind call option (by which landowners would be permitted non-conforming uses if they can demonstrate reasonable plans to effectively remedy feared externalized harms).¹⁸⁰

But the Supreme Court is not stocked with ill-equipped thinkers. We may presume that whatever the implications, the justices who forged the *Nollan* and *Dolan* rules saw them as the best means to their selected end. If it was not to enhance the utility of landowners, then the Court’s support for the nexus and proportionality regime must stem from a conviction that unconstrained bargaining—even in the comparatively tame context of today’s “conditional use permits”—is an unsuitable means of conducting good land use planning, presumably because it provides inadequate safeguards against state abdication and exploitation abuses.

177. Fennell, *supra* note 40, at 4-5.

178. See, e.g., Cordes, *supra* note 2, at 167 (describing downzoning techniques by which “undeveloped property is initially heavily restricted with the clear intention of rezoning the property in response to specific development proposals.”).

179. See Fennell, *supra* note 40, at 50.

180. *Id.* at 7-8.

The concern is certainly not unfounded. For example, although Professor Kayden argues that there is no constitutional basis to prevent unrelated amenity bargaining, he nevertheless worries that allowing it may still prove unsound public policy.¹⁸¹ He warns that the danger of unconstrained bargaining in the land use context is that it sanctions municipal bribery, enabling "zoning for sale," and may corrupt healthy planning processes.¹⁸² Although unrelated amenity trades may make a given landowner and bureaucrat feel better off, they create systemic problems for the community in terms of assuring that the larger public interest is truly served:

The constitutional acceptance of incentive zoning for unrelated amenities should not obscure the technique's potential shortcomings and the resulting importance of policy guidelines. Questions of who gains and who loses demand explicit and rigorous examination, especially as the disconnection between an incentive's burden and an amenity's benefit increases. In order to make informed judgments about whether to support or oppose the tradeoff between congestion here and low-income housing there, citizens need full disclosure about the nature of the bargain.

Furthermore, incentive zoning, no less than land policy at all levels of government, should strive toward ideals of fairness and equity in its administration. Incentive zoning's burdens and benefits should be evenly distributed throughout a city in accordance with zoning's bedrock principle of according equal and uniform treatment to similarly situated landowners. No single area should bear a disproportionate share of bonus floor area, nor enjoy a disproportionate share of amenities.¹⁸³

(In lay terms, the low-income residents already living next to where the factory gets built may not be so excited about the municipal bargain that allowed it in exchange for new low-income housing constructed elsewhere.) Kayden's concerns recall the conclusion of Daniel Pollak that the new rules may contribute a positive "rationalization" of the land use decisionmaking toward what he suggests are "simply good planning practices."¹⁸⁴

Due Process in Municipal Bargaining. If rendered in the language of equal protection, Kayden's essential concern, impliedly shared by Pollak, is about due process. The problem with unfettered

181. See Kayden, *supra* note 58, at 41-44.

182. *Id.* at 7.

183. *Id.* at 49-50.

184. POLLAK, *supra* note 16, at 75, 34.

bargaining in land uses is that the excessive reliance on particularized decisionmaking prevents application of the procedural safeguards that normally constrain arbitrary action by state actors. Zoning laws typically require notice and a hearing before a decision is made, but they do not require impartiality of decision makers, and judicial review of zoning decisions applies the minimal scrutiny generally afforded legislative decisions.

Although the decisions of a zoning board are traditionally considered legislative in nature, some states have adopted the position that the small scale of local zoning authority prevents the deliberation and logrolling that typically constrain arbitrary decision by larger legislative bodies, and that zoning decisions should be treated as judicial phenomena.¹⁸⁵ Professor Cordes describes how the special nature of zoning boards renders them immune from the safeguards of "legislative due process":

[An important] reason for more closely scrutinizing rezoning decisions concerns the nature of local legislative bodies themselves. The normal deference to legislative decisionmaking processes is premised on a model of government in which undue influence in decisionmaking is mitigated by the inability of any one interest group to dominate. This model, based on national and state legislatures, envisions logrolling and coalition building as a necessary part of the legislative process. Further, this necessarily involves a protracted process resulting in the forced deliberation of issues; benefits insured in other contexts by trial-like procedures. These features of legislative action are often viewed as a type of 'legislative due process.'

Commentators have frequently noted that local governing bodies often lack these features. They are frequently smaller in size and of a more homogenous character and thus are not forced to pursue the more compromising and deliberative process indicative of 'higher' legislative bodies. This makes them more susceptible to the undue influence of personal conflicts

185. See Cordes, *supra* note 2, at 190-95. Cordes writes: "Although a majority of jurisdictions still regard rezoning decisions as legislative, a growing minority of states, supported by substantial academic commentary, now view small-scale rezonings as quasi-judicial and thus subject to basic due process requirements. The leading case reflecting this trend is *Fasano v. Washington County*, in which the Oregon Supreme Court held that the rezoning of 32 acres of land was a quasi-judicial act which required, among other things, provision of procedural safeguards such as impartial decision makers. In reaching this conclusion, the court emphasized the limited number of parties involved, the small size of the affected parcel, and the pre-existing standards established by the county's comprehensive plan." (Footnotes omitted). *Id.* at 190-91. See also Kublicki, *supra* note 4, at 132-34.

since the process itself is less likely to insulate against the taint of bias upon the ultimate decision.¹⁸⁶

Nevertheless, most zoning boards remain unconstrained by the due process safeguards that apply to judicial decisions. Can we trust them to render ad hoc particularized decisions in the public interest?

And like Alice, it seems that we are back to where we started, at the edge of a cavernous rabbit hole. The critiques of the bargaining model are compelling, and yet they provide no further elucidation about how to strike the appropriate balance between public and private interests in land use, and the bargaining model arose as a response to that uncertainty. So, perhaps rather than just eviscerating bargaining a la nexus and proportionality, which gives rise to inefficiencies and insoluble cumulative impacts problems, perhaps the better approach is to work harder to fix bargaining.

VII. REPAIRING THE BARGAINING MODEL: TOWARD A THEORY OF REPRESENTATION

Building a better bargaining model means creating a system that enables value-creating exchanges that benefit all. The trick is figuring out how to make sure that "all" are truly benefiting.

Protecting the private parties of immediate interest is crucial, but this seems manageable in a bargaining regime primarily because they are present at the table. Nevertheless, it is important to constrain the bargaining environment such that municipalities do not unreasonably establish the initial allocation of rights in favor of the public interest. For example, abusive deployment of downzoning, by which "undeveloped property is initially heavily restricted with the clear intention of rezoning the property in response to specific development proposals,"¹⁸⁷ must be curtailed. (Ironically, nexus and proportionality would appear to steer municipalities even closer toward this practice; Pollak recommends similar practices to municipalities with still undeveloped land.¹⁸⁸)

However, controlling the initial allocation represents a more traditional bargaining problem: that of the legislative process. On issues of comprehensive planning, as opposed to individual permit negotiations, we should be able to trust the democratic process because bargaining at that level of scale should involve a sufficiently public clash of competing values as to force a deliberative procession toward

186. Cordes, *supra* note 2, at 195.

187. *Id.* at 167.

188. POLLAK, *supra* note 16, at 90-91.

the correct balance. And where a landowner party to municipal bargaining feels they are beginning with the wrong initial allocation, then her beef is not with bargaining in the individual case but with the electoral process that yielded the comprehensive plan. (Her ultimate BATNA: exit. Houston awaits.)

The more challenging problem is how to get the negotiation to recognize the "all" implied by the public interests in a given land use conflict. Most of them will not be present at the table.

In some respects, the problems confronting zoning decisionmaking are similar to the problems implicated by negotiated rulemaking in administrative agencies, a context in which state actors are charged to render publicly significant outcomes through a bargaining process. As compared to a zoning dispute, the issues treated in negotiated rulemaking command enormously greater stakes, impacting vastly more parties than are present at the bargaining table. If we trust negotiated decisionmaking in that context, who could question it in the context of a local zoning dispute? However, the bedrock of negotiated rulemaking legitimacy is its excessive attention to the adequacy of representation at the table. Great pains are taken that all potentially interested parties are represented at the negotiating table, and if it is feared that the assembled group does not fairly represent the interested public, negotiation will not proceed.¹⁸⁹

Perhaps a bargaining-model of zoning could stand to learn from negotiated rulemaking in its strict attention to representation. After all, in the absence of the safeguards associated with judicial and larger-scale legislative processes—and in the absence of rigid bargaining constraints like nexus and proportionality—the only guarantor that the true public interest be served is in representation. Conceding the real (and at times irreconcilable) tensions between the competing private and public values at stake in land use disputes, perhaps what can save the bargaining model of zoning decisionmaking is a better theory of representation.

Scholars of public dispute resolution offer some helpful starting points for the inquiry.

As discussed above, Professor Rose proposes mediation as the best theoretical model for legitimizing local land use planning decisionmaking, and offers concepts of "exit" and "voice" as means of providing necessary representational constraints.¹⁹⁰ She argues that in

189. See oral communication with Susskind, *supra* note 71; cf. Freeman & Langbein, *supra* note 100, at 73-75, 83 (describing the inclusive participation protocols for negotiated rulemaking).

190. Rose, *supra* note 62, at 890-92.

local arenas, where constraints founded on separation-of-powers concepts are ill-fitted to the scale of operations, legitimacy can be harvested through mediative processes that ensure meaningful participation (voice) for interested parties and recognize the parties' ultimate BATNA—that of leaving the bargaining table (exit). But as compelling as is her recognition that unconstrained land use bargaining may best be harnessed as mediation, Rose's proposition that voice and exit can salvage and legitimate the bargaining model is unpersuasive in most contexts. In other than very small communities, voice is difficult to ensure (absent the still-missing theory of representation), and in most localities—especially small communities—exit is an unlikely, and accordingly hollow threat.

Professor Menkel-Meadow has also considered the question of how deliberative democratic processes can take account of representation issues in public problem-solving contexts where negotiation-based processes are relied on in the absence of a shared substantive concept of the good.¹⁹¹ Turning to Jurgen Habermas's political theory for inspiration, she proposes as a governing procedural model the "discourse principle," according to which outcomes are legitimate "if and only if all possibly affected persons could agree to them as participants in rational discourse."¹⁹² Menkel-Meadow adopts the discourse principle subject to the additional substantive requirement that inequality of power and resources not distort decisionmaking or coerce deliberation.¹⁹³ She recognizes, however, the problem of how this theory can take account of representation in contexts where individual participation is impossible:

[T]o the extent that participation remains a cornerstone of democratic theory, new forms of participation (whether direct or mediated by agents or representatives) may require the creation of new institutions or modifications of old forms to permit optimum and appropriate levels of participation for effective and legitimate outcomes.¹⁹⁴

(Unfortunately, this in-progress piece stops short of proposing a solution.)

The literature reveals few novel proposals for managing the tensions of land use bargaining with reference to the representation problem, but two proposals falling at either end of the legalistic/market-model spectrum of decisionmaking bear mentioning. At the free

191. Menkel-Meadow, *supra* note 63, at 9.

192. *Id.* at 11.

193. *Id.*

194. *Id.* at 9.

market end, Professor Fennell proposes that private and public interests could be protected in a bargaining framework by the adaptation of a liability-based in-kind call option, which would allow landowners free disposition of their property so long as they effectively remedy harms to identified public values. Her proposal is not specifically oriented toward solving the representation problem, but offers protection for interested parties through the market method of veto-purchasing:

The centerpiece of [the proposed] approach is a mechanism that amounts to an in-kind 'call option'—a species of liability rule that would permit landowners to engage in otherwise forbidden land uses by providing in-kind remediation of cognizable negative externalities. Although the idea of using liability rules to regulate land use is not new, my approach differs from the standard liability rules in that it focuses on the in-kind remediation of externalities rather than the payment of monetary damages. This in-kind call option would place a ceiling on the permissible bargaining range while leaving landowners and governmental entities free to pursue more efficient alternatives without regard to the *Nollan/Dolan* limitations. The call option would itself be alienable as well, allowing communities to effectively buy veto rights with respect to development on a given parcel of land. This framework would provide a coherent mechanism for blocking unconstitutional takings without also blocking socially beneficial bargains.¹⁹⁵

Fennell's model deals well with the problem of government overreaching and exploitation of landowners, but neglects the problems of zoning authority capture by interest groups and abdication of governmental responsibility. Additionally, although the market framework provides an attractively predictable model of stakeholder behavior, it weakens protections for Kayden's marginalized community members that may have difficulty protecting interests easily compromised in the bargaining process (especially in the realm of raising "cognizable" objections to a proposed use and its corresponding remedy). Needless to say, marginalized groups are unlikely to be able to purchase veto-entitlements. Finally, in promoting the market sale of entitlements, Fennell's proposal risks steering development of the bargaining process away from the more promising consensus-based mediation model advocated by Professor Rose.

At the other end of the spectrum is a proposal by a pair of New Jersey judges that localities enact "fairness hearings" at which a

195. Fennell, *supra* note 40, at 7-8.

judge can assess a proposed settlement's reasonableness and fairness to all interested parties.¹⁹⁶ They observe that such hearings have been advocated in various "public law" contexts due to the salutary effect that neutral review provides for the interests of absent third parties.¹⁹⁷ According to this proposal,

A fairness hearing would be similar to the public hearings held prior to board action. The applicant and/or municipal agency involved could explain the settlement and the basis for its support. Members of the public could comment for or against the settlement. [It is] essential that members of the public be given notice and an opportunity to be heard. A fairness hearing, affording limited intervention to present arguments or to appeal an approved settlement, seeks to balance competing concerns. Intervention is permitted, but only to determine the settlement's fairness, not to allow the intervener to compel a full adjudication of the case's merits.¹⁹⁸

The fairness hearing appropriately attends to the problem of absent third parties, but it presumes an adversarial nature in the settlement context that may not accurately characterize the relationships at play in the bargaining model except in the most controversial contexts. Although this model would work well where a proposed settlement is notorious within a community, it may require more participation from interested third parties than is realistic, especially when bargaining has proceeded smoothly. Most problematically, this judicially-modeled proposal presumes that a judge hearing only a fraction of the exchange that gave rise to a negotiated outcome can adequately represent the interests of absent parties that he or she may know little about. A significant value of the mediation model of bargaining is that parties present over the course of the negotiation experience "learning" benefits that enable them to better understand the conflicting interests and values at play.¹⁹⁹

But rather than entrusting the representation of absent third parties' interests to a purposefully shielded authority figure for vindication after the negotiation process is over, perhaps the better solution is to entrust their representation to a designated member of the negotiating team distinct from the rest of the zoning board.

This person could be deputized with the special obligation of representing the interests of vulnerable absentee parties as distinct from

196. Cohen et al., *supra* note 17, at 864-65.

197. *Id.*

198. *Id.*

199. *Cf.* Freeman & Langbein, *supra* note 100, at 80-81.

the rest of the zoning board, which is charged with the representation of the general public interest. This third-party deputy would acquire sufficient knowledge of the absent parties' needs and interests as to make them part of the negotiation, such that the primary parties can be confronted with them during the "learning" phases of the process. (Ideally, where possible, the deputy could also convey the learning benefits she gains through the negotiation to the interested third parties.) Furthermore, if adequately insulated from the zoning board (in the style of an ombudsman), the third-party deputy could maintain vigilance against capture, or even exploitation of present party land-owners based on the regulatory expertise she would develop in her professional role.

The involvement of a third-party deputy might enable the development of a zoning mediation process that could approach the utility of Susskind's negotiated rulemaking model, where the public interest is successfully pursued through learning-based consensus.²⁰⁰ Ultimately, a third-party deputy would also be subject to capture—potentially, and perhaps most disarmingly, by the zoning board itself. The same representation critiques that apply in other arenas would likely apply in this one, since a proxy can never seamlessly translate another individual's preferences, nor fully convey procedural learning benefits to the principal. But representational flaws associated with the deputy are no more daunting than the flaws associated with the status quo and they are arguably less so. Until Professor Menkel-Meadow delivers a welcome (!) theory of representation in deliberative democracy, perhaps this is the best means of preserving the bargaining model dominant in land use planning while protecting the public interests most likely to be sacrificed therein.

VIII. CONCLUSION

This article has sought to demonstrate how modern land use planning is fundamentally an exercise in bargaining, and how recent movements in the Supreme Court's takings jurisprudence would dismantle that system. It concludes that while there is merit to the Court's concerns about impermissible bargaining, the constraints it has crafted through nexus and proportionality are ill wed to the actual nature of the process it seeks to govern. Nexus and proportionality provide helpful indications of good planning decisions in many cases, but may needlessly prevent beneficial solutions to real

200. See *id.* at 110-13 (discussing the learning and consensus benefits of negotiated rulemaking); oral communication with Susskind, *supra* note 71.

problems in land use planning for which the doctrines fail to provide even the possibility of solution, such as the cumulative impacts problem.

Nevertheless, unfettered bargaining poses real risks that outcomes will fail to vindicate the correct balance between public and private interests in land use within communities. But the real problem may lie in the impossibility of reaching consensus on where that balance should rest. Until that occurs, procedural protection for all parties in the form of adequate representation is the best remedy. One means of accomplishing this may be the appointment of a third-party deputy to represent absent third parties in a mediation-oriented bargaining process.