

# *Fordham Environmental Law Review*

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*Volume 23, Number 1*

2011

*Article 2*

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## When Mixed Use Development Moves in Next Door: Finding a Home for Public Discourse and Input

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# WHEN MIXED USE DEVELOPMENT MOVES IN NEXT DOOR: FINDING A HOME FOR PUBLIC DISCOURSE AND INPUT

*Dorothy D. Nachman\**

## INTRODUCTION

In the latter part of the 20<sup>th</sup> century, city and regional planners sought to identify alternatives to the urban sprawl experienced in many American cities. This movement, known as New Urbanism or, alternatively, Smart Growth, focuses on creating neighborhoods and communities that integrate societal needs, environmental impacts, economic development and livable communities. Although smart growth concepts can enrich new developments or redeveloped areas, they do not necessary protect existing, adjacent neighborhoods that may be negatively impacted by the smart growth redevelopment. Municipalities across the country have adopted zoning ordinances that attempt to balance the benefits of new urbanism while protecting the property interests of existing landowners.

This Article looks at the prevailing land use tools that seek to address the concerns of existing homeowners living in the midst of redevelopment, without stifling the smart growth principals embraced by comprehensive plans of many local governments. In considering which tool or tools to use to promote smart communities while preserving the nature and characteristics of long-standing neighborhoods, the role of community input and enforcement are of primary concern. This Article compares private restricted covenants, conservation zoning overlays and development agreements as three

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possible mechanisms for incorporating smart growth, mixed use development without sacrificing existing, healthy and well-established neighborhoods.

### I. SMART GROWTH/NEW URBANISM

New urbanism was first identified in the late 1970s<sup>2</sup> and the leading organization promoting new urbanism is The Congress for the New Urbanism (CNU).<sup>3</sup> In their simplest form, the primary principals advocated by CNU are “walkable, mixed use neighborhood development, sustainable communities and healthier living conditions.”<sup>4</sup> More detailed in their charter, CNU advocates:

...the restructuring of public policy and development practices to support the following principles: neighborhoods should be diverse in use and population; communities should be designed for the pedestrian and transit as well as the car; cities and towns should be shaped by physically defined and universally accessible public spaces and community institutions; urban places should be framed by architecture and landscape design that celebrate local history, climate, ecology, and building practice.<sup>5</sup>

Although new urbanism was initially accomplished in greenfield developments, its principles have increasingly been adopted in grayfield developments and infill projects.<sup>6</sup> The most common response to new urbanism is the mixed use development which

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2. Brian W. Ohm & Robert J. Sitkowski, *The Influence of New Urbanism on Local Ordinances: The Twilight of Zoning?*, 35 URB. LAW. 783, 783 (2003).

3. *What is CNU?*, THE CONG. FOR THE NEW URBANISM, [http://www.cnu.org/who\\_we\\_are](http://www.cnu.org/who_we_are) (last visited Aug. 20, 2011).

4. *Id.*

5. *Charter of the New Urbanism*, THE CONG. FOR THE NEW URBANISM 1, [http://www.cnu.org/sites/www.cnu.org/files/cnu\\_charter2010\\_0.pdf](http://www.cnu.org/sites/www.cnu.org/files/cnu_charter2010_0.pdf). (last visited Dec. 20, 2011).

6. Thomas H. Sander, *Social Capital and New Urbanism: Leading a Civic Horse to Water?*, 91 NAT'L CIVIC REV. 213, 215 (2002) (defining “greenfield” as “undeveloped suburban or rural land;” “Grayfield” “as in converting a mall or industrial plant tract into a New Urbanist development.”).

typically includes residential, commercial, office, industrial, and recreational uses.<sup>7</sup>

Such smart growth principals are largely incompatible with existing Euclidean zoning<sup>8</sup> that divides land into single use districts and fails to provide sufficient flexibility for the mixed use development that is at the heart of new urbanism.<sup>9</sup> Local governments that want to embrace and support the principals of new urbanism must amend their zoning ordinances to incorporate these principles.<sup>10</sup> A wholesale rewrite of the entire zoning ordinance that is sensitive to the design requirements of new urbanism is one approach,<sup>11</sup> while other local governments may adopt new development tools and restrictions *in addition to* the existing zoning ordinances to diversify the possibilities for new and re-development projects.<sup>12</sup> In the latter approach, the new codes co-exist with the original ones forming an overlay district.<sup>13</sup> Particularly difficult is finding a land use planning tool to which a developer will submit his new development that also provides sufficient opportunity for public input and discourse.

## II. PRIVATE RULES – COVENANTED SUBDIVISIONS

### *Private Covenanted Subdivisions*

The private covenanted subdivision, or common interest community, has been around for decades as a mechanism for controlling land use in neighborhoods and private developments. In 1962, there were approximately 500 private covenanted

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7. Wayne S. Hyatt, *Lawyers in Wonderland: Opportunities Through the Common Interest Looking Glass*, in 7 ACREL Papers 5, 30 (Alan J. Robin, ed. 1995).

8. *See generally infra* Part III.A.1.

9. Ohm & Sitkowski, *supra* note 2, at 785.

10. *Id.* at 788.

11. *Id.*

12. *Id.* at 789.

13. *Id.* at 790 (citing Andres Duany & Emily Talen, *New Urbanism and Smart Growth: Making the Good Easy: The Smart Code Alternative*, 29 FORDHAM URB. L.J. 1445, 1466 (2002)). The *Smart Code* is available at [www.cnu.org/node/2645](http://www.cnu.org/node/2645).

communities<sup>14</sup> and by 2010, there over 309,600 private communities encompassing 24.8 million housing units across America.<sup>15</sup> Typically, these covenants are prepared initially by the developer of the project and are filed with the register of deeds prior to the initial homesite sale in the development.<sup>16</sup> Once filed, the declaration of covenants is binding on all current and future property owners, and anyone who purchases a home in the community is subject to the covenants.<sup>17</sup> Most covenants seek to provide increased community security,<sup>18</sup> street maintenance, green space, community buildings, and curbside trash collection; regulate the types of homes and extent of occupancy that may occur, the design of additional or renovated portions of the home, and other land use rules customarily associated with a municipality's design review process and provision of services.<sup>19</sup>

Typically, a homeowners' association (HOA) is charged with the maintenance and upkeep of the common areas of the community and the collection and distribution of the HOA's dues. The HOA's dues are the primary source for paying for maintenance of the common areas.<sup>20</sup> Each homeowner, upon purchasing his or her home, automatically becomes a member of the HOA. Homeowners pay an assessment equal to their proportional ownership interest in the community. These assessments are the sole source of income to the HOA.<sup>21</sup>

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14. Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 711 (2010); *Cf. id.* n.68 ("This number may be an underestimate.").

15. COMMUNITY ASSOCIATIONS INSTITUTE, INDUSTRY DATA: NATIONAL STATISTICS, <http://www.caionline.org/info/research/Pages/default.aspx/info/research/Pages/default.aspx> (last visited December 20, 2011).

16. Wiseman, *supra* note 14, at 712.

17. Steven Siegel, *A New Paradigm for Common Interest Communities: Reforming Community Associations Through the Adoption of Model Governing Documents that Reject Intricate Rule-Bound Legal Boilerplate in Favor of Clarity, Transparency and Accountability*, 40 REAL EST. L.J. 27, 35 (2011).

18. Christopher Baum, *The Benefits of Alternative Dispute Resolution in Common Interest Development Disputes*, 84 ST. JOHN'S L. REV. 907, 910 (2010).

19. Siegel, *supra* note 17, at 31.

20. Rachel Furman, *Collecting Unpaid Assessments: The Homeowner Association's Dilemma When Foreclosure is No Longer a Viable Option*, 19 J.L. & POL'Y 751, 754 (2011).

21. *Id.*

Although private communities should be able to retroactively form private homeowners' associations and covenants, this idea has not taken hold.<sup>22</sup> The differing voices of existing neighbors represent one challenge that confronts an existing neighborhood seeking to retroactively adopt binding covenants. Individual homeowners have conflicting opinions about the purpose of the neighborhood, the value of individual property rights, and to what degree limitations should be placed on private property uses.<sup>23</sup> The retroactive adoption of a set of restrictive covenants would require the consent of each existing homeowner in order to bind future homeowners. If one or more existing homeowners objects to the proposed covenant and refuses to be bound, it largely defeats the purpose of covenants seeking to control land use. Thus, while adopting restrictive covenants at the initial creation of a development may be an easy task undertaken solely by the developer, retroactive adoption is much more difficult. Therefore, although existing homeowners may desire to define the character of their neighborhoods with restrictions and covenants, the difficulty of retroactive adoption of private covenants has such neighborhoods turning to public land tools to achieve similar results.<sup>24</sup>

Although developer-created covenants are easier to create, they are criticized for allowing the developer to control the substance of the covenants with little regulatory oversight and virtually no input from the homeowners that ultimately reside in the community.<sup>25</sup> Homeowners have the right to amend and modify the agreement once the units in the development are sold to private homeowners, but they rarely exercise this right.<sup>26</sup> This control can be especially troublesome for homeowners who inherit the developer's covenants because a primary objective for the developer in drafting the covenants is to make the project appear more stable and attractive in the eyes of potential lenders.<sup>27</sup> Thus, the interests of the developer

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22. Wiseman, *supra* note 14, at 732.

23. *Id.*

24. *Id.*

25. Siegel, *supra* note 17, at 34.

26. *Id.* at 35 ("In fact, the rule regime is often remarkably resistant to change, because, in most CICs, key elements of the rule regime may be modified only by a supermajority vote of the residents.").

27. Siegel, *supra* note 17, at 36.

at the time of the initial preparation of the covenants may differ greatly from those of homeowners who ultimately live in the community.

### *Enforceability*

In addition to the general management of property and finances, the HOA is primarily charged with enforcement of the covenants.<sup>28</sup> It is through this enforcement that the development's original land use plan is preserved.<sup>29</sup> The HOA usually enforces the covenants by assessing fines against homeowners in violation.<sup>30</sup> If the fines go unpaid, the HOA can attach a lien to the individually-owned property for the value of the outstanding fines, which ultimately could lead to a forced sale.<sup>31</sup> The HOA could traditionally use the threat of foreclosure on the outstanding lien as leverage to force the violating homeowner to come into compliance with the covenant and pay any outstanding fines,<sup>32</sup> but in today's economic climate the threat of foreclosure does not carry the same sting.<sup>33</sup>

## III. PUBLIC LAND USE TOOLS

### *Traditional Euclidean Zoning*

#### History

Zoning became a phenomenon in the United States in the early 1900s. In New York, the construction of the Equitable Building in 1915 highlighted the need for height and setback restrictions on city buildings.<sup>34</sup> Upon completion, the Equitable Building cast a seven-acre shadow over neighboring buildings, impacting the

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28. Wiseman, *supra* note 14, at 713.

29. Hyatt, *supra* note 7, at 10.

30. Siegel, *supra* note 17, at 33.

31. *Id.* at 32. See generally Gemma Giantomasi, *A Balancing Act: The Foreclosure Power of Homeowners' Associations*, 72 *FORDHAM L. REV.* 2503 (2004).

32. Furman, *supra* note 20, at 756.

33. *Id.* at 757.

34. *About Zoning: Background*, N.Y.C. DEP'T OF CITY PLANNING, <http://www.nyc.gov/html/dcp/html/zone/zonehis.shtml> (last visited May 17, 2011).

neighborhood's access to light and air.<sup>35</sup> In addition to the Equitable Building, the increase of the immigrant population and accompanying need for tenant housing caused a blurring of lines between housing areas, upscale retail and factory uses.<sup>36</sup> In response to these developments, New York City enacted the Zoning Resolution of 1916, a simple document dictating height and setback requirements as well as appropriate uses that set the stage for more wide-spread zoning initiatives.<sup>37</sup> Thereafter, in the landmark 1926 Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, the Court upheld the constitutionality of municipal zoning ordinances as a justified use of a government's police power.<sup>38</sup> The Zoning Resolution of 1916 continued as the primary source of zoning regulation in NYC until the enactment of the 1961 Zoning Resolution.<sup>39</sup> The 1961 Resolution was a comprehensive plan that addressed use regulations, parking requirements, open spaces and incentive zoning.<sup>40</sup> Zoning today can take a number of different forms which can be used in combination to create a comprehensive plan, including incentive zoning, contextual zoning and special purpose district techniques.<sup>41</sup> Likewise, a more flexible approach of allowing a mixed use of development to create an inclusive neighborhood of residential, light commercial, and services has met

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35. *Id.*

36. *Id.*

37. *Id.*

38. *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365, 387 (1926).

39. *About Zoning: Background*, *supra* note 34.

40. *Id.* ("It [The 1961 Resolution] introduced incentive zoning by adding a bonus of extra floor space to encourage developers of office buildings and apartment towers to incorporate public plazas into their projects.").

41. *About Zoning: Zoning Today*, N.Y.C. DEP'T OF CITY PLANNING, [http://www.nyc.gov/html/dcp/html/zone/zoning\\_today.shtml](http://www.nyc.gov/html/dcp/html/zone/zoning_today.shtml) (last visited Dec. 20, 2011). *Zoning Glossary*, N.Y.C. DEP'T OF CITY PLANNING, *See also* <http://www.nyc.gov/html/dcp/html/zone/glossary.shtml> (last visited Oct. 13, 2011) ("Incentive Zoning provides a bonus, usually in the form of additional floor area, in exchange for the provision of a public amenity or affordable housing"; "Contextual zoning regulates the height and bulk of new buildings, their setback from the street line, and their width along the street frontage, to produce buildings that are consistent with existing neighborhood character"; Special Purpose Districts are "designed to supplement and modify the underlying zoning in order to respond to distinctive neighborhoods with particular issues and goals.").



the need for neighborhood planning consistent with new urbanism initiatives.

Since the advent of zoning regulations in New York City, model acts were created to provide direction to other cities and municipalities wanting to adopt zoning guidelines. Under the leadership of then-Secretary of Commerce, Herbert Hoover, an advisory group drafted the Standard State Zoning Enabling Act (SSEA) which was published in 1924 and revised in 1926.<sup>42</sup> The Department of Commerce published a second model, the Standard City Planning Enabling Act, in 1927 which was finalized in 1928.<sup>43</sup> These acts formed the basic foundation for zoning enabling regulations throughout the country.<sup>44</sup> Enabling legislation authorizes local governments to exercise authority over its territory that would otherwise be controlled at the state level.<sup>45</sup> Despite the obvious benefits of zoning ordinances, they were recognized as “radical departure(s) from the traditional concepts of private property because it was perceived as prohibiting a citizen from devoting his property to a purpose” that was otherwise legal and harmless.<sup>46</sup> Because of the restrictions it places on the rights of a private landowner, there exists still today a belief that “any zoning is an unreasonable restriction on the rights of private property owners.”<sup>47</sup>

Zoning falls within a state’s police power and thus enabling legislation is needed in order to give local municipalities the power to

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42. *Standard State Zoning Enabling Act and Standard City Planning Enabling Act*, AM. PLANNING ASS’N, <http://www.planning.org/growingsmart/enablingacts.htm> (last visited Aug. 20, 2011).

43. *Id.*

44. *Id.*

45. Stephen A. Morris, *Zoning and Historic Preservation*, in CULTURAL RESOURCES PARTNERSHIP NOTES 1 (June 1998), <http://www.nps.gov/hps/pad/partnership/Zoning699.pdf>.

45. Stephen A. Morris, *Zoning and Historic Preservation*, in CULTURAL RESOURCES PARTNERSHIP NOTES 1 (June 1998), <http://www.nps.gov/hps/pad/partnership/Zoning699.pdf>.

46. *Fayette Cnty Office of Planning, Zoning and Cmty Dev. v. Joseph Cellurale, Sr.*, No. 1774, 2007 Pa. Dist. & Cnty. Dec. LEXIS 375, at \*4 (Oct. 23, 2007) (quoting EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING, 1-10, (4th ed. 2007)).

47. *Id.* at \*6-7.

plan and adopt zoning regulations within their boundaries.<sup>48</sup> The SZEAs required zoning ordinances to comply with a comprehensive plan,<sup>49</sup> authorized the municipality to divide its geographic area into districts, and recommended procedures for adopting and amending zoning districts. The SZEAs had been adopted in whole or part in 19 states by 1925.<sup>50</sup> By 1926, more than 70 cities had adopted zoning regulations and an additional 1,246 municipalities had adopted it by 1936.<sup>51</sup> In 1975, the American Law Institute adopted the Model Land Development Code and it became the newest model land use legislation since the SZEAs.<sup>52</sup>

Despite its long history, zoning can be one of the most controversial activities falling to a local governing body and generating emotional energy from residents, developers and environmentalists alike.<sup>53</sup> Private property owners oftentimes resent the imposition of government imposed restrictions on the otherwise lawful and harmless use of his or her private property.<sup>54</sup> On the other hand, developers cite to the “complexity and length” of most zoning codes that make compliance expensive and difficult.<sup>55</sup> Additional complaints about traditional zoning revolve around its exclusionary nature based on usage as opposed to a broader design tool that would permit multiple uses within a zone as long as the overall quality of the development comported to established design criteria.<sup>56</sup> Lastly,

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48. Morris, *supra* note 45, at 1.

49. ADVISORY COMM. ON ZONING, DEPARTMENT OF COMMERCE, STANDARD STATE ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS 6 (rev. ed. 1926); *available at* <http://www.planning.org/growingsmart/pdf/SZENablingAct1926.pdf>.

50. Ronald H. Rosenberg, *Referendum Zoning: Legal Doctrine and Practice*, 53 U. CIN. L. REV. 381, 381 n.2 (1984).

51. William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STU. 317, 319 (2004).

52. See EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 1:3 (4th ed. 2011).

53. See *On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 721 (S.C. 2000).

54. See EDWARD H. ZIEGLER, JR. ET AL., RATHKOPF’S THE LAW OF ZONING AND PLANNING § 1:2 (4th ed. 2011).

55. See Richard S. Geller, *The Legality of Form-Based Zoning Codes*, 26 J. LAND USE & ENVTL. LAW 35, 39, (2010).

56. See Roger K. Lewis, *Traditional Zoning Can’t Meet the Challenge of Modern Development*, WASH. POST, July 24, 2004, at F4, *available at* <http://www.washingtonpost.com/wp-dyn/articles/A9505-2004Jul23.html>.

environmentalists object to traditional zoning and its resulting urban sprawl because it increased the use of and created a dependence on vehicular traffic.<sup>57</sup> Thus, there is motivation from various places to reconsider how municipalities make and impose land use decisions and whether traditional Euclidean zoning is the best approach.

### Types

Traditional zoning ordinances are broad-based in their approach to regulating land use. Zoning ordinances seek to control population growth, building density, traffic, resource management, historic areas, and public services to promote “public health, safety, morals, convenience, order, appearance, prosperity and general welfare”<sup>58</sup> of existing and future communities. To achieve these goals, zoning regulations may authorize and local municipalities may employ a variety of zoning techniques.<sup>59</sup> A hallmark of standard zoning is that the zoning ordinances will apply uniformly to all of the property within a zoning boundary.<sup>60</sup>

Generally, zoning regulations separate different types of land uses to ensure their compatibility within the same community.<sup>61</sup> One of the underlying beliefs of traditional zoning is that by separating the uses through the implementation of zoning boundaries and ordinances, each class of land use is protected from the negative impacts of other uses.<sup>62</sup> General use districts permit a variety of uses within their boundary; conditional use districts permit only a limited type of use within their boundary; and overlay districts exist within a general or conditional district, and impose additional limitations on the use of the property.<sup>63</sup> Initially, zoning ordinances separated the

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57. See Geller, *supra* note 55, at 77.

58. S.C. CODE ANN. § 6-29-710 (A) (2011); *F’On*, L.L.C., 526 S.E.2d at 720.

59. See S.C. CODE ANN. § 6-29-720 (C) (2011); see also *F’On*, L.L.C., 526 S.E.2d at 720.

60. Shelby D. Green, *Development Agreements: Bargained-For Zoning that is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 386 (2004).

61. Wiseman, *supra* note 14, at 714.

62. Green, *supra* note 60, at 386-87.

63. See RALEIGH, N.C., CITY CODE § 10-2011(b) (2011), available at <http://library.municode.com/index.aspx?clientID=10312&stateID=33&statename=North%20Carolina>.

geographic areas into three districts: residential, commercial, and industrial;<sup>64</sup> but as zoning became a more prevalent practice, the complexity of zoning regions increased.<sup>65</sup> Today, types of zoning districts can differ significantly, and depending on the size of the city or town, the number of different zoning districts can be vast.<sup>66</sup> Zoning districts can separate land use based on the type of uses (commercial, heavy industrial, single family, residential, multi-family residential) and furthermore by the type of individual uses within the district (grocery, retail, office).<sup>67</sup> Despite the varied use of traditional zoning districts, they nevertheless fail to offer many options for maintaining the community aesthetic sought by neighborhoods and more easily protected by private covenants.<sup>68</sup>

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64. David W. Owens & Andrew Stevenson, An Overview of Zoning Districts, Design Standards, and Traditional Neighborhood Design in North Carolina Zoning Ordinances 2 (N.C. Sch. of Gov't Special Ser. No. 23, Oct. 2007), *available at* <http://sogpubs.unc.edu/electronicversions/pdfs/ss23.pdf>.

65. *See id.*

66. *See id.*

66. *See* Wiseman, *supra* note 14, at 714. The Town of Mars Hill, North Carolina, population 1,798 as of July 2009, *Mars Hill, North Carolina*, CITY-DATA.COM, <http://www.city-data.com/city/Mars-Hill-North-Carolina.html> (last visited Sept. 1, 2011), has 9 zoning districts that primarily address minimum lot size, setbacks, and permitted uses, MARS HILL, NC, ZONING ORDINANCE § 301-09, *available at* <http://www.townofmarshill.org/Zoning%20Ordinances.htm>. The Town of Raleigh, North Carolina, population 405,791 as of July 2009, *Raleigh, North Carolina*, CITY-DATA.COM, <http://www.city-data.com/city/Raleigh-North-Carolina.html> (last visited Sept. 1, 2011), has 24 zoning districts, each of which has a corresponding conditional use district, and an additional 14 zoning overlay districts, RALEIGH, N.C., CITY CODE § 10-2011 (2011), <http://library.municode.com/index.aspx?clientID=10312&stateID=33&statename=North%20Carolina>. The City of Los Angeles, California has 35 zoning districts including districts relating to the following uses: residential; agricultural; commercial; manufacturing; institutional; industrial; resort and recreation; scientific research and development; and open space, LOS ANGELES, CA, COUNTY CODE § 22.12.010 (2011), <http://search.municode.com/html/16274/index.htm>.

67. Wiseman, *supra* note 14, at 714; *see* SPRINGFIELD, OHIO, ZONING CODE § 1113.02 (2009), *available at* <http://www.ci.springfield.oh.us/Gov/ord/1113.pdf>.

68. Wiseman, *supra* note 14, at 731-32 (“Just as traditional zoning with its blunt approach to rules fails to offer many options for controlling the sublocal community aesthetic, applying covenants to old communities is not generally a practically achievable endeavor.”).

The exact nature of zoning adoption and enforcement is a combination of legislative and administrative actions, and the distinction between legislative and administrative approaches can inform the type of enforcement opportunities available. The adoption of the zoning districts typically occurs at the municipal level, pursuant to enabling statutes.<sup>69</sup> The local planning entity must hold public hearings before enacting or amending zoning regulations.<sup>70</sup> In some jurisdictions, zoning may occur by initiative and referendum subject to the applicable voter referendum rules, while other jurisdictions have prohibited such initiatives, reserving zoning decisions to the authority of the municipality.<sup>71</sup> In cases prohibiting zoning by referendum, the courts have held that the authority granted by the legislature to the local governing body was not intended to permit voters to decide complex matters such as zoning,<sup>72</sup> and that allowing voters to decide zoning regulations would “nullify zoning and land use rules developed after extensive debate among a variety of interested persons.”<sup>73</sup>

If proposed development complies with all of the provisions of the zoning ordinances, no further municipality action is required. Sometimes, a developer’s plan requires further discretionary action by the municipality in the form of special permits or variances.<sup>74</sup> Requests for zoning map amendments, variances, or special use permits are subject to a public review process.<sup>75</sup> Amending the zoning map is a legislative action, which is limited not to a specific

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69. *How to Avoid Problems with Local Government: Zoning Issues*, THE WITTERMAN LAW FIRM, P.C., <http://www.witterman.com/Articles.shtml> (last visited Aug. 31, 2011) (“In turn, state government gives your local community government the power to regulate how you use your property. The States usually give this power to local communities through what are known as State Enabling Statutes.”).

70. See S.C. CODE ANN. § 6-29-760(A) (2010); *I’On, L.L.C. v. Town of Mt. Pleasant*, 526 S.E.2d 716, 720 (S.C. 2000).

71. *I’On, L.L.C.*, 526 S.E.2d at 720-21. See *id.* n.4 for a list of cases.

72. See *id.* at 718.

73. *Id.* at 721.

74. See *About Zoning: The Zoning Process*, N.Y.C. DEP’T OF CITY PLANNING, <http://www.nyc.gov/html/dcp/html/zone/zonehis3.shtml> (last visited May. 17, 2011).

75. See *id.*

development but to the larger geographic region to which the amendment applies.<sup>76</sup>

### Enforcement

The effectiveness of zoning ordinances in controlling land use and development is only as strong as the municipality's ability to enforce the zoning rules. A local governing body has a number of remedies available to it to enforce violations of a zoning ordinance, including injunctive relief, imposition of penalties for violation of the zoning ordinance, and amendment or forfeiture of zoning variances.<sup>77</sup> Local ordinances will typically dictate the nature and extent of enforcement options, and will often vary significantly within a state, since the locality has wide latitude under the enabling statutes to promulgate its zoning ordinance.<sup>78</sup> Section 8 of the SZEA provides that violations of a zoning ordinance can be punishable by civil or criminal penalties.<sup>79</sup> Criminal sanctions for zoning violations are considered misdemeanors punishable by fines and imprisonment.<sup>80</sup> Some jurisdictions employ building inspectors or other officers or agents tasked with enforcing the building code,<sup>81</sup> while others rely on citizen complaints for enforcement.<sup>82</sup> Despite the presence of civil and criminal liabilities for zoning violations, there may be little

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76. *See Id.*

77. *See Allendale Nursing Home, Inc. v. Allendale*, 357 A.2d 333, 337 (N.J. Super Ct. Law Div. 1976).

78. E-mail from Kevin A. Medeiros, President, N.C. Ass'n of Zoning Officials, to author (May 31, 2011, 5:11 PM EST) (on file with author).

79. ADVISORY COMM. ON ZONING, *supra* note 49, at 12.

80. CHAPEL HILL, N.C., CODE OF ORDINANCES § 4.13.4 (2011) available at [http://library.municode.com/HTML/19952/level3/CO\\_APXALOUSMA\\_ART4PR.html#CO\\_APXALOUSMA\\_ART4PR\\_4.13VIPE](http://library.municode.com/HTML/19952/level3/CO_APXALOUSMA_ART4PR.html#CO_APXALOUSMA_ART4PR_4.13VIPE); *Reporting Violations of the Boundary County Zoning and Subdivision Ordinance*, BOUNDARY COUNTY PLANNING & ZONING, <http://www.boundarycountyid.org/planning/violations.htm> (last visited Aug. 21, 2011).

81. *See Historic Building Enforcement Officer*, HISTPRES: UNIQUE HISTORIC PRESERVATION JOBS, (posted May 16, 2011), <http://histpres.com/other/historic-building-enforcement-officer-city-of-san-antonio-tx>; *Historic Building Enforcement Officer*, PRESERVE.NET, (posted May 12, 2011), <http://www.preservenet.cornell.edu/employ/jobdetail.cfm?POSTID=2544>.

82. *See Reporting Violations of the Boundary County Zoning and Subdivision Ordinance*, *supra* note 80.

motivation for the municipality to spend limited public funds to litigate these matters.<sup>83</sup>

A private citizen may bring an action in equity to enforce a zoning restriction if he or she is situated as an adjoining or proximate landowner to the offending landowner.<sup>84</sup> In order to succeed, a private citizen must establish that the violation of the zoning ordinance has resulted in an injury that is unique to him and not one that is shared by all surrounding neighbors.<sup>85</sup> He must allege and subsequently establish that the harm experienced is “special and peculiar” to his property,<sup>86</sup> and is “over and above the public injury.”<sup>87</sup> Injuries that are common to the surrounding landowners will be insufficient to meet this burden.<sup>88</sup> However, an “adjoining, confronting or nearby property owner” is entitled to assert a zoning violation because the mere proximity of the claimant to the offending property owner is sufficient to establish that his damages are unique.<sup>89</sup>

The right of a private citizen to enforce a zoning violation exists even if the municipality has also pursued the violation in a penalty proceeding.<sup>90</sup> A private landowner need not request that the

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83. See Richard Ducker, *Civil Penalties and Zoning: Why Fight ‘Em, Just Cite ‘Em*, COATES’ CANONS: NC LOCAL GOV’T L. BLOG (Mar. 10, 2010, 5:13 PM), <http://sogweb.sog.unc.edu/blogs/localgovt/?p=2008>. This is especially true in places like North Carolina where the state constitution provides that “all fines collected in the several counties for any breach of the penal laws of the State, shall . . . [be] used exclusively for maintaining free public schools.” N.C. CONST. art. IX, § 7. Thus, the local municipality cannot offset the cost of enforcement with the fines collected from the zoning violation.

84. See *Fox v. Township of Williams*, 67 Pa. D. & C.2d 266, 267 (1974).

85. See *Garrou v. Teaneck Tryon Co.*, 94 A.2d 332, 335 (N.J. 1953) (finding plaintiff has standing to obtain equitable injunction where his interest is distinct from and greater than community as a whole); *Allendale Nursing Home, Inc. v. Allendale*, 357 A.2d 333, 337 (N.J. Super Ct. Law Div. 1976); *Fox*, 67 Pa. D. & C.2d at 267-68.

86. See *Burne v. Kearney*, 225 A.2d 892, 894 (Pa. 1967); *Fox*, 67 Pa. D. & C.2d at 267-68.

87. *Cahill v. Heckel*, 208 A.2d 651, 653 (N.J. Super. Ct. Ch. Div. 1965) (quoting *Sautto v. Edenboro Apartments, Inc.*, 202 A.2d 466, 473 (1964)).

88. See *Fox*, 67 Pa. D. & C.2d at 268.

89. *Lee v. Osage Ridge Winery*, 727 S.W.2d 218, 222 (Mo. Ct. App. 1987); see *Cahill*, 208 A.2d at 653 (quoting *Sautto*, 202 A.2d at 474).

90. See *Allendale*, 357 A.2d at 337 (citing *Cahill*, 208 A.2d at 653).

municipality enforce the ordinance prior to bringing a private action to do so.<sup>91</sup> Despite the burden imposed upon an offending landowner forced to defend himself simultaneously against the municipality and his neighbor (with the accompanying possibility of inconsistent decisions), the neighbor has a cause of action independent of the municipality's.<sup>92</sup> There are cases holding that if an adequate statutory remedy exists, it must be exhausted before a court may impose injunctive or declaratory relief from a provision of a zoning ordinance.<sup>93</sup> In those cases, failure to exhaust the statutory remedy prohibits the court from granting injunctive or declaratory relief.<sup>94</sup> In *Westside*, however, the issue did not involve a mere challenge to the validity of an ordinance (for which no exhaustion of remedies is generally required)<sup>95</sup> but rather an attempt to change the applicable zoning.<sup>96</sup> Contrary cases, however, have held that a private individual does not have standing to initiate criminal proceedings against his neighbor for violation of zoning ordinances in the presence of a statute that neither expressly grants nor denies the right of a private citizen to bring such an action.<sup>97</sup>

A writ of mandamus is also available for the enforcement of a zoning action, but is only available in the absence of another appropriate remedy.<sup>98</sup> Mandamus exists as a remedy to force the public official or governing body to perform a public duty they are required to perform. In *Garrou v. Teaneck Tryon Co.*, the court addressed the issue of whether mandamus is a proper means of compelling municipal officials to enforce the terms of zoning

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91. See *Evans v. Roth*, 201 S.W.2d 357, 361 (Mo. 1947) (quoting 10 THOMPSON ON REAL PROPERTY § 5632 (Per. Ed. 1939)); *Lee*, 727 S.W.2d at 222.

92. See *Cahill*, 208 A.2d at 653.

93. See *Lee*, 727 S.W.2d at 222; *Westside Enterprises, Inc. v. City of Dexter*, 559 S.W.2d 638, 640 (Mo. Ct. App. 1977).

94. See *Lee*, 727 S.W.2d at 223; *Westside Enterprises Inc.*, 559 S.W.2d at 640.

95. See *Westside Enterprises Inc.*, 559 S.W.2d at 640.

96. *Id.* at 641.

97. See *City of Houston Houston v. Tri-Lakes Ltd.*, 681 So.2d 104, 105 (Miss. 1996).

98. See *Unger v. Township of Hampton*, 263 A.2d 385, 387 (Pa. 1970); *Fox v. Township of Williams*, 67 Pa. D. & C.2d 266, 267 (1974).

98. See *Unger v. Township of Hampton*, 263 A.2d 385, 387 (Pa. 1970); *Fox v. Township of Williams*, 67 Pa. D. & C.2d 266, 267 (1974).



ordinances.<sup>99</sup> While the courts have found that a writ of mandamus is sometimes an available remedy, it should only be available when there is no other adequate relief available.<sup>100</sup> Such other relief must “realistically be adequate.”<sup>101</sup>

### Benefits and Burdens of Traditional Zoning

Traditional zoning is generally insufficient to meet the goals of mixed use developments because the mixed use concept is contrary to the firm boundaries of traditional zoning.<sup>102</sup> Seeking variances or other special use zoning to create a mixed use development within a traditional zoning model would create a patchwork of ad hoc uses that would likely fail to preserve the unique character of an existing neighborhood community.

### *Overlay Districts*

#### Neighborhood Conservation Districts

In response to the inability of traditional zoning to effectively preserve the identity of existing neighborhoods, communities sought additional zoning tools to regulate redevelopment.<sup>103</sup> Zoning overlays supplement traditional zoning, and are intended to address specific benefits or burdens in a particular geographic area by applying supplemental rules.<sup>104</sup> In an overlay district, the issues of enforcement, benefit, and burden look similar to traditional zoning issues. Historic districts (HDs) are an instructive early example of an overlay district. The first recorded HD was South Carolina’s Old and Historic Charleston District, recognized in 1931.<sup>105</sup> Since that time, more than 13,590 historic districts have been registered with the

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99. *Garrou v. Teaneck Tryon Co.*, 94 A.2d 332, 336-37 (N.J. 1953).

100. *See id.* at 302.

101. *See id.* at 303.

102. *See Wiseman*, *supra* note 14, at 731.

103. *See id.* at 717-18.

104. *See id.*

105. *Preservation Advocacy*, PRESERVATION SOCIETY OF CHARLESTON, [http://www.preservationsociety.org/program\\_advocay.asp](http://www.preservationsociety.org/program_advocay.asp) (last visited Aug. 25, 2011).

National Registry of Historic Places.<sup>106</sup> The goal of historic preservation is to protect our nation's "cultural and architectural" heritage.<sup>107</sup> This is achieved by municipalities providing regulations for the construction, renovation, restoration, and demolition of original buildings located within the designated area.<sup>108</sup> By imposing the regulations through a zoning overlay, the approval of alterations within the historic district falls to the municipality's historic district commission or other municipality staff to review and enforce the design rules.<sup>109</sup>

Since the advent of the historic district, there has been an increase in the number and diversity of overlay districts.<sup>110</sup> Today, common overlay districts include flood hazard, water supply, historic, corridor protection, central business, manufactured housing, airport, and neighborhood conservation districts.<sup>111</sup> This increase evidences the growing desire among property owners to preserve aesthetic qualities of a geographic area even where the community cannot reach the standards of a historic district.<sup>112</sup>

A neighborhood conservation district (NCD) is a zoning overlay district that allows existing neighborhoods to preserve physical amenities, affordability, and landscape features that impact the experience of the neighbors as a community.<sup>113</sup> NCDs offer some of the protections that are traditionally found in an HD zoning overlay, but typically the NCD's application and recognition process is not as stringent and its protections are more flexible and custom-designed.<sup>114</sup> An NCD's restrictions range from the type or size of

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106. See NATIONAL REGISTER OF HISTORIC PLACES, <http://www.nationalregisterofhistoricplaces.com> (last visited Aug. 25, 2011).

107. Gregory A. Ashe, *Reflecting the Best of Our Aspirations: Protecting Modern and Post-Modern Architecture*, 15 CARDOZO ARTS & ENT. L.J. 69, 101-02 (1997).

108. See CHAPEL HILL, N.C., LAND USE MANAGEMENT ORDINANCE § 3.6.2 (2003), available at <http://www.ci.chapel-hill.nc.us/Modules/ShowDocument.aspx?documentid=2401>

109. See *id.*

110. Wiseman, *supra* note 14, at 716.

111. See Owens & Stevenson, *supra* note 64, at 3-4.

112. See Wiseman, *supra* note 14, at 716-17.

113. *Id.* at 717.

114. Adam Lovelady, *Broadened Notions of Historic Preservation and the Role of Neighborhood Conservation Districts*, 40 URB. LAW. 147, 148 (2008).

outbuildings<sup>115</sup> to a requirement that trashcans and dumpsters be screened from view.<sup>116</sup> Guidelines in an NCD might also address size and design specifications for homes and businesses, including a minimum number of windows per wall, driveway composition, and restrictions on the demolition of certain existing buildings.<sup>117</sup> While private covenants have gone so far as to restrict actual uses in terms of number and types of pets and noise limitations, overlay districts have not sought that degree of regulation.<sup>118</sup>

Conservation districts date back to the mid-1970s<sup>119</sup> but have increasingly become a preferred method for neighborhood-level planning.<sup>120</sup> NCDs can be an attractive option for neighborhoods that lack landowner support for a full HD designation, do not possess the requisite historic significance for an HD designation, or do not desire the excessive building and use limitations associated with an HD designation.<sup>121</sup> NCDs may be used to prevent teardowns or to serve as a planning tool for evolving neighborhoods wishing to adequately address transportation, public safety and public services.<sup>122</sup> Despite their differences, historic and conservation districts can often be seen

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115. See Wiseman, *supra* note 14, at 709.

116. See *id.*

117. See *id.*

118. See *id.*

119. LORI SALGANICOFF, PRESERVATION ALLIANCE OF GREATER PHILADELPHIA, NEIGHBORHOOD CONSERVATION DISTRICTS SURVEY 5, 8, 11 (Aug. 2003), <http://www.preservationalliance.com/publications/Conservation%20District%20Description.pdf> (Phoenix, AZ, “Special Conservation Districts” enacted in 1978; Boston, MA, “Architectural Conservation Districts” enacted in 1975; Portland, OR, “Plan Districts” enacted in 1978).

120. See Lovelady, *supra* note 114, at 154.

121. See *id.* The historic district design guidelines adopted in the Town of Chapel Hill, North Carolina, consists of a seventy-six page document addressing everything from appropriate exterior building materials, porches and balconies, walkways and driveways, allowable exterior lighting, and other site features and permitted plantings, to name a few and these design guidelines were tailored after those of the United States Department of Interior, developed by the Department in 1976. See CHAPEL HILL HISTORIC DISTRICT COMMISSION, DESIGN GUIDELINES CHAPEL HILL HISTORIC DISTRICT 5 (2001), available at <http://www.ci.chapel-hill.nc.us/Modules/ShowDocument.aspx?documentid=2405>.

122. See Lovelady, *supra* note 114, at 155; see also CITY OF SAN ANTONIO PLANNING DEPT, APPENDIX I: CONSERVATION DISTRICTS, available at <http://www.sanantonio.gov/planning/neighborhoods/mahncke/Appendix%20I.PDF>.

as interchangeable when their distinctions are subtle.<sup>123</sup> NCDs provide an alternative for neighborhoods worthy of preservation and protection but that may lack the historical, architectural or cultural importance typically the subject of an HD designation.<sup>124</sup>

In other NCDs, the focus is less on neighborhood preservation as on planning, primarily in response to new development.<sup>125</sup> In these models, overlay requirements attempt to limit and control future development by imposing restrictions on lot size, building height, and setbacks, but might not require certain architectural or aesthetic styles subject to the review of a design committee.<sup>126</sup>

### Process

Like other zoning regulations, the local municipality must have the authority to adopt overlays. This authority is derived from a state's enabling power; this may be an express delegation or broad zoning authority granted to the locality.<sup>127</sup> The formation of an NCD is different from private covenants because it is a public zoning overlay, which in most instances requires public notice and input. Community members are often invited to open discussions around issues of future growth, degradation of the community, impact on future development, and community aesthetics.<sup>128</sup> The ensuing rules can be quite detailed, contrary to traditional zoning districts and restrictions. These zoning overlay restrictions can be as detailed as the regulations found in private covenants.<sup>129</sup> Since the adoption of an overlay district requires the action of the municipality's public

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123. *See id.* at 158 (observing that Nashville, TN's full HP District controls the construction, alteration, repair, relocation or demolition of a structure within its boundaries while the NCD controls the construction, alteration, repair, relocation or demolition of a structure within its boundaries while the NCD controls the construction, relocation, demolition of structures only). Lovelady refers to NCDs as "Preservation-Lite or Regulation-Lite." *Id.* at 157.

124. *See* SAN ANTONIO, TEX., UNIFIED DEVELOPMENT CODE §35-335 (a)(1) (2004), available at [http://www.sanantonio.gov/planning/pdf/Neighborhoods/NCDs/NCD\\_Enabling\\_Ordinance\\_-\\_UDC\\_Section\\_35-335.pdf](http://www.sanantonio.gov/planning/pdf/Neighborhoods/NCDs/NCD_Enabling_Ordinance_-_UDC_Section_35-335.pdf).

125. *See* Lovelady, *supra* note 114, at 162.

126. *See id.*

127. *See id.* at 155.

128. *See* Wiseman, *supra* note 14, 717.

129. *See id.* at 719.

body, the jurisdiction's open meeting laws are implicated.<sup>130</sup> Pursuant to open meeting laws, legislatively mandated in most jurisdictions, any meeting of a government body must be open to the public if the government body will take action that must be recorded in the minutes.<sup>131</sup> The requirement that the meetings be open to the public pursuant to the open meeting laws is mandate and not merely discretionary.<sup>132</sup> Open meeting laws are designed to ensure that "the formation of public policy and decisions is public business and shall not be conducted in secret."<sup>133</sup> The open meeting law requirement serves to benefit the public's access to information about proposed overlay adoptions, and together with public notice requirements, provide a significant opportunity for community input into the proposed changes to their neighborhoods.

The process for creating a neighborhood conservation district varies by jurisdiction. In San Antonio, TX, an application for designation as an NCD may be initiated by owners representing 51% of the land area within the proposed district or 51% of property owners within the proposed district.<sup>134</sup> Once the boundaries of the district have been identified, the San Antonio ordinance permits all property owners within the proposed district to participate in drafting the specifics of the NCD,<sup>135</sup> which the City Council ultimately approves as part of the zoning ordinance.<sup>136</sup> In Chapel Hill, North Carolina, the Land Use Management Ordinance (LUMO) adopts a two-phase approach for NCD designation. The initial petition may be initiated by 51% of land owners in the proposed district or owners

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130. See 4 MCQUILLIN, THE LAW OF MUN. CORPS. §13:10 (3rd ed. 2011).

131. See *id.*

132. See *id.*

133. TENN. CODE ANN. § 8-44-101(a) (2011); *Johnston v. Metro. Gov't of Nashville & Davidson County*, 320 S.W.3d 299, 309 (2009).

134. See SAN ANTONIO, TEX., UNIFIED DEVELOPMENT CODE § 35-335(d)(1)(A)-(B) (2004), available at [http://www.sanantonio.gov/planning/pdf/Neighborhoods/NCDs/NCD\\_Enabling\\_Ordinance\\_-\\_UDC\\_Section\\_35-335.pdf](http://www.sanantonio.gov/planning/pdf/Neighborhoods/NCDs/NCD_Enabling_Ordinance_-_UDC_Section_35-335.pdf).

Similarly, in Chapel Hill, NC, see CHAPEL HILL HISTORIC DISTRICT COMMISSION, *supra* note 121.

135. See *id.* § 35-335(d)(3).

136. See News Release, City of San Antonio, Public meeting set for the proposed Woodlawn Lake Neighborhood Conservation District (Aug. 16, 2010), available at <http://www.sanantonio.gov/news/NewsReleases/nr2010woodlawnpublicmeeting.asp?res=1280&ver=true>.

owning 51% of the land area in the proposed district.<sup>137</sup> The Chapel Hill Planning Department makes a recommendation to the municipality whether to adopt a plenary or committee structure for the creation of the NCD design guidelines.<sup>138</sup> In plenary design approach, the municipality's planning department facilitates a dialogue to open the process to the entire neighborhood.<sup>139</sup>

The San Antonio code requires that the NCD include Design Standards that minimally address building height, building size, principal elevation features, lot size, setbacks, off-street parking requirements, roof line and pitch, and paving and hardscape covering.<sup>140</sup> Similarly, the Chapel Hill LUMO requires that the design standards of the NCD minimally include building size and height, lot size, setbacks, off-street parking, roof line and pitch, and hardscape coverings.<sup>141</sup>

### Enforcement

Since NCDs are zoning overlays, the process for enforcing the design requirements within an NCD will typically fall to the same process for general zoning violations. If the violation occurs during the design phase of a building permit request, the permit will be denied pending compliance with the NCD standard.<sup>142</sup> If the violation occurs outside of the permit process, the municipality has the authority to impose civil penalties.<sup>143</sup> In those jurisdictions that designate an individual or commission to enforce historic district designations, the role of enforcing NCD requirements will likely fall

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137. See Town of Chapel Hill Planning Dep't, Land Use Management Ordinance § 3.6.5(c)(1)(A) (2003), available at <http://www.townofchapelhill.org/modules/ShowDocument.aspx?documentid=8733>.

138. See *id.* § 3.6.5(c)(2)(G).

139. See *id.* §§ 3.6.5(c)(2)(F), 3.6.5(c)(2)(J).

140. See SAN ANTONIO, TEX., UNIFIED DEVELOPMENT CODE § 35-335(e)(3)(A)-(H) (2004).

141. See Town of Chapel Hill Planning Dep't, Land Use Management Ordinance, § 3.6.5(e)(3) (2003).

142. See E-mail from Gary Edenburn, Deputy Project Manager, City of San Antonio, to author (May 31, 2011, 8:46 AM EST) (on file with author).

143. See CHARLOTTESVILLE, VA., CODE § 34-340 (f), available at <http://library.municode.com/index.aspx?clientID=12078&stateID=46&statename=Virginia>.

to the same individual or group.<sup>144</sup> Individual complaints can be a frequent source of reporting violations.<sup>145</sup> Even if the municipality receives reports of violations, verifying the presence of the violation can require a “lengthy and invasive” investigation, which local governments often lack the resources to conduct.<sup>146</sup> The lack of an effective enforcement mechanism is the Achilles’ heel of NCDs.<sup>147</sup> With the increased use of NCDs, the ability to enforce them must be addressed. Because the land use restrictions in an NCD are less stringent and detailed than those in a historic district, they are easier and more efficient to police, but still require personnel and municipal resources.<sup>148</sup> Thus, “any gain in efficiency is lost to increased volume.”<sup>149</sup>

### Benefits and Burdens of NCDs

The benefits of a NCD include its ability to be custom-tailored to the needs of the specific neighborhood, and to avoid the stringent requirements of a historic district.<sup>150</sup> NCDs offer a compromise between neighbors desiring a level of preservation and protection and those that fear the classification will lead to increased housing costs.<sup>151</sup> Likewise, NCDs reach a broader set of neighborhoods<sup>152</sup> and offer an alternative to those neighborhoods that primarily seek to prevent teardowns and inform (but not prevent) new development

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144. See *Historic Building Enforcement Officer*, *supra* note 81.

145. See *Reporting Violations of the Boundary County Zoning and Subdivision Ordinance*, *supra* note 80.

146. See Katelyn Ferral, *Northside rules not working: Town to review conservation district Monday*, THE CHAPEL HILL NEWS (May 22, 2011), <http://www.chapelhillnews.com/2011/05/22/v-print/64543/northside-rules-not-working.html>.

147. See Lovelady, *supra* note 114, at 156.

148. *Id.* at 177 (citing Telephone Interview with Ann Roberts, Executive Director, Nashville-Davidson County Metropolitan Historical Commission/Metropolitan Historic Zoning Commission in Nashville, Tenn. (May 4, 2007)).

149. *Id.* at 177 (citing E-mail from Tracey Cox, Planner, City of Dallas, to Lovelady (May 8, 2007, 16:17 EST) (on file with Lovelady)).

150. See *id.* at 175.

151. See *id.*

152. See *id.* at 176.

and growth.<sup>153</sup> When new development is proposed for an area subject to an NCD, the developer will work with the municipality to ensure the project is in compliance with the NCD requirements. Developers may appreciate a set of design standards that inform their plans from the outset.<sup>154</sup>

Like any land use ordinance, the primary objection to NCDs is the imposition of land use restrictions on privately held property.<sup>155</sup> Opponents also worry that too much preservation results in stagnant neighborhoods that fail to encourage the influx of energy that new development can bring to a community.<sup>156</sup> Individual homeowners that seek the protection of NCDs to prevent tear downs or high density are often unprepared for the impact the NCD requirements will have on their abilities to renovate or upgrade their own homes.<sup>157</sup> Although the overlays may encourage conversations between developers and landowners about the details of the NCD requirements, accusations can emerge that developers participated in the conversation to have a “voice in the process” while continuing to create developments plans that “technically meet the regulations but still allow the properties to function” in an unapproved use.<sup>158</sup>

Another challenge associated with overlay districts is the degree to which one can “opt out” of the overlay. If there are significant numbers of homeowners that object to the adoption of an overlay district, the municipality may be reticent about adopting the overlay for fear of reprisals at the polls.<sup>159</sup> To encourage the adoption of the overlay, proponents may provide an “opt out” provision to satisfy more constituents in the voting pool and reduce the municipality’s exposure to disgruntled voters.<sup>160</sup> Opt out provisions, however, jeopardize the underlying value of the overlay. If a fundamental purpose of an overlay is to create design rules to preserve the historic

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153. *See id.* at 177 (citing Telephone Interview with Ann Roberts, *supra* note 148).

154. *See* E-Mail from Gary Edenburn, *supra* note 142.

155. *See* Lovelady, *supra* note 114, at 175.

156. *See id.* (“[S]tifling important redevelopment.”).

157. *See* Ferral, *supra* note 146.

158. *See id.*

159. *See* Johnston v. Metro. Gov’t of Nashville & Davidson Cnty, 320 S.W.3d 299 at 303, 309 (2009).

160. *See id.* at 305.



and aesthetic character of a neighborhood, the presence of excluded lots defeats this purpose.<sup>161</sup>

Finally, there can be a significant time lapse between the initiation of an NCD designation and the final government approval of the NCD's guidelines.<sup>162</sup> If one of the purposes of an NCD is to have input in the redevelopment of adjacent property, and a developer is involved in the negotiations of the NCD guidelines, this elapsed time can have an impact on the developer's building and financing options. The amount of time required from initiation to approval varies depending on the model for NCD creation adopted by the municipality.<sup>163</sup>

NCDs offer significant opportunity for public dialogue that can impact the municipality's ultimate design guidelines. The degree of public input varies depending on the model of NCD creation adopted. The NCD process can bring a developer and adjacent homeowners to the same table to exchange ideas and concerns, thus decreasing the likelihood of strong public opposition to the development at the time of approval. In an instance where the NCD boundary includes both existing neighborhoods and new, mixed use development, the NCD must seek to address the myriad of needs and land uses associated with these different uses. This challenge will often require different design guidelines for different portions of the NCD. This patchwork result, combined with the challenges associated with enforcement,

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161. *See id.* at 303.

162. *See* PLANNING DEP'T, TOWN OF CHAPEL HILL, QUESTIONS AND ANSWERS ABOUT NEIGHBORHOOD CONSERVATION DISTRICTS 7, 11 (2009) (indicating time periods from 10 months to 2 years for final approval of the NCD guidelines for NCDs in the Town of Chapel Hill, North Carolina) *available at* <http://www.townofchapelhill.org/modules/ShowDocument.aspx?documentid=726>.

163. *See id.* at 5-6, 11; *but compare to Conditional Use Rezoning*, City of Raeligh, January 11, 2012, <http://www.raleighnc.gov/environment/content/CityMgrDevServices/Articles/RezoningConditionalUse.html> (recognizing that Chapel Hill, North Carolina's NCD process has two steps, and the process permits a committee of citizens to make recommendations to the Planning Board about the contents of the NCD and the decision-making mechanism by the committee is generally consensus-based. Thus, the Chapel Hill process has the potential to be significantly longer than the process in Raleigh, North Carolina where the petitions are reviewed by the staff and recommended for approval directly to the City Council).

serve as a disincentive for community members and developers alike to embark on the lengthy NCD process.

### *Development Agreements*

#### Introduction

Development agreements grew out of the increase in large, complex projects implemented over time by developers who sought some assurance that the local development regulations would not substantially change over their projects' durations.<sup>164</sup> Much of the early design and development phase associated with a new development occurs prior to the developer receiving the municipality's approval to proceed with the project.<sup>165</sup> The uncertainty associated with the building approval process, especially long-term projects, discouraged investment in and commitment to comprehensive planning between the developer and the municipality.<sup>166</sup> The primary advantage sought by developers in these agreements is the promise that zoning ordinances will remain constant for the life of the agreement.<sup>167</sup> In effect, a development agreement freezes the municipality's rules, regulations, and policies for the life of the development agreement with respect to a specific project.<sup>168</sup> Local government agencies might use the development agreement to seek funding, land, and other support for schools, parks, community facilities, or affordable housing projects.<sup>169</sup> This should be distinguished from the zoning variance offered to a developer in

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164. See David Owens, *Development Agreements*, County Attorneys' Winter Conference, 1 (Feb. 14, 2009), <http://www.sog.unc.edu/programs/attorneyconferences/conferences.php> (use the Development Agreements hyperlink, under the 2009 County Attorneys Winter Conference heading, to download a copy of the paper).

165. See Brad K. Schwartz, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 719 (2001).

166. See *Mammoth Lakes Land Acquisition, LLC. v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 443 (2010).

167. See *Queen Anne's Conservation, Inc. v. County Comm'rs*, 382 Md. 306, 308-09 (2004); see Owens, *supra* note 164, at 2; see also Schwartz, *supra* note 165, at 721.

168. See *Mammoth Lakes*, 191 Cal. App. 4th at 442.

169. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *DEVELOPMENT AGREEMENT MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS* 28 (2002).

exchange for the developer's promise to provide services or infrastructures that benefit the larger community.<sup>170</sup> Development agreements based on a bargaining model, which place emphasis on flexible planning and mutually agreeable land use solutions, represent an increasingly popular approach to land use decision-making.<sup>171</sup> Development agreements are negotiated agreements between the municipality and the developer wherein the municipality agrees to freeze the zoning regulations that will apply to the project in exchange for a voice in the development's design, the creation of certain social initiatives, or both.<sup>172</sup>

Development agreements can be as comprehensive or as narrowly tailored as the parties may desire,<sup>173</sup> which requires them to think critically about the agreement's goals. The scope of issues that the development agreement might address may include the types of uses on the property, the density of the development, maximum building height and size, public use projects and reservation of property for public use, financing for the public projects, and timelines for projected completion and duration of the agreement.<sup>174</sup> The development agreement might also address whether the project will comply with mass transit opportunities, thus placing density requirements on the development necessary to ensure public financing for and access to mass transit stations.<sup>175</sup>

### Process

Development agreements are contracts entered into by the municipality and the developer<sup>176</sup> as the parties with the "legal or

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170. See Owens, *supra* note 164, at 2.

171. See Green *supra* note 60, at 392; see also Erin Ryan, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 343-48 (2002).

172. See Green, *supra* note 60, at 393.

173. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 25.

174. See *id.* at 26 (text box figure on the left margin).

175. See *id.* at 28.

176. See *Queen Anne's Conservation, Inc. v. County Comm'rs*, 382 Md. 306 at 309 (citing the amicus brief that the National Association of Home Builders filed in the case).

equitable interest” in the real property subject to the agreement.<sup>177</sup> In addition, the agreement should join any other parties without whom the municipality would not receive the “benefit of its bargain” and whom would not otherwise be bound by the agreement.<sup>178</sup>

In addition to identifying the necessary parties to the agreement, the development agreement must also contain a term of duration.<sup>179</sup> Unlike an NCD overlay, which does not have an expiration date, the development agreement will only last as long as its term, prior termination by the parties or in the event of a breach.<sup>180</sup>

In 1979, California was the first state to statutorily grant authority to cities and counties to enter into agreements with landowners regarding property development.<sup>181</sup> Several states have since followed suit.<sup>182</sup> In several statutes, the use of the development agreement is optional and it is within the discretion of the county, city or local governing board to adopt this particular tool.<sup>183</sup> Some

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177. See CAL. GOV'T CODE § 65865(a) (2011); see also INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 50; see generally National Parks & Conservation Assn. v. County of Riverside, 42 Cal. App. 4th 1505 (1996).

178. See CAL. GOV'T CODE § 65868.5 (2011); see also INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 50.

179. N.C. GEN. STAT. § 153A-349.6 (2011), available at [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-349.6.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-349.6.html); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 51.

180. INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 52.

181. Owens, *supra* note 164, at 1.

182. *Id.* (These states include, Arizona, California, Colorado, Florida, Hawaii, Idaho, Louisiana, Maryland, Nevada, New Jersey, Oregon, South Carolina, Virginia, and Washington).

183. N.C. Gen. Stat. § 160A-400.22 (“A local government may establish procedures and requirements, as provided in this Part, to consider and enter into development agreements with developers”); Tex. Loc. Gov’t Code Ann. § 382.102 (“A county may enter into a development agreement with an owner of land”); S.C. Code Ann. § 6-1-1050 (“A fee payor and developer may enter into an agreement with a governmental entity, including an agreement entered into pursuant to the South Carolina Local Government Development Agreement Act”); N.D. Cent. Code Ann. § 48-02.1-03 (“A public authority may negotiate and enter into a development agreement with any private operator.”); Alaska Stat. Ann. § 38.05.027(a) (“the commissioner, ... may enter into cooperative resource management or development agreements with the federal government, a state agency, a village or municipality, or a person.”); Utah Code Ann. § 17-27a-102(b) (“counties may enact all ordinances, resolutions, and rules and may enter into other

common areas of statutory regulation in development agreements are the minimum land area that can be subject to the development agreement, the maximum duration of the agreement, and the degree, if any, to which changes in local zoning laws will impact the development.<sup>184</sup> In addition to these basic design concepts, the development agreement might also include regulatory issues – traffic, utilities, environmental impacts – and less-tangible benefits for the local government (e.g., affordable housing, school construction, and similar improvements).<sup>185</sup> Even in those jurisdictions that have no statutory enabling law permitting the development agreements, they have been nonetheless sanctioned in light of their effective means of allowing municipalities to more effectively control land use.<sup>186</sup> Proceeding with a development agreement outside the presence of an enabling statute, however, should not be undertaken lightly.<sup>187</sup>

The consideration developers offer in exchange for the zoning concessions includes public facilities that serve the development and surrounding community.<sup>188</sup> Although, in states like North Carolina, development agreements cannot impose any tax or fee in exchange

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forms of land use controls and development agreements”); Wash. Rev. Code Ann. § 36.70B.170(1) (“A local government may enter into a development agreement with a person having ownership or control of real property within its jurisdiction.”); Or. Rev. Stat. Ann. § 94.504(1) (“A city or county may enter into a development agreement...”); Minn. Stat. Ann. § 473.756 (12) (“The authority may enter into a development agreement with the team, the county, or any other entity...”); Ariz. Rev. Stat. Ann. § 9-500.05(A) (“A municipality, by resolution or ordinance, may enter into development agreements relating to property”); Fla. Stat. Ann. § 163.3245(8) (“A developer...may enter into a development agreement with a local government...”)

184. See *id.* at 3 (discussing N.C.G.S. §§ 153A-379A-379.6; 160A-400.25, which state that the agreement must include a clear identification of the exact land involved, the duration of the agreement, a description of the uses of the property, the population density of the development, and building types, intensities, placement, and design).

185. Owens, *supra* note 164, at 3.

186. Green, *supra* note 60, at 395-96; *Bollech v. Charles Cnty.*, 166 F. Supp. 2d 443, 454 (2001).

187. See DAVID L. CALLIES ET. AL., *BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES* 101 (2003).

188. See Owens, *supra* note 164, at 3.

for promises contained therein, some local governments have found adequate authority, in the absence of the statutes to the contrary, to negotiate cost-sharing and financial matters beyond tax or fee based mechanisms.<sup>189</sup>

Whether the execution of a development agreement is a legislative act or an administrative act has implications for its adoption and its enforcement.<sup>190</sup> A legislative decision is based in public policy that considers the population as a whole, as opposed to an administrative act, which applies general rules to a particular set of facts.<sup>191</sup> In the case of the North Carolina statute authorizing development agreements, the use of the development agreement is optional<sup>192</sup> but the local governing board must adopt each development agreement as an ordinance.<sup>193</sup> The ordinance approval process makes the development agreement process a “legislative act.”<sup>194</sup>

In several states, the public’s input into the development agreement must be sought prior to its approval.<sup>195</sup> Including stakeholders in the conversation about the development agreement and its terms early in

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189. *See id.*

190. Schwartz, *supra* note 165, at 743 (citing Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for its Application*, 1 J. LAND USE & ENVTL. L. 451, 470-71 (1985)).

191. Schwartz, *supra* note 165, at 743; 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, 1012, (1987). For a comparison between CAL GOV CODE § 65867.5(a) (2011) and HAW. REV. STAT. §§ 46-131 (2011), *see infra* note 203.

192. N.C. GEN. STAT. § 153A-349.3 (2011), *available at* [http://www.ncga.state.nc.us/enactedlegislation/statutes/html/byarticle/chapter\\_153a/article\\_18.html](http://www.ncga.state.nc.us/enactedlegislation/statutes/html/byarticle/chapter_153a/article_18.html); N.C. GEN. STAT. § 160A-400.22 (2011), *available at* [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_160A/GS\\_160A-400.24.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-400.24.html).

193. Owens, *supra* note 164, at 2.

194. *See Mammoth Lakes Land Acquisition, L.L.C. v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 442 (2010).

195. Green, *supra* note 60, at 399; *see* CAL GOV CODE § 65867 (Deering 2011); FLA. STAT. § 163.3225(1) (2011) (requiring at least two public hearings); HAW. REV. STAT. § 46-128 (2011); LA. REV. STAT. ANN. 33:4780.28 (2011); MD. CODE ANN. art. 66B, § 13.01(d)(2) (2011); N.C. GEN. STAT. § 153A-323(a) (2011); S.C. CODE ANN. § 6-31-50 (a) (2010) (requiring at least two public hearings); WASH. REV. CODE § 36.70B.200 (2011); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 32.

the process will decrease the likelihood of community backlash when the terms of the development agreement are made more widely known.<sup>196</sup> The North Carolina statutes provide that the terms of the development must be subjected to a public hearing prior to its adoption by the governing board.<sup>197</sup> Public notice requirements are the same for development agreements as more routine zoning ordinance amendments.<sup>198</sup>

Jurisdictions also differ with respect to whether the approval of the development agreement is subject to voter referendum. Because the development agreement is approved by ordinance, it may be subject to referendum, which would allow the public to overturn approval of the agreement.<sup>199</sup> This can be true because the adoption of the development is deemed a legislative act;<sup>200</sup> administrative decisions are not subject to voter referenda.<sup>201</sup> In those jurisdictions where entry into development agreements is subject to voter repeal through the referendum process, the effective date of the development agreement must be postponed until the expiration of the referendum period.<sup>202</sup> Contrarily, if the entry of a development agreement is merely an administrative act, it may not be repealed by referendum.<sup>203</sup> Just as the negotiation and adoption of an overlay

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196. INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 33.

197. N.C. GEN. STAT. § 153A-323(a) (2011), *available at* [http://www.ncga.state.nc.us/enactedlegislation/statutes/html/byarticle/chapter\\_153a/article\\_18.html](http://www.ncga.state.nc.us/enactedlegislation/statutes/html/byarticle/chapter_153a/article_18.html).

198. *See id.* §§ 153A-379.5, 160A-400.24 (2011); Owens, *supra* note 164, at 2.

199. *See* Mammoth Lakes, 191 Cal. App. 4th at 442.

200. Green, *supra* note 60, at 399; *see* COLO. REV. STAT. ANN. 24-68-104(2) (West 2010).

201. Schwartz, *supra* note 165, at 743 (citing David A. Callies, *Development Agreements*, in ZONING AND LAND USE CONTROLS ch. 9A, at 22 (2000)).

202. *See* Midway Orchards v. County of Butte, 220 Cal. App. 3d 765, 781 (1990); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 32; Green, *supra* note 60, at 399.

203. *See* P'On, L.L.C v. Town of Mt. Pleasant, 526 S.E.2d 716, 721 (S.C. 2000); Green, *supra* note 60, at 399; Chris Grygiel, City attorney: *Tunnel agreement not subject to public vote*, SEATTLEPI (March 29, 2011 at 12:44 PM), <http://blog.seattlepi.com/seattlepolitics/2011/03/29/city-attorney-tunnel-agreement-not-subject-to-public-vote/>. *See also* CAL. GOV'T CODE § 65867.5(a) (Deering 2011) ("A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum"). *But see*, HAW REV. STAT. § 46-

district is subject to open meeting laws, so is the discussion and debate surrounding entering into a development agreement.<sup>204</sup> The notice requirements for public hearings on the development agreement are typically the same as those for other zoning decisions.<sup>205</sup>

Once the agreement is adopted by the local governing board, it must be recorded with the register of deeds in the county where the property is located, and it becomes binding on subsequent purchasers for value.<sup>206</sup> Periodic review may be required by the statute as well as opportunities to amend, extend, or cancel the agreement.<sup>207</sup> Like other contracts, amending its terms requires the mutual agreement of the parties,<sup>208</sup> and is likely subject to the same review and approval procedure as the original development agreement.<sup>209</sup>

If the approval of a development agreement is a legislative act, the standard of review for the adoption of a development agreement occurs under traditional mandamus procedures.<sup>210</sup> Mandamus is a writ issued by a court to compel performance of a particular act by a

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131 (2011) (“Each development agreement shall be deemed an administrative act of the governing body”).

204. INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 34.

205. *See id.* at 35 (Showing a comparison of California’s zoning and development agreement notice requirements).

206. *See* CAL. GOV’T CODE § 65868.5 (Deering 2011) (10 days to record); N.C. GEN. STAT. § 153A-349.11 (2011) (Must be recorded within 14 days); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 39.

207. *See* N.C. GEN. STAT. § 153A-349.8 (2011) *available at* [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-349.8.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-349.8.html).

208. *See* CAL. GOV’T CODE § 65868 (Deering 2011); N.C. GEN. STAT. § 153A-349.9 (2011); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 40.

209. *See* CAL. GOV’T CODE § 65868 (Deering 2011) (providing that the development agreement can be amended by the mutual consent of the parties, pursuant to § 65867, and cancellation of the development agreement requires the mutual consent of the parties and is subject to the notice and referendum requirements of § 65867.5); HAW. REV. STAT. § 46-130 (2011) (providing amendment occurs by mutual consent of parties, but if amendment would substantially alter original development agreement, amendment must be subject to public hearing); IDAHO CODE ANN. § 67-6511A (2011) (allowing for modification of development agreement after public hearing); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 40.

210. *See* *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 1004 (2007).



lower court or a governmental officer or body, usually to correct a prior action or failure to act.<sup>211</sup> In a traditional mandamus action, the only question for review by the trial court is whether or not the municipality's actions were "arbitrary, capricious, or entirely without evidentiary support, and whether it failed to conform to procedures required by law."<sup>212</sup> The trial court may not substitute its judgment for the judgment of the public body but may exercise its "independent judgment" in determining whether the agency's action was "consistent with applicable law."<sup>213</sup>

### Enforcement

The power to enforce these agreements lies with the governing agency that was a party to the agreement.<sup>214</sup> Although the statutes might articulate how notices of breach must occur and the degree to which opportunities for cures must be afforded,<sup>215</sup> they may be silent on the specific mechanisms for enforcement and remedies.<sup>216</sup> Most agreements provide for specific performance of the agreement.<sup>217</sup> Because the development agreement is a contract, the breach may also be subject to monetary and liquidated damages as well as specific performance.<sup>218</sup>

The process for enforcing a development agreement is grounded in contract law, but similar to zoning violations, the route to

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211. BLACK'S LAW DICTIONARY (9th ed. 2009).

212. See *Neighbors in Support*, 157 Cal. App. 4th at 1004 (citing *Pitts v. Perluss*, 58 Cal.2d 824, 833 (1962)).

213. *Id.* (citing *Associated Builders & Contractors, Inc. v. San Francisco Airports Com.*, 21 Cal. 4th 352, 361 (1999)).

214. N.C. Gen. Stat. § 153A-349.8(b) (2011) available at [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-349.8.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-349.8.html).

215. See N.C. GEN. STAT. §§ 153A-349.8, 160A-400.27 (2011); INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 40.

216. See *Owens*, *supra* note 164, at 4, 24 ("In addition to any other rights or remedies, any Party may institute legal action against a defaulting Party to cure, correct, or remedy any default or breach, to specifically enforce any covenants or agreements set forth in the Agreement or to enjoin any threatened or attempted violation of the Agreement, or to obtain any remedies consistent with the purposes of the Agreement.").

217. See *id.* at 4.

218. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 56-57.

enforcement depends on who is bringing the action: a party to the contract or a third party plaintiff. Usually breaches of the agreement by the developer are discovered by the municipality's design review committee during periodic reviews of the development's progress.<sup>219</sup> When the developer is found to be in noncompliance, the municipality may terminate or modify the agreement.<sup>220</sup> A breach of the agreement by the municipality, by adopting a new zoning ordinance that "renders the approved development impermissible," can amount to an unconstitutional impairment of contract, the remedy for which is an injunction preventing the municipality from enforcing the new zoning ordinance.<sup>221</sup> A claim for impairment of contract allows the developer to seek damages against the municipality.<sup>222</sup> Otherwise, the developer can seek relief under a claim of breach of contract, which affords the developer common law remedies available for breach including damages, restitution, and specific performance.<sup>223</sup> In the case of a claim of breach of contract, the municipality can avoid penalties for nonperformance if they can establish that the noncompliance serves the public health, safety or welfare;<sup>224</sup> but cannot avoid liability on public health reasons if the relief sought is based on a claim of unconstitutional impairment of contract.<sup>225</sup> Courts that have had to deal with the municipality's breach by adopting changes to the zoning rules "have no difficulty" finding that the new rules do not apply to the property subject to the agreement.<sup>226</sup>

In *Mammoth Lakes*, the developer and the town entered into a development agreement, which provided, in part, for the developer's right to build a hotel and condominium complex with an accompanying option to purchase the hotel.<sup>227</sup> When the town refused to approve the developer's hotel plans, the developer sought

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219. Schwartz, *supra* note 165, at 744.

220. *Id.*

221. *Id.* at 746.

222. *Id.* at 752 (*citing* Interview with Jon Witten, Adjunct Professor of Land Use Planning, Boston College Law School (May 16, 2000)).

223. *Id.*; Wegner, *supra* note 191, at 1035.

224. Schwartz, *supra* note 165, at 746.

225. *See id.*; Wegner, *supra* note 191, at 1037.

226. CALLIES ET AL., *supra* note 187, at 109.

227. *Mammoth Lakes Land Acquisition, L.L.C. v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435, 440 (2010).

damages, specific performance, injunctive relief and declaratory relief.<sup>228</sup> The jury awarded the developers \$30 million for the town's breach of the development agreement.<sup>229</sup> On appeal, the town argued that the developer had failed to exhaust the administrative and judicial remedies available.<sup>230</sup> Specifically, the town argued that the remedy for its failure to approve the developer's conditional use permit was an administrative mandamus; thus, a complaint in court was inappropriate.<sup>231</sup> According to the doctrine of "exhaustion of administrative remedies," if an administrative remedy is provided by statute, that remedial process must be exhausted before the courts will act.<sup>232</sup> It is well settled that if an administrative remedy is provided, exhaustion of that remedy is required as a prerequisite to access to the courts.<sup>233</sup> If, however, there is no available administrative remedy, there is no prerequisite for first completing the administrative process.<sup>234</sup> In *Mammoth Lakes*, the only remedy that would have been available through the administrative process was a writ vacating the final decision of the town in their denial of the developer's use permit.<sup>235</sup> Damages would not have been an available remedy via the administrative process. Since the developer had given the town notice of default and the town failed to cure the default, the issue for resolution was no longer the denial of a land use application but a contractual default.

In *Queen Anne's County*, a developer entered into a development agreement with the County Commissioners of Queen Anne's County.<sup>236</sup> Third party plaintiffs filed a complaint naming both the developer and the county commissioners as defendants alleging that the development agreement was invalid.<sup>237</sup> The defendants filed a

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228. *Id.* at 452.

229. *Id.* at 453.

230. *Id.*

231. *Id.* at 454.

232. *Id.*

233. *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 292 (1941); *Mammoth Lakes*, 191 Cal. App. 4th at 454.

234. *Mammoth Lakes*, 191 Cal. App. 4th at 454; *Tahoe Vista Concerned Citizens v. County of Placer*, 81 Cal.App.4th 577, 590 (2000).

235. *Mammoth Lakes*, 191 Cal. App. 4th at 455.

236. *Queen Anne's Conservation, Inc v. County Com'rs of Queen Anne's Cnty.*, 855 A.2d 325, 327 (2004).

237. *Id.* at 327.

motion to dismiss on the grounds that the plaintiffs failed to exhaust all available remedies, specifically the statutory procedure for appeals of administrative decisions to the Board of Appeals for Queen Anne's County.<sup>238</sup> The development agreement in question was the subject of multiple public hearings during the review and adoption process and was ultimately approved by the local governing agency. Thereafter, the plaintiffs filed a complaint for declaratory and injunctive relief claiming, in part, that the development agreement was illegal contract zoning and that the development agreement as finally adopted contained revisions that were not part of the public hearing process.<sup>239</sup> Pursuant to applicable law, the Board of Appeals was to hear and decide appeals where it was alleged that the order, requirement, decision or determination made by the officer was in error. The court held that the approval of the development agreement was done by the county commissioners acting collectively as an administrative officer and as such made the appeals process available to the plaintiffs.<sup>240</sup> This result was contrary to the process that provided for the circuit court's immediate judicial review of a zoning action by a municipality. The circuit court found that the entry of the development agreement was done administratively as a "public principal" and not as a "local legislative body."<sup>241</sup> The plaintiffs argued that when the county commissioners decided upon the terms of the development agreement, they were exercising a fundamental legislative task, and thus acting as a local municipality as opposed to an administrative one.<sup>242</sup> Determining to the contrary, the court held that when a local governmental body enters into a contract, it is a purely discretionary executive act and not a legislative one. A development agreement "is not an ordinance or legislation . . . rather, it is a contract whose purpose is to vest rights under zoning laws . . . ."<sup>243</sup> The test for distinguishing between a legislative act and an administrative act is whether the act makes a new law or only "facilitates the administration, execution or

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238. *See id.* at 327-28.

239. *See id.* at 332.

240. *See id.* at 333.

241. *See id.*

242. *See id.* at 334.

243. *See id.*

implementation of a law already in force and effect.”<sup>244</sup> Because the plaintiffs failed to appeal the commissioners’ administrative act of entering into the development agreement, thus exhausting all its administrative remedies, the complaint was rightfully dismissed.

### Benefits and Burdens of Development Agreements

There are benefits to both the developer and the municipality to entering into a development agreement. The municipality can extract agreements from the developer to fund public projects and improvements without meeting the requirements for regulatory takings.<sup>245</sup> Additionally, the municipality can partner with developers to reach their comprehensive and long-range planning goals.<sup>246</sup>

The developer will know going into the project the degree to which it will be held responsible for financing public projects<sup>247</sup> and will have an easier time finding affordable financing because the risk of non-approval of the project has been significantly reduced.<sup>248</sup> That said, the general parameters of the interests and projects sought should be communicated early in the negotiations to avoid surprises on either side after months of dialogue.<sup>249</sup> However, the specific details and scope of the parameters should remain confidential during the negotiations to ensure competent bargaining power.<sup>250</sup>

Another benefit a development agreement affords project proponents is securing the applicable regulatory rules that will affect the project.<sup>251</sup> Without a development agreement, the municipality retains the right to change the rules relating to a project, so long as the change occurs before the construction rights have vested.<sup>252</sup> The

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244. *Id.* at 337 (citing *City of Bowie v. County Comm’rs for Prince George’s County*, 258 Md. 454, 463 (1970)).

245. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 17.

246. See Green *supra* note 60, at 394.

247. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 17.

248. See Green *supra* note 60, at 394.

249. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 18.

250. See *id.* at 26 (discussing that the need to retain a degree of confidentiality over the parameters of the development agreement can be difficult to achieve in light of the municipality’s obligation to comply with open meeting laws).

251. See *id.* at 21.

252. See *id.*

circumstances under which the developer's rights have vested (at which time the developer may reasonably rely on the representations and applicable regulations) varies depending on other state statutes.<sup>253</sup> Generally speaking, a developer's rights have vested when all necessary permits have been obtained, there has been substantial work completed in good faith reliance, and substantial liabilities have been incurred based on this good faith reliance.<sup>254</sup> Although some courts have held that even if the developer had performed substantial work and incurred substantial liabilities on the project, the right to complete the work did not vest until the developer obtained the building permit.<sup>255</sup> The legislatively-enacted development agreement allows municipalities and developers to move away from the common law rules regarding vested rights.<sup>256</sup>

Although the development agreement fixes the rights of the developer and the governing agency with respect to the rules that will apply to the development,<sup>257</sup> there are certain recognized exceptions.<sup>258</sup> The development agreement cannot circumvent newly enacted laws affecting public health, safety, or welfare.<sup>259</sup> Likewise, a development agreement cannot allow uses within a zoning

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253. See N.C. GEN. STAT. § 153A-344.1 (2011), available at [http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter\\_153A/GS\\_153A-344.1.html](http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-344.1.html).

254. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 19 (figure on Vested Rights); see also *Mammoth Lakes Land Acquisition, L.L.C. v. Town of Mammoth Lakes*, 191 Cal. App. 4th 435,443. *But see* *Union County v. CGP, Inc.*, 277 Ga. 349, 351 (2003) (finding that substantial expenditures made in good faith reliance did not vest the rights of the developer where the building permit was invalid). The general rule regarding substantial work in good faith reliance requires that the land be changed by the work. Therefore, merely preparing or clearing the land in anticipation of building in reliance on the permit is typically not substantial enough. Demolition of buildings in reliance is also rarely substantial reliance. Actual excavation of the site in order to prepare the foundation and erecting buildings do qualify as substantial compliance required for vesting a builder's rights in the zoning decisions. See 2 EDWARD H. ZIEGLER, JR., ET AL., *RATHKOPF'S THE LAW OF ZONING AND PLANNING* § 70:21 (4th ed. 2011).

255. See *Mammoth Lakes*, 191 Cal. App. 4th at 443; see also *Avco Cmty. Developers, Inc. v. S. Coast Reg'l Comm'n*, 17 Cal.3d 785, 793 (1976).

256. See *Mammoth Lakes*, 191 Cal. App. 4th at 443.

257. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 20.

258. See Schwartz, *supra* note 165, at 731.

259. See *id.*

boundary that are not otherwise permitted by the applicable zoning ordinance without first amending the zoning ordinance or rezoning the property.<sup>260</sup> The fact that a special exception to the zoning ordinance is contained within a development agreement does not overcome the obstacle presented by a special exception or conditional use that would violate the zoning ordinance itself.<sup>261</sup> The protection of the development agreement “shell” cannot perfect a use that cannot be obtained through the grant of a conditional or special use permit. To do so would violate the principal of uniformity sought in the zoning schemes.

The authority to impose zoning rules is afforded local governments through the state’s delegation of their police powers articulated in state statute.<sup>262</sup> Although state law may impose minimum limitations on zoning matters, it is the intent that local cities and counties exercise the maximum degree of control over local zoning matters.<sup>263</sup> For instance, state statute might impose a uniformity requirement on zoning schemes.<sup>264</sup> The purpose of requiring uniformity within a class has been articulated in contract principals:

A zoning scheme, after all, is similar in some respects to a contract; each party foregoes rights to use its land as it wishes in return for the assurance that the use of neighboring property will be similarly restricted, the rationale being that such mutual restriction can enhance total community welfare.<sup>265</sup>

An ad hoc exception to a zoning scheme contained in a development agreement violates the benefits and burdens afforded to land owners through the expectations imposed by the zoning scheme.<sup>266</sup> Furthermore, it denies other landowners in the zoning boundary the ability to seek similar treatment for their similarly-situated property.<sup>267</sup> It has been held that the development agreement

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260. See *Neighbors in Support of Appropriate Land Use v. County of Tuolumne*, 157 Cal. App. 4th 997, 1001 (2007).

261. See *id.* at 1003.

262. See Lesley R. Attkisson, *Putting a Stop to Sprawl: State Intervention as a Tool for Growth Management*, 62 VAND. L. REV. 979, 981-82 (2009).

263. See *Neighbors in Support*, 157 Cal. App. 4th at 1006.

264. See *id.* at 1008-09.

265. See *id.* at 1009 (quoting *Topanga Ass’n for a Scenic Cmty. v. County of Los Angeles*, 11 Cal.3d 506, 517-518 (1974)).

266. See *Neighbors in Support*, 157 Cal. App. 4th at 1009.

267. See *id.* at 1009.

laws do not provide relief from zoning restrictions by permitting ad hoc uses that result in zoning “disuniformity” [sic] that the municipality is otherwise unauthorized to make.<sup>268</sup>

There are also benefits afforded the public by use of a development agreement insomuch as many of the development agreement processes grant the public a right to input in the details.<sup>269</sup> In the development agreement process, the public access usually comes by way of a noticed public hearing.<sup>270</sup> The process might be best served, however, by including the public in a more substantial way during the development of the agreement instead of only an after-the-fact response.<sup>271</sup> By allowing public stakeholders a chance to air their concerns as the project is being developed, the municipality and the developer can re-evaluate the project as necessary to avoid strong public opposition.<sup>272</sup> The challenge with allowing public input is that the municipality and those negotiating on their behalf must keep the negotiations confidential, which limits the degree to which the public can be involved in an open dialogue.<sup>273</sup>

There are a number of challenges to using a development agreement effectively. The municipality must ensure that the concessions and compromises offered by the developer do not unduly influence the municipality’s overall planning policies.<sup>274</sup> Since the development agreement prohibits application of future regulatory changes on the existing project, it is imperative that the municipality identifies at the outset of the project all of the issues that the municipality might seek to control.<sup>275</sup> Otherwise, it would require subsequent modifications to the development agreement to which the developer may not agree.<sup>276</sup> Not only must the municipality be forward-thinking in their approach to the terms of the development agreement, but the developer must also consider all the possible outcomes and obstacles that might arise during the course of the

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268. *See id.* at 1014.

269. *See* INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 32 n.178.

270. *See id.* at 32.

271. *See id.* at 33.

272. *See id.*

273. *See id.* at 34.

274. *See id.* at 14.

275. *See id.* at 20-21.

276. *See id.* at 21.



development project, and ensure that the agreement provides sufficient flexibility to address otherwise unforeseen market conditions.<sup>277</sup> Because the development agreement is still subject to revisions to state and federal regulations, the developer does not acquire a risk-free platform on which to build, but does acquire some protection from regulatory change.<sup>278</sup>

One challenge associated with a development agreement is its applicability to successors-in-interest to the contracting party. Many development agreements provide that the contract terms are covenants that run with the land, and thus the benefits and burdens bind successors-in-interest of the property.<sup>279</sup> While the agreement may bind successors-in-interest, the likelihood of performance with a non-contracting successor-in-interest is low.<sup>280</sup> If there are multiple successors-in-interest, the more removed the successor from the contracting party, the less bound he or she may feel to the original agreement. If a successor-in-interest does not have the same financial stability as the original contracting party, the risk of breach increases without additional protection provided to the municipality. If a successor-in-interest files bankruptcy, the municipality may feel unable or unwilling to pursue an action against the successor-in-interest in default.<sup>281</sup> Some of these challenges can be addressed in the development agreement to provide assurances or prior approval provisions on a pending sale of the property.<sup>282</sup>

Another protective measure to take when entering a development is to ensure that all parties necessary to achieve the full performance of the terms of the development agreement are bound to it. As a contract, the terms will only be binding on the contracting parties (and possible third party beneficiaries), but if approval from other governmental agencies is required, they should be included as parties to the contract. Otherwise, there may be no legal leverage to enforce their performance necessary for the contracting parties to get their benefit of the bargain.<sup>283</sup>

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277. *See id.*

278. *See id.*

279. *See id.* at 59.

280. *See id.*

281. *See id.*

282. *See id.*

283. *See Green, supra* note 60, at 396.

In addition, the municipality must avoid the classification of its entering into a development agreement as illegal contract zoning. Contract zoning occurs when the landowner seeking a certain zoning action and the zoning authority undertake “reciprocal obligations.”<sup>284</sup> Often, the nature of these obligations includes the governing body’s assurance that it will not alter the zoning classification of the area in question for a period of time. Because the municipality is agreeing to refrain from exercising its legislative authority, the contract zoning is illegal as *ultra vires*.<sup>285</sup> To establish this illegal contract zoning, the landowner and the municipality must have a “meeting of the minds” about the reciprocal assurances made to one another.

Contract zoning is also a concern to the extent that it contracts away a municipality’s police powers. As noted above, the management of the zoning ordinances is a police power afforded the local governing body by the enabling statute. By contracting away these police powers for the benefit of a landowner who stands to benefit from the zoning action, the municipality runs the risk of the courts finding that the municipality has engaged in the prohibited act of contract zoning.<sup>286</sup> If a development agreement freezes the ordinances or other relevant land use regulations, it may amount to an illegal surrendering of the municipality’s police power.<sup>287</sup> Avoiding this outcome depends on the degree to which the municipality has surrendered its control over land use decisions and might be avoided if the municipality retains all of its powers except as the development

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284. See *Hall v. Durham*, 323 N.C. 293, 298-99 (1988); see also *McLean Hosp. Corp. v. Town of Belmont*, 56 Mass. App. Ct. 540, 545 (2002) (defining illegal contract zoning as a “process by which a local government enters into an agreement with a developer whereby the government extracts a performance or promise from the developer in exchange for its agreement to rezone the property” (citing 3 RATHKOPF, ZONING & PLANNING § 44:11 (Ziegler rev. ed. 2001))).

285. See *Hall*, 323 N.C. at 298. An *ultra vires* act or contract is one into which the municipality has no authority to enter under any circumstances or for any purpose. Further, it is an act or contract by the municipality that cannot be subsequently ratified by the governing body. See 10 MCQUILLIN, THE LAW OF MUN. CORPS. § 29:14 (3rd ed. 2011).

286. See *McLean Hosp. Corp.*, 56 Mass. App. Ct. at 545.

287. See *CALLIES ET. AL.*, *supra* note 187, at 92; see also *INSTITUTE FOR LOCAL SELF GOVERNMENT*, *supra* note 169, at 54. See generally *Santa Margarita Area Residents Together v. San Luis Obispo Cnty. Bd. of Supervisors*, 84 Cal. App. 4th 221 (2000) (finding that the municipality did not contract away their police powers).

agreement may otherwise provide.<sup>288</sup> In determining whether there has been an illegal surrender of police powers, the court will make two inquiries: 1) did the municipality make its zoning decision based upon “its own assessment of what best serves the public health, safety, and welfare”<sup>289</sup> and 2) did the municipality “surrender all power to act in the future to protect the public health, safety, and welfare.”<sup>290</sup> The prevailing view is that as long as the municipality reserves some power to control the development in the agreement, there has not been an illegal contracting away of the police powers.<sup>291</sup>

Also of importance is the length of time for which the municipality has agreed to freeze the zoning. Courts appear to object when the police power has been bargained away forever or for a particularly long time.<sup>292</sup> Alternatively, state law could provide that the development agreement will not prevent the municipality from applying new policies, regulations or rules to the property.<sup>293</sup>

Development agreements may run afoul of the prohibition against contract zoning if not drafted carefully, and a similar concern has been raised with respect to conditional zoning. Despite a general prohibition against contract zoning, *conditional* zoning has been upheld where the municipality bargains for certain conditions from the landowner in exchange for certain zoning changes.<sup>294</sup> Understanding the distinctions between contract and conditional zoning is necessary to achieve the desirable benefits of the latter while avoiding the negative implications of the former, but courts

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288. See INSTITUTE FOR LOCAL SELF GOVERNMENT, *supra* note 169, at 54; see also *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 733 (1976).

289. *Green*, *supra* note 60, at 409; *Alderman v. Chatham Cnty.*, 89 N.C. App. 610, 618 (1988).

290. *Green*, *supra* note 60, at 409.

291. See *Callies et al.*, *supra* note 187, at 93; see also *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724, 734 (1976).

292. See *Callies et al.*, *supra* note 187, at 93 (noting that the main question of time usually turns on the ability of one council to bind its successors); *Morrison Homes Corp.*, 58 Cal. App. at 735 n.8 (noting that with regard to the length of time it “may constitute a finding of ultimate fact.”).

293. See *Callies et al.*, *supra* note 187, at 91; see also *City of Pasadena*, CAL. CODE § 17.66.090(B) (2011), available at <http://ww2.cityofpasadena.net/zoning/P-6.html#17.66.090>.

294. See *Green*, *supra* note 60, at 459; see also *Ryan*, *supra* note 171, at 356.

have struggled with properly identifying these two distinct concepts.<sup>295</sup> Conditional zoning, like contract zoning, involves the rezoning of a parcel of land but is done subject to conditions imposed on the landowner as opposed to a result of reciprocal promises.<sup>296</sup> In conditional zoning, the municipality makes no promises to the landowner that the rezoning will occur but, in fact, adopts the rezoning upon the “imposition of conditions, covenants, and restrictions” on the landowner.<sup>297</sup> Conditional zoning avoids the reciprocal agreement problem associated with contract zoning because it is only the landowner making promises (a unilateral agreement) and any subsequent rezoning is based on an independent assessment of the public’s interest.<sup>298</sup>

There are several benefits to the use of a development agreement to address the emergence of a mixed used development among existing homeowners. The greatest deficiency is the absence of the homeowner’s voice at the bargaining table. While enabling statutes require the development agreement to be discussed at public hearings, the opportunity for feedback in that venue is less meaningful than the degree of public input permitted when the homeowners have a seat at the bargaining table.<sup>299</sup> Likewise, a private landowner must acknowledge that the municipality, in the course of negotiating the development, must be concerned with the common welfare of the entire municipality and cannot limit its agenda to the interests of the surrounding neighbors.

#### IV. MOVING FORWARD

A review of these three zoning tools illustrates how each tool, individually, can successfully meet one or more goals of the

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295. See Green, *supra* note 60, at 444-45 (describing how the unilateral/bilateral distinction has often been overlooked by the courts, and much of the confusion in the cases can be attributed to the failure of courts to properly define the two concepts); see also *Knoxville v. Ambrister*, 196 Tenn. 1, 5-7 (1953).

296. See Green, *supra* note 60, at 406 (citing KENNETH H. YOUNG, ANDERSON’S AMERICAN LAW OF ZONING § 9.20 (4th ed. 1996)).

297. *Id.*

298. *Id.* at 407.

299. See Alejandro Esteban Camacho, *Mustering the Missing Voices: A Collaborative Model for Fostering Equality, Community Involvement and Adaptive Planning in Land Use Decisions*, 24 STAN. ENVTL. L.J. 269, 274-76 (2005).

developer, the municipality, or the surrounding neighborhood, but individually, each fails to create a mechanism that can simultaneously meet the needs of all of these stakeholders. With respect to protecting the developer's right to build a mixed use development over time without fear of changing zoning rules, the best tool to use is a development agreement that effectively freezes the zoning rules for the developer during the construction phase. In terms of protecting existing, surrounding homeowners from the harsh realities of new development and redevelopment the most effective of the three tools is an NCD. Existing restrictive covenants applicable to the surrounding neighborhood will fail to bind the developer because the developer's underlying property is not subject to the restrictions and an attempt to initiate restrictive covenants will fail unless the developer willingly agrees to be bound. Likewise, development agreements negotiated between the municipality and the developer might include protections for the existing neighborhood but the interests of the neighbors are secondary to those of the developer and the municipality. If, in addition to protections against infill development or redevelopment, existing neighbors also wish to protect themselves against one another in the absence of existing restrictive covenants, the best tools are private covenants or an NCD, which will address issues of tear-downs, setbacks, and additions; a development agreement will not be useful in addressing neighbor-to-neighbor concerns.

In terms of promoting mixed use development adjacent to existing neighborhoods, the best tool would be a development agreement that specifically addresses the promises and expectations by the developer and municipality with respect to accepted uses. But the development agreement fails to adequately provide for public input and buy-in. An NCD is not an effective tool because of the myriad of rules necessary to address the varied uses within the mixed use development. Preserving the opportunity for public input is most supported through the NCD process, especially those processes that are committee-based; public input is only minimally protected through the negotiation of a development agreement. Enforceability is easiest within the context of restrictive covenants, which impose fines and other penalties on the breaching owner, and development agreements which embrace contract remedies for breach; enforceability is most difficult within the zoning realm because of the

lack of resources and municipal momentum for enforcement. Binding future homeowners to the adopted restrictions and limitations is most easily done through the restrictive covenants that by their very nature run with the land and, thereafter, are achieved through the NCD zoning overlay applicable to homeowners within the overlay district. Binding future homeowners is virtually impossible in the context of a development agreement between the developer and the town.

In light of the deficiencies of these three tools in addressing the influx of mixed use developments in and around existing, healthy neighborhoods, a new Community Design & Preservation Agreement (CDPA) model should be adopted. A CDPA would weave together the strengths of all of these land use tools to address the conflicting interests of homeowner, developer, and municipality alike. The parties to the CDPA would be the developer, the municipality, and representatives of the community stakeholders. The participation of the developer and municipality would bind them to the terms of the CDPA and the participation of representatives of the community stakeholders will serve to bind the existing homeowners living in proximity to the proposed development. Borrowing from the NCD model, the CDPA could be initiated by the developer, the municipality, or a petition by a majority of the surrounding landowners. The surrounding landowners would participate in the CDPA if the CDPA is initiated by their own petition. Likewise, if the CDPA process is initiated by a developer or municipality, a majority of the homeowners could consent to participate as respondents in the petition. In the event that there is not sufficient homeowner support to initiate a petition or consent to participate as a respondent to a developer or municipality-initiated process, the developer and municipality would proceed under a traditional development agreement process. If, however, there is sufficient support from surrounding landowners, the three stakeholder groups (developer, municipality, and landowners) would form a representative committee to negotiate the CDPA terms. Continuing to borrow from the NCD model, the boundary of the Community Design & Preservation area would be determined to minimally encompass the land subject to the mixed use development as well as the surrounding homeowners most likely to be affected by the mixed use. Representatives of the three stakeholder groups would work to

create design guidelines that adequately address concerns of homeowners amongst each other, as well as concerns of homeowners about the mixed use development.

Because the municipality is a party to the agreement, the negotiations would be subject to open meeting laws and public hearings to get input from the community at large, while the representative homeowners serving on the committee will have a voice at the negotiating table. The terms of the CDPA would include the ability to freeze the zoning regulations that would apply to the project, design guidelines for the new mixed use development, and design guidelines for existing homeowners. Design guidelines would identify setbacks, height requirements, roof pitches, impervious surface requirements, land uses, green space requirements and related issues. The various design guidelines required to address the diverse design schemes present in a MUD can be addressed more efficiently in a CDPA than in an NCD: in a CDPA, the contracting parties can delineate the design guidelines for each specific area of the new development. In an NCD, the zoning overlay district clumsily attempts to address the various design guidelines necessary to meet the needs of a MUD in one conservation district, resulting in a patchwork solution that is cumbersome and difficult to enforce. To avoid the claim that the municipality has contracted away its police powers by entry into the CDPA, there must be a term limitation placed on the freezing of the zoning regulations. Thus, the CDPA should provide that the zoning regulations will be frozen for such period of time as necessary for completion of the development construction and no longer. The other terms of the CDPA need not expire at the same time and, in fact, borrowing from the restrictive covenant arena, the remaining terms of the agreement would continue in effect indefinitely, binding successors-in-interest. A copy of the CDPA would be filed with the register of deeds in the county in which the property in question is located and would serve as notice to future purchasers in the CDPA boundary that the home is subject to the terms of the CDPA. Because all homeowners in the CDPA boundary, as well as all future property owners in the mixed use development, would be subject to the CDPA, the agreement should make it clear that every landowner and his successor-in-interest is a third party beneficiary of the CDPA and has the authority to sue on its terms.

For purposes of enforcement, the CDPA model would look to the development agreement and restrictive covenant approach and provide for contract remedies within the terms of the CDPA, including, but not limited to specific performance, fines, and other pecuniary damages and attorneys' fees (forfeiture is rarely an approved damage in cases of zoning violations). The municipality or other homeowners residing in the CDPA boundary could enforce the terms of the CDPA against a breaching developer. Likewise, the municipality, other homeowners or the developer could enforce the contract terms against another breaching homeowner. Primarily, this approach removes the enforcement from the hands of the municipality, which may not have the will or resources to pursue an action in enforcement.

#### CONCLUSION

Mixed use developments are an increasing part of our development landscape, as towns and cities grapple with the challenges of urban sprawl and the associated environmental implications. As these communities embrace the standards of smart growth and new urbanism movements, we will see a proliferation of new MUD. Current land use tools do not adequately protect the private homeowner faced with his new mixed use neighbor. Adopting a Community Design and Preservation Agreement model will allow the continued evolution of land use regulations to provide a direct opportunity for homeowner voice in the negotiations with the municipality and their mixed use neighbors, increase community accord, reduce community pushback, and provide efficient and broad-based enforcement techniques for all involved parties.