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# Contract and Conditional Zoning Without Romance: A Public Choice Analysis

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# CONTRACT AND CONDITIONAL ZONING WITHOUT ROMANCE: A PUBLIC CHOICE ANALYSIS

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*The growth and development of the United States after World War II left the country needing more flexibility in zoning law. Over the past few decades, zoning has undergone drastic changes to make the process more flexible. Two methods used to meet this new demand are contract and conditional zoning. Jurisdictions are split on whether to permit contract zoning, conditional zoning, both, or neither. This is an important question that a growing number of jurisdictions have recently encountered. This Note seeks to propose potential solutions to the conflict by analyzing it through public choice theory. By applying the principles of public choice theory, this Note finds that increased flexibility in zoning will likely have the undesired consequence of allowing legislators to easily appease interest groups, rather than bargain for the most efficient land use allocation. From this observation, this Note ultimately concludes that jurisdictions should either prohibit both contract and conditional zoning or, if economic efficiency concerns prove too great, permit both contract and conditional zoning but apply a strict standard of judicial review.*

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## INTRODUCTION

Imagine you own property in an area zoned residential by your town. A power company wants to construct a new power plant adjacent to your property although the area is not zoned for it. In furtherance of this desire, the power company offers the town eight million dollars to rezone the area, and the town subsequently rezones the property as requested. This is essentially what happened to eight neighboring landowners in *Durand v. IDC Bellingham, LLC*[1] and, perhaps counter intuitively, many jurisdictions find this practice entirely legal.

1. 793 N.E.2d 359 (Mass. 2003).

Zoning is a common and accepted practice in nearly every jurisdiction in the United States.[2] Since the U.S. Supreme Court validated the practice in the landmark case *Village of Euclid v. Ambler Realty Co.*,[3] its popularity and complexity has proceeded at a rapid pace.

Early forms of zoning were thought to be too inflexible for the post–World War II society, and thus zoning law has undergone various changes designed at increasing flexibility.[4] One such change was the implementation of contract and conditional zoning. Contract zoning is defined as "a bilateral agreement between a developer and legislative officials entered into as a condition for the rezoning of land which often involves the use of private covenants to restrict the land rezoned."[5] Conditional zoning is defined as "zoning that places land in a temporary use classification that will become permanent only if the land is developed or certain events occur within a specified period of time."[6] States disagree on whether to allow either contract or conditional zoning, with some states opting to allow both, some opting to only allow conditional, some opting to allow neither, and others declining to decide on the matter.[7] When viewed through public choice theory, contract and conditional zoning are concerning because they provide an easy way for interest groups to capture local government officials and ultimately have conditions attached that are inconsistent with the fundamental purpose of zoning.[8] With the growing number of states that are accepting the practice, and many others sure to rule on it soon, it is important to provide an alternative lens through which to analyze the practice and its implications.[9]

Public choice theory has been described by its late founder, James M. Buchanan, as "the avenue through which a romantic and illusory set of notions about the workings of governments and the behavior of persons who govern has been replaced by a set of notions that embody more skepticism about what governments can do and what governors will do."[10] It relies primarily on three premises: (1) that legislators, like every other individual, will seek to maximize their own utility (i.e., gain reelection);[11] (2) that voters will not serve as an adequate check on this due to their

2. *See* 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 1:2 (5th ed. 2012).

3. 272 U.S. 365 (1926).

4. *See* 1 EDWARD H. ZIEGLER ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:13–14 (4th ed. 2012).

5. *See id.* § 1:23.

6. *See id.* § 1:21.

7. *See infra* Part III.A–D.

8. *See* Hanna v. Bd. of Adjustment, 183 A.2d 539, 543 (Pa. 1962) ("A basic purpose of zoning is to ensure an orderly physical development of the city, borough, township or other community by confining particular uses of property to certain defined areas. With such a purpose nonconforming uses are inconsistent.").

9. See *infra* Part III.A–D for a discussion of the various positions states have taken on the issue.

10. James M. Buchanan, *Politics Without Romance: A Sketch of Positive Public Choice Theory and Its Normative Implications*, *in* THE THEORY OF PUBLIC CHOICE-II 11, 11 (James M. Buchanan & Robert D. Tollison eds., 1984).

11. *See infra* Part II.A.

"rational-ignorance";[12] and (3) that the "collective action problem" makes it difficult for majorities to form coalitions and thus easier for special interest groups to gain influence in the political process.[13] The theory predicts this set of conditions will lead to legislators seeking to appease interest groups, as doing so maximizes their likelihood of reelection.[14] This is particularly troublesome in the contract/conditional zoning realm because the discretion and flexibility individual legislators are given makes it easier for them to successfully appease interest groups at the potential detriment to the community at large.[15]

This Note addresses the conflict between the states and offers an alternative analysis based on public choice theory. To facilitate an understanding of zoning law—particularly contract and conditional zoning—Part I of this Note provides a historical overview of zoning law. Part II of this Note provides a detailed description of public choice theory. Part III details the conflict between the states and the various arguments advanced on all sides. Part IV applies public choice principles to the conflict and concludes that states should shy away from both contract and conditional zoning, but also concludes that if the efficiency concerns are too great to eliminate the practices, states should impose a stricter standard of judicial review.

## I. ZONING LAW GENERALLY

A general understanding of zoning law is necessary to understand the policy concerns at play. This part first details the history of the development of zoning. It next describes the general requirements that must be met to implement a valid zoning plan. It then explains the inadequacy of general rezoning. It subsequently details contract and conditional zoning, particularly their rise to prominence. Finally, it discusses the standard of judicial review for contract and conditional zoning decisions.

### *A. The History of Zoning*

"Zoning is the regulation by the municipality of the use of land within the community" in accordance with a general plan and for the purposes set forth in an enabling statute.[16] Zoning grew out of the concept of public nuisance,[17] which protects the rights of the public to be free from activities

12. *See infra* Part II.B.
13. *See infra* Part II.C–D.
14. *See infra* Part II.C.
15. *See infra* Part IV.
16. *See* 1 ZIEGLER, *supra* note 4, § 1:3.
17. *See* David C. Keating, *Exclusionary Zoning: In Whose Interests Should the Police Power Be Exercised?*, 23 REAL EST. L.J. 304, 304 (1995) (noting zoning's roots as an extension of public nuisance doctrine); *see also* Thomas E. Raccuia, Note, *RLUIPA and Exclusionary Zoning: Government Defendants Should Have the Burden of Persuasion in Equal Terms Cases*, 80 FORDHAM L. REV. 1853, 1858 (2012) (same).

that interfere with those rights.[18] By the late nineteenth century, the failures of nuisance doctrine to regulate land use in an industrial society became evident as "residents in larger urban areas began to protest the loss of light and air as taller structures were . . . built."[19] Shortly after the construction of the forty-two story Equitable Building in Lower Manhattan, the pressure for additional controls on building height and form became clear, and New York City ultimately responded with the Zoning Resolution of 1916.[20] The Resolution established height and setback controls, and designated residential districts that excluded perceived incompatible uses.[21] The Resolution was not without controversy, however, and its constitutionality under the New York State Constitution was challenged in *Lincoln Trust Co. v. Williams Building Corp*.[22] The court in *Lincoln Trust* ultimately approved the constitutionality of the Zoning Resolution on the grounds that zoning is "a proper exercise of the police power."[23] Following the *Lincoln Trust* decision, zoning became tremendously popular and spread quickly throughout the country.[24]

The *Lincoln Trust* decision did not put the constitutionality question to rest, however, as some objected to zoning on the grounds that it violated the Fourteenth Amendment to the U.S. Constitution by depriving persons of liberty and property without due process of law and denying equal protection of the law.[25] The Supreme Court ended the debate by upholding zoning ordinances as a valid exercise of the state police power in *Euclid*.[26] After *Euclid*, "Euclidean," or "use zoning," became popular throughout the country.[27]

Euclidean zoning refers to the "concept of separating incompatible land uses through the establishment of fixed legislative rules."[28] Although Euclidean zoning provided for changes and variances, it was envisioned that discretionary review of individual proposed uses would be the "exception" rather than the rule and that zoning restrictions would be uniform for each kind of building in each district.[29] This concept proved to be very rigid and has resulted in the allowance for flexibility in the

18. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW § 14.2 (2d ed. 2007). These acts are often those that injure the public health or safety but also include those that are contrary to public morals. *See id.*

19. 1 SALKIN, *supra* note 2, § 1:3.

20. *See id.*

21. *See id.*

22. 128 N.E. 209 (N.Y. 1920).

23. *Id.* at 210.

24. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 3.3 (noting that, by the time of the *Euclid* decision, "some 564 cities and towns had enacted zoning" ordinances).

25. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 384 (1926); *see also* U.S. CONST. amend XIV.

26. *See Euclid*, 272 U.S. at 390 ("We find no difficulty in sustaining restrictions of the kind thus far reviewed.").

27. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 3.3.

28. *See* 1 ZIEGLER, *supra* note 4, § 1:5.

29. *See id.*

development approval process.[30] Two of the methods used to create flexibility are contract and conditional zoning, which is discussed in further detail below.[31]

### *B. Requirements Necessary for a Valid Zoning Ordinance*

This section outlines the uniform requirements necessary to implement a valid zoning ordinance. First, it is important to note that municipalities themselves do not have police power.[32] Police power is reserved for the state and not for its political subdivisions.[33] Thus, a municipality can only exercise power "when it has specifically or impliedly received a delegation of such power from the state."[34] Application of this principle to zoning makes clear that the authority to enact zoning ordinances must be specifically delegated to municipalities in order for them to exercise the power to zone.[35] Pursuant to this requirement, states issue enabling acts that grant the power for municipalities to zone.[36]

All fifty states have adopted enabling acts that are substantially patterned after the Standard State Zoning Enabling Act (SZEA), a guideline resulting from the work of an Advisory Committee appointed by then–Secretary of Commerce Herbert Hoover.[37] The SZEA: (1) declares the purposes of zoning and defines its scope; (2) details a procedure for adopting zoning regulations and making amendments; (3) proposes the creation of a zoning commission; (4) permits the creation of a Board of Adjustment to hear appeals from enforcement of the ordinance, to decide special exceptions, and to give variances; and (5) contains provisions for the enforcement of the regulations.[38] Regarding purpose, the SZEA separates into two categories: the first being the "grant of powers" category, and the second being the "purposes in view" category.[39] The "grant of powers" category is based on section 1 of the SZEA, which states that the purpose of delegating the zoning power is to "promot[e] health, safety, morals, or the general welfare of the community."[40] The "purposes in view" category is based on section 3 of the SZEA, which lists various purposes such as "to provide adequate light and air" and "to conserv[e] the value of buildings."[41]

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30. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 4.15.
31. *See supra* Part I.C.
32. *See* 1 ZIEGLER, *supra* note 4, § 1:8.
33. *See id.*
34. *Id.*
35. *See id.* § 1:9 (citing various state court decisions that hold that the power to zone must be specifically delegated); *see also, e.g.*, Good Deal of Ivy Hill, Inc. v. City of Newark, 160 A.2d 630, 632 (N.J. 1960); Golden v. Planning Bd., 285 N.E.2d 291, 296 (N.Y. 1972); Roeders v. City of Washburn, 298 N.W.2d 779, 782 (N.D. 1980).
36. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 3.6.
37. *See id.*
38. *See id.*
39. 1 ZIEGLER, *supra* note 4, § 1:12.
40. JUERGENSMEYER & ROBERTS, *supra* note 18, § 3.6.
41. *See id.*

Therefore, a zoning ordinance may be invalid if "it is beyond the power conferred by the enabling act"[42] or if it was "exercised for [a] purpose[] beyond those expressed or implied in [the] enabling act."[43] Courts generally interpret zoning enabling acts as allowing for a wide array of land use controls and also generally defer to local legislative judgment as to what land use regulations are needed to promote the general welfare.[44] However, courts have refused to find that an enabling act confers a local community with plenary police power.[45] This small limitation allows for courts to uphold conditional zoning "despite the lack of express language authorizing such a technique,"[46] while simultaneously allowing courts to strike down zoning ordinances that are "unrelated to the achievement of land use objectives"[47] because they would be zoning for a purpose that is "beyond the scope of the police power."[48] This liberalized standard helped facilitate the move from strict Euclidean zoning to more flexible rezoning measures and, subsequently, significantly enhanced the individual discretion of local officials in the operation of zoning codes.[49]

### *C. Inadequacy of General Rezoning and the Move to Flexible Rezoning*

Euclidean zoning "proved too rigid to meet changing community needs and development pressures."[50] These difficulties led to many rezoning requests, but change was difficult because of two competing concerns: the protection of neighbors and environmentally sensitive lands versus the possibility of leaving land underused and of imposing unnecessary restrictions.[51] Various techniques were developed over the years to address these flexibility concerns.[52] Two of which were contract and conditional zoning.

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42. *Id.* § 3.13.

43. 1 ZIEGLER, *supra* note 4, § 1:12.

44. *See id.*

45. *See id.*; *see also, e.g.*, Taxpayers Ass'n of Weymouth Twp. v. Weymouth Twp., 364 A.2d 1016, 1031 (N.J. 1976) ("[Z]oning is not a panacea for all social, cultural and economic ills especially where they are unrelated to the use of land.") (citations omitted).

46. JUERGENSMEYER & ROBERTS, *supra* note 18, § 3.13; *see also* Giger v. City of Omaha, 442 N.W.2d 182, 190 (Neb. 1989).

47. JUERGENSMEYER & ROBERTS, *supra* note 18, § 3.13; *see also* Belle Harbor Realty Corp. v. Kerr, 323 N.E.2d 697, 699 (N.Y. 1974) (holding that revocation of a permit to operate a nursing home "to assuage strident community opposition" was outside the enabling act); Cellular Tel. Co. v. Vill. of Tarrytown, 624 N.Y.S.2d 170, 175 (N.Y. App. Div. 1995) (holding that a moratorium imposed on cellular telephone antennas was outside the enabling act).

48. *See, e.g.*, Robyns v. City of Dearborn, 67 N.W.2d 718, 720 (Mich. 1954) (stating that zoning exercised to lower the market value of property so that a governmental body could acquire it cheaper by eminent domain is unconstitutional); JUERGENSMEYER & ROBERTS, *supra* note 18, §3.13.

49. *See* 1 ZIEGLER, *supra* note 4, § 1:14.

50. *See supra* note 30 and accompanying text; *see also* Shelby D. Green, *Development Agreements: Bargained-For Zoning That Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 389 (2004).

51. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 4.15.

52. *See id.*

### 1. Contract Zoning

Contract zoning refers to "the process by which a local government enters into an agreement with a developer whereby the government exacts a performance or promise from the developer in exchange for its agreement to rezone the property."[53] Numerous state court decisions have found contract zoning to be illegal.[54] Historically, courts had struck down the practice on the theories that it was an illegal bargaining away or abrogation of the police power,[55] that it was inconsistent with uniformity requirements,[56] and that it may lead to corruption or favoritism.[57] Today, by contrast, courts have warmed to the idea of contract zoning and often distinguish between illegal contract zoning and valid conditional zoning.[58] The modern trend is that "illegal contract zoning is likely to be found only where there is an express bilateral agreement that bargains away the municipality's future use of the police power."[59]

An example of a court finding an express bilateral agreement that bargains away the municipality's future use of the police power is the Florida case *Chung v. Sarasota County*.[60] In *Chung*, an adjacent landowner challenged a settlement agreement reached by a landowner and the county in an action disputing the county's initial refusal to rezone the landowner's parcel.[61] The settlement agreement *required* the county to rezone the parcel subject to numerous stipulations and conditions.[62] The court concluded that the settlement agreement constituted a case of improper contract zoning because the county had "contracted away the exercise of its police power, which constituted an ultra vires act."[63] The *Chung* case, therefore, is an example of a court finding contract zoning illegal on the basis of a bilateral agreement that bargains away the police power.

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53. 3 ZIEGLER, *supra* note 4, § 44:11.

54. *See, e.g.*, V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) (holding that contract zoning is an illegal bargaining away of the police power); City of Farmers Branch v. Hawnco, Inc., 435 S.W.2d 288, 291 (Tex. Civ. App. 1968) (stating the same); *see also* 3 ZIEGLER, *supra* note 4, § 44:11 n.2 (listing other decisions).

55. *See* 3 ZIEGLER, *supra* note 4, § 44:11 n.2 (listing decisions).

56. *See, e.g.*, Campion v. Bd. of Aldermen, 859 A.2d 586, 601 (Conn. App. Ct. 2004); Bd. of Cnty. Comm'rs v. H. Manny Holtz, Inc., 501 A.2d 489, 493 (Md. Ct. Spec. App. 1985).

57. *See* City of Knoxville v. Ambrister, 263 S.W.2d 528, 530 (Tenn. 1953) (stating that contract zoning destroys "that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society." (quoting Osborne v. Allen, 226 S.W. 221, 224 (Tenn. 1920))).

58. *See* 3 ZIEGLER, *supra* note 4, § 44:11.

59. *Id.*

60. 686 So.2d 1358 (Fla. Dist. Ct. App. 1996).

61. *See id.* at 1359.

62. *See id.*

63. *Id.* at 1360.

### 2. Conditional Zoning

Conditional zoning refers to the imposition of conditions on proposed developments.[64] Conditional zoning can happen in one of two ways: (1) the conditions can be attached administratively in the special permit or variance process; or (2) conditions can be attached in a rezoning process.[65] This Note only addresses the second.

When conditions are attached by way of rezoning, conditional zoning is very similar to contract zoning.[66] Many courts distinguish the two, however, on the grounds that contract zoning bargains away a municipality's police power, while conditional zoning does not.[67] Conditional rezoning is therefore upheld in the majority of jurisdictions as long as: "(1) [it] promotes the general welfare and not merely private interests; (2) the rezoning does not otherwise constitute illegal spot zoning; (3) the conditions imposed are reasonable and not otherwise illegal; and (4) there is no express agreement bargaining away a municipality's future use of the police power."[68]

A recent example of the willingness of courts to uphold unilateral conditional zoning is the Massachusetts case *Durand v. IDC Bellingham, LLC*.[69] In *Durand*, the town of Bellingham developed a proposal to rezone certain land from "agricultural" and "suburban" to "industrial use" in order to increase its tax base.[70] The proposal ultimately fell eight votes short of the required two-thirds majority at a town meeting.[71] Two years later, IDC Bellingham, LLC discussed rezoning the land so that a power plant could be built on it.[72] The Town Administrator told IDC officials that the town was eight million dollars short of what was required to construct a new high school.[73] IDC responded by publicly announcing that it would make an

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64. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.11.

65. *See id.*; *see also* 3 ZIEGLER, *supra* note 4, § 44:12.

66. *See* 1 ZIEGLER, *supra* note 4, § 44:12.

67. *See, e.g.*, Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 369 (Mass. 2003); Church v. Town of Islip, 168 N.E.2d 680, 683 (N.Y. 1960); Chrismon v. Guilford Cnty., 370 S.E.2d 579, 594 (N.C. 1988). The Supreme Court of New Mexico drew a different distinction between contract and conditional zoning. That court found that

> contract zoning is illegal whenever it arises from a *promise* by a municipality to zone property in a certain manner, *i.e.*, when a municipality is either a party to a bilateral contract to zone or when a municipality is a party to a unilateral contract in which the municipality promises to rezone . . . [such a] contract . . . is illegal because, in making such a promise, a municipality preempts the power of the zoning authority to zone the property according to prescribed legislative procedures.

Dacy v. Vill. of Ruidoso, 845 P.2d 793, 797 (N.M. 1992).

68. 3 ZIEGLER, *supra* note 4, § 44:12. For examples of courts applying this doctrinal test, see *supra* note 67.

69. 793 N.E.2d 359.

70. *Id.* at 361.

71. *See id.*

72. *See id.*

73. *See id.*

eight million dollar gift to the town if IDC could build the plant.[74] While the offer clearly was made with regards to the high school, IDC stated the town could use the money for "any municipal purpose."[75] In response to the offer, the town held another meeting, and this time the rezoning was approved by two-thirds vote.[76] The plaintiffs, eight neighboring landowners, filed suit against IDC, the town, the town zoning board of appeals, and the owner of the property, alleging the rezoning constituted illegal contract zoning.[77] The court held that the eight million dollar offer did not constitute contract zoning because voters at the town meeting were not "bound to approve the zoning change."[78] In other words, the agreement was unilateral. The court further held that a "voluntary offer of public benefits is not, standing alone, an adequate ground on which to void an otherwise valid rezoning."[79] The court concluded that there is generally no reason to invalidate an otherwise valid rezoning because "[it] defer[s] to legislative findings and choices without regard to motive."[80] The *Durand* case, therefore, provides an example of a court upholding conditional zoning on the theory that it is unilateral and of showing high deference to the legislature in these matters.

### *D. Judicial Review of Contract and Conditional Zoning*

Provisions for judicial review of zoning decisions differ by state. However, many states authorize an appeal from a local zoning board under the same procedures available for appeals from state administrative agencies.[81] The SZEA provides for review of decisions of the board of adjustment by petition to a court of record alleging why the board decision is illegal.[82] The Act states that "[a]ny person . . . aggrieved by any decision of the board of adjustment, or any taxpayer,"[83] as well as "proper local authorities of the municipality,"[84] may petition the court. This standard has led courts to recognize standing for (1) owners of property that is the subject of the dispute, (2) persons who have interest in property that adjoins property directly affected by the zoning decision, (3) associations acting as an agent for members who own property or reside in the area, and (4) local governments aggrieved by the zoning decision.[85] Although SZEA provides

74. *See id.* at 361–62.
75. *See id.*
76. *See id.*
77. *See id.* at 362–63.
78. *Id.* at 366.
79. *Id.* at 368.
80. *Id.* at 369.
81. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.32.
82. *See* A STANDARD STATE ZONING ENABLING ACT UNDER WHICH MUNICIPALITIES MAY ADOPT ZONING REGULATIONS § 7 (1926), *available at* http://www.planning.org/growingsmart/pdf/SZEnablingAct1926.pdf.
83. *Id.*
84. *Id.* § 8.
85. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.34.

that "any taxpayer" may petition the court,[86] not all courts have found this to provide automatic standing for all taxpayers.[87]

Courts have struggled to develop standards of review that protect from abuses of power, while not overly interfering with the legislative process.[88] Despite the confusion, the standard can best be broken down into two categories: review of legislative acts and review of administrative acts.[89]

### 1. Legislative Acts

Courts traditionally accord legislative actions a strong presumption of validity.[90] This strong presumption of validity means courts typically use a rational basis test to assess validity in contract/conditional zoning.[91] Rational basis review requires a law to be "reasonable, not arbitrary and [to] bear[] . . . a rational relationship to a [permissible] state objective."[92] In recent decades, however, courts have expressed dissatisfaction with granting such high deference to local legislative authorities and instead subject them to greater scrutiny.[93] Although courts have yet to deviate from rational basis review with regards to contract or conditional zoning, in the analogous situation of "spot zoning,"[94] some courts find that its quasi-

86. *See supra* note 83 and accompanying text.

87. *Compare* Jolly, Inc. v. Zoning Bd. of Appeals, 676 A.2d 831, 838 (Conn. 1996) (declining to overrule precedent that taxpayers have automatic standing), *with* Comm. for Responsible Dev. on 25th St. v. Mayor of Balt., 767 A.2d 906, 915 (Md. Ct. Spec. App. 2001) (holding that "taxpayers must be aggrieved in order to seek judicial review").

88. *See* Robert J. Hopperton, *Standards of Judicial Review in Supreme Court Land Use Opinions: A Taxonomy, an Analytical Framework and a Synthesis*, 51 WASH. U. J. URB. & CONTEMP. L. 1, 98 (1997) (noting that there is "no set formula" for the standards of judicial review but instead "[c]onfusion, disarray, and inconsistency"); *see also* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.37.

89. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.37.

90. *See id.*

91. *See id.*

92. Vill. of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974) (citations omitted) (internal quotation marks omitted); *see also* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest."). For a more detailed discussion of rational basis review, see Richard B. Saphire, *Equal Protection, Rational Basis Review, and the Impact of* Cleburne Living Center, Inc., 88 KY. L.J. 591, 603–08 (2000).

93. *See* Bd. of Cnty. Comm'rs v. Snyder, 627 So.2d 469, 476 (Fla. 1993) (holding that the zoning board has the burden to show that its decision "is not arbitrary, discriminatory, or unreasonable").

94. "[S]pot-zoning refers to the singling out of a lot or a small area for discriminatory or different treatment from that accorded surrounding land which is similar in character." Willot v. Vill. of Beachwood, 197 N.E.2d 201, 203 (Ohio 1964) (internal quotation marks omitted); *see also* 1 ZIEGLER, *supra* note 4, § 11:5. This Note treats spot zoning analogously to contract/conditional zoning because of the high discretion awarded to policymakers in both. *See supra* note 49 and accompanying text; *see also* Hedrich v. Vill. of Niles, 250 N.E.2d 791, 796 (Ill. App. Ct. 1969) (noting the danger of "bartering . . . *legislative discretion*" (emphasis added)); Green, *supra* note 50, at 404 n.114 (noting the similarities between contract zoning and spot zoning).

judicial nature disqualifies it from deferential review.[95] The leading case in favor of this position comes from the Oregon Supreme Court in *Fasano v. Board of County Commissioners*.[96] In *Fasano*, the county commissioners rezoned a thirty-two acre tract from single-family use to mobile home use, and the neighbors challenged the rezoning.[97] The defendant board asserted the presumption of validity and argued that the challengers must show their decision was arbitrary.[98] The court, however, rejected to extend to the board the presumption of validity, holding that doing so would be "ignoring reality" that local decision groups are not the equivalent of state and national legislatures.[99] The court felt it was justified in not extending the presumption because of "the almost irresistible pressures that can be asserted by private economic interests on local government."[100] The *Fasano* court did not go so far as to state all acts of local governments should not be given the presumption of validity, but instead drew a distinction between actions that are of a legislative character and actions that are of a quasi-judicial character.[101] If the action is legislative in character, judicial deference is appropriate.[102] If, on the other hand, it is quasi-judicial in character, as the court found site-specific rezoning classifications to be, then judicial deference is not appropriate.[103] *Fasano* has been met with mixed reaction around the country, with numerous states following it, and others specifically rejecting it.[104]

### *a. Jurisdictions That Use* Fasano *Review*

The American Law Institute (ALI) was quick to adopt *Fasano* review in its Model Development Code.[105] The ALI agreed with the *Fasano* court that local legislatures are not equal in all respects to state and national legislatures and that rezoning is an administrative, not a legislative, function.[106]

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95. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.37.
96. 507 P.2d 23 (Or. 1973).
97. *See id.* at 25.
98. *See id.*
99. *Id.* at 26.
100. *Id.* at 30. This analysis borrows in large part from James Madison's concern that the legislative process is vulnerable to capture by factions who act without regard for others. *See* THE FEDERALIST NO. 10 (James Madison). It also borrows from public choice theory. *See infra* Part II.
101. *Fasano*, 507 P.2d at 26–27.
102. *See id.* at 26.
103. *See id.* at 26–27.
104. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.9. *Compare* Bd. of Cnty. Comm'rs v. Snyder, 627 So.2d 469, 475 (Fla. 1993) (adopting *Fasano* review and finding rezoning subject to "strict scrutiny"), *and* Cooper v. Bd. of Cnty. Comm'rs, 614 P.2d 947, 949–50 (Idaho 1980) (adopting *Fasano* review), *with* Cabana v. Kenai Peninsula Borough, 21 P.3d 833, 836 (Alaska 2001) (rejecting *Fasano* and finding spot zoning to be "an arbitrary exercise of *legislative* power"), *and* Wait v. City of Scottsdale, 618 P.2d 601, 602 (Ariz. 1980) (rejecting the view that rezoning is not a legislative function).
105. *See* MODEL LAND DEV. CODE § 2-312(2) (1975).
106. *See id.*

Following adoption by the ALI, numerous states began to follow *Fasano* as well.[107] One of the first states to do so was Idaho in *Cooper v. Board of County Commissioners*.[108] In *Cooper*, the plaintiff-appellants bought roughly ninety-nine acres of land that had a D-2 zoning classification, which permitted a maximum density of one home per acre.[109] The appellants applied to rezone the property to an R-5 classification, which would allow two residential units per acre if either a central sewage facility or central water facility were available, and three residential units per acre if both facilities were available.[110] After two hearings and deliberation, the board voted to deny the rezoning.[111] Appellants then brought suit in the state district court, where the court applied rational basis review and found that since the board did not act arbitrarily or capriciously in its decision, the decision was valid.[112]

On appeal, appellants argued that the district court erred in characterizing the action as legislative and instead should have considered the action as "an administrative, quasi-judicial determination of individual rights."[113] The court explained the *Fasano* distinction between legislative acts and quasi-judicial acts and ultimately held that characterizing the action of a zoning body as quasi-judicial "in applying general rules or policies to specific individuals, interests, or situations represent[s] the better rule. The shield from meaningful judicial review which the legislative label provides is inappropriate in these highly particularized land use decisions."[114] The court went on to explain that the rationale for granting deferential review to legislative action—that legislators are freely elected by the people and can be removed[115]—was inapposite when applied to a local zoning body's decision as to the fate of an individual's application to rezone, because "[m]ost voters are unaware or unconcerned that fair dealing and consistent treatment may have been sacrificed in the procedural informality which accompanies action deemed legislative."[116] In other words, the *Cooper* court felt voters were an inadequate check on the board with respect to rezoning, and it was necessary for the court to apply a stricter review in order to provide an adequate check.[117]

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107. *See supra* note 104 and accompanying text.
108. 614 P.2d 947 (Idaho 1980).
109. *See id.* at 947.
110. *See id.* at 948.
111. *See id.*
112. *See id.* at 949.
113. *See id.*
114. *Id.* at 950.
115. *See* Bi-Metallic Inv. Co. v. Bd. of Equalization, 239 U.S. 441, 445 (1915) (stating that the people's "rights are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule").
116. *Cooper*, 614 P.2d at 950.
117. *See id.* at 951 ("To allow the discretion of local zoning bodies to remain virtually unlimited in the determination of individual rights is to condone government by men rather than government by law. Accordingly, we adopt the rule which distinguishes between legislative and quasi-judicial actions of local zoning bodies . . . .").

Roughly a decade after *Cooper*, the Florida Supreme Court adopted *Fasano* in what has become a leading case in its favor—*Board of County Commissioners v. Snyder*.[118] In *Snyder*, the respondents owned a one-half-acre parcel of property that was zoned GU (general use), which allowed for construction of a single-family residence.[119] The respondents filed an application to rezone the property to the RU-2-15 classification, which allows the construction of fifteen units per acre.[120] After the application was filed, the Brevard County Planning and Zoning staff reviewed the application and concluded that the proposed multifamily use was consistent with all aspects of the comprehensive zoning plan, except that it was located in a flood plain on which a maximum of only two units per acre was allowed and therefore recommended the request be denied.[121] The Commission subsequently voted to deny the rezoning request without stating a reason why, even after the respondents stated that they intended to build only five or six units on the property.[122] The respondents then filed suit in the circuit court, where their petition was denied, but won on appeal in the Fifth District Court of Appeal.[123] The Fifth District opted to adopt *Fasano* review and found that the respondent's application for rezoning was consistent with the comprehensive plan so that there was no stated reason for the denial.[124]

Thus, the Florida Supreme Court was faced with the issue of whether to adopt *Fasano* review.[125] The court found that comprehensive rezonings affecting a large portion of the public are legislative in nature and, therefore, are granted a presumption of validity, but found that rezoning actions that (1) have a limited impact, (2) are contingent on a fact arrived at from distinct alternatives presented at a hearing, and (3) can be viewed as "policy application, rather than policy setting" are by nature quasi-judicial.[126] Due to their quasi-judicial nature, the court found they should be subject to strict scrutiny.[127]

### *b. Jurisdictions That Have Rejected* Fasano

Some jurisdictions have rejected *Fasano* review.[128] One early example is Arizona in *Wait v. City of Scottsdale*.[129] In *Wait*, the lead appellant was a doctor who had purchased a five-acre parcel of land that was zoned R1-43 (singe family residential, one house per acre) and wanted to rezone it to an

118. 627 So.2d 469 (Fla. 1993).
119. *See id.* at 471.
120. *See id.*
121. *See id.*
122. *See id.*
123. *See id.*
124. *See id.* at 471–72.
125. *See id.* at 472.
126. *Id.* at 474.
127. *Id.* at 475.
128. *See supra* note 104 and accompanying text.
129. 618 P.2d 601 (Ariz. 1980).

S-R zoning classification (service residential) that would allow him to construct a personal office building on the property.[130] The city zoning staff recommended that the rezoning request be denied for a number of reasons—one being that it would be contrary to the city's General Land Use Plan.[131] The city's Planning and Zoning Commission disagreed with the staff recommendation and approved the application by a four-to-three vote, which sent it to the City Council for approval.[132] The City Council unanimously voted to deny the rezoning and the appellants filed suit.[133] The appellants argued that the act of rezoning is a quasi-judicial function and therefore not subject to rational basis review.[134] The court noted that their position was in the minority and held that rezoning is a legislative function.[135] Applying rational basis review, the court acknowledged that the appellants argument—the diminution in value of their property outweighs the public need to maintain the current zoning—was important, but found that the appellants failed to meet their burden of demonstrating that the R1-43 zoning classification was arbitrary and capricious.[136]

In a more recent leading case, *Cabana v. Kenai Peninsula Borough*, the Supreme Court of Alaska rejected *Fasano*.[137] In *Cabana*, the Kenai Peninsula Borough traded a forty-acre parcel for a twenty-acre parcel with a purchaser looking to use the forty-acre parcel to store and process gravel to be sold to customers in the area.[138] The Kenai Peninsula Borough Code required that land owned by the borough must be classified before it can be sold.[139] In accordance with this requirement, the Borough Planning Commission held a public hearing and eventually recommended a light industrial classification for the parcel with a variance permitting material stockpiling and related activities.[140] The Kenai Peninsula Borough Assembly then held a public hearing on the proposed classification and, despite some objections, passed a resolution classifying the parcel as light

130. *Id.* at 602.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* ("The enactment of the original zoning ordinance is a legislative function, and we fail to see why the amendment of an ordinance should be of a different character. We accept the majority view that the enactment and amendment of zoning ordinances constitute legislative action. Since we hold that the decision to rezone is a legislative one, neither the motives of the councilmen in denying the application for rezoning nor the reasons that were spread before them to induce the denial of the rezoning request are proper subjects for judicial inquiry.").
136. *See id.* at 603. The court based its decision on the fact that zoning is "much more than mere classification of a particular piece of property." *Id.* The court noted that zoning "[a]mong other things . . . involves consideration of future growth and development, public streets, pedestrian walkways, drainage and sewage, increased traffic flow, [and] surrounding property values." *Id.*
137. 21 P.3d 833 (Alaska 2001).
138. *Id.* at 834.
139. *Id.*
140. *Id.* at 835.

industrial.[141] The appellants, led by Cabana, challenged the resolution arguing that it violated various procedural and statutory requirements, and that it constituted "spot zoning."[142] The appellants further argued that the Borough Assembly's classification was a quasi-judicial proceeding and thus not subject to deferential review.[143] The court disagreed, holding that small-scale rezonings are legislative decisions.[144] The court, relying on past precedent, held spot zoning is "the legal term of art for a zoning decision which affects a small parcel of land and which is found to be an arbitrary exercise of *legislative* power."[145] Therefore, "[j]ust as the act of spot zoning is a legislative act, the decision to spot zone is a legislative decision."[146]

### 2. Administrative Acts

Most states accord administrative zoning actions with a presumption of validity.[147] The justification for deference lies in the judgment that board members are experts whom courts should trust or that they are more familiar with local conditions than the reviewing court.[148] However, it is common for judges, after reciting the presumption of validity and stating "they will not overturn an administrative ruling unless it is arbitrary or capricious," to sometimes engage in a review that is less deferential than standard rational basis review for legislative action.[149] Generally, substantial evidence must support an administrative action, and thus the board must make findings so that "the court can assure itself that the board acted properly."[150]

## II. PUBLIC CHOICE THEORY

This part provides a general, but detailed, framework of public choice theory. It begins by discussing the theories of self-interested legislators and rationally ignorant voters. It next discusses the interest group theory of government and the collective action problem. Then, it applies public choice theory to local politics by first examining whether the rational-ignorance effect is present in local politics and whether interest groups have influence in the zoning process. Finally, it distinguishes public choice theory from corruption.

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141. *Id.*
142. *Id.*
143. *See id.*
144. *Id.* at 835–36.
145. *Id.* at 836. (quoting Griswold v. City of Homer, 925 P.2d 1015, 1020 n.6 (Alaska 1996)).
146. *Id.*
147. *See* JUERGENSMEYER & ROBERTS, *supra* note 18, § 5.37(B).
148. *Id.*
149. *Id.*
150. *Id.*; *see also, e.g.*, WASH. REV. CODE § 7.16.120(4)–(5) (1989).

James M. Buchanan and Gordon Tullock effectively founded public choice theory with their work *The Calculus of Consent: Logical Foundations of Constitutional Democracy*.[151] Public choice theory begins with the assumption that policymakers, like all individuals, are motivated by self-interest or, in economic terms, "utility maximization."[152] This assumption allows for economists to apply economics to political decision making.[153] Three important factors distinguish decision making in the political arena from a typical market transaction. First, rather than spending dollars, which are allocated unevenly, in the political arena people express their preferences (or "spend") with votes, which are usually distributed evenly. Second, voting takes place in the context of other voters whose preferences will affect the eventual outcome, unlike a typical market transaction where the outcome is determined solely by the buyer and seller. Third, preferences are often expressed through intermediaries, usually elected officials.[154] In order to better understand how each of these factors affects the analysis, a basic understanding of the economic principles used is needed.

### *A. Self-Interested Legislators*

A primary concern of public choice theory is "the agency costs that lead government officials to make decisions in their own interests, which may diverge from that of their constituents."[155] Given the assumption that legislators are rational self-interest maximizers, it should be expected that their primary interest is not pursuing the "common good."[156] Because the political arena is not like a typical market, profit maximization cannot simply be pegged to monetary profit. Instead, it is thought the profit-maximizing action of the legislator or administrator is to maximize her likelihood of reelection or reappointment, as failure to do so will result in the loss of whatever benefits come from holding office.[157] This assumption is supported by empirical evidence showing that, in Senate reelection campaigns, candidates tend to move toward the positions held by the most

151. JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY (1962).

152. *See id.* at 19–20.

153. *See* DENNIS C. MUELLER, PUBLIC CHOICE 1 (1979).

154. *See* JEFFREY L. HARRISON, LAW AND ECONOMICS IN A NUTSHELL 378–79 (4th ed. 2007); *see also* JAMES D. GWARTNEY, ET AL., ECONOMICS: PRIVATE AND PUBLIC CHOICE 126–27 (12th ed. 2009) (discussing the differences between governments and markets).

155. *See* Stewart E. Sterk, *Structural Obstacles to Settlement of Land Disputes*, 91 B.U. L. REV. 227, 248 (2011).

156. *See* BUCHANAN & TULLOCK, *supra* note 151, at 19–20.

157. *See* Daniel A. Farber & Philip P. Frickey, *The Jurisprudence of Public Choice*, 65 TEX. L. REV. 873, 891 (1987); *see also* GWARTNEY ET AL., *supra* note 154, at 130 ("Just as profits are the lifeblood of the market entrepreneur, votes are the lifeblood of the politician.").

recently elected Senator in the state.[158] The desire to get reelected could lead to two possible outcomes: (1) the legislator makes sure that the legislation she supports is, on average, legislation that is supported by a majority of her constituents; or (2) the legislator supports legislation that will get her approval of interest groups that can provide information about the candidate to the public, thus increasing the odds that those inclined to support the legislator will actually vote.[159] It should be noted that this model has been criticized for offering too simplistic an explanation of legislative voting.[160] Despite being generally supportive of public choice theory, Professors Farber and Frickey argue that ideology plays an important role in legislative voting and therefore propose a model that accounts for ideology.[161] Whether or not ideology should play a role is beyond the scope of this Note and its basic outline of public choice theory. Accounting for ideology, however, will not change the analysis or solutions proposed by this Note in Part IV.

### *B. Rationally Ignorant Voters*

Another pillar of public choice theory is its conception of the "rationally ignorant" voter.[162] Anthony Downs first developed the theory in his political science treatise, *An Economic Theory of Democracy*.[163] The theory asserts, as Downs phrased it, that "it is irrational to be politically well-informed because the low returns from data simply do not justify their cost in time and other scarce resources."[164] To summarize, voters are rational maximizers of self-interest and thus compare the costs and benefits of voting. Since the time required to gather political information has an "opportunity cost,"[165] and since it is extraordinarily unlikely that one individual vote will change the outcome of an election, the cost of voting outweighs the marginal benefit—often times zero.[166] It is therefore "rational for voters to remain ignorant of the political process."[167] This

158. *See* A. Glazer & M. Robbins, *How Elections Matter: A Study of U.S. Senators*, 46 PUB. CHOICE 163, 171 (1985) (concluding that "a nonreviewed senator does tend to move in the direction of the reviewed senator from his own state").

159. *See* Farber & Frickey, *supra* note 157, at 891–92.

160. *See id.* at 895 ("[E]conomic models clearly overlook important aspects of the political process."); *see also* RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM 265–67 (1985) (arguing that legislation may be motivated by a wide variety of concerns).

161. *See* Farber & Frickey, *supra* note 157, at 900–01.

162. *See* MARK PENNINGTON, LIBERATING THE LAND: THE CASE FOR PRIVATE LAND-USE PLANNING 59 (2002).

163. *See* ANTHONY DOWNS, AN ECONOMIC THEORY OF DEMOCRACY 260–76 (1957); *see also* BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER: WHY DEMOCRACIES CHOOSE BAD POLICIES 94 (2007).

164. *See* DOWNS, *supra* note 163, at 259.

165. In economics, "opportunity cost" is defined as [t]he highest valued alternative that must be sacrificed as a result of choosing an option." GWARTNEY ET AL., *supra* note 154, at 9.

166. *See* CAPLAN, *supra* note 163, at 94.

167. PENNINGTON, *supra* note 162, at 59.

rational ignorance empowers interest groups to "capture" the political process.[168]

### *C. The Interest Group Theory of Government*

Special interest groups exist to further the interests of their members.[169] Public choice theory defines a special interest as "one that generates substantial personal benefits for a relatively small number of constituents, while simultaneously imposing a small individual cost on a much larger, *unidentified* group of voters."[170] The economic analysis of interest groups is relatively straightforward and can be stated in conventional supply and demand terms.[171] "The demand for transfers is based upon the organizational costs facing potential interest groups."[172] A successful interest group will be one that can organize in a cost-efficient manner.[173] The "supply" of transfers is simply the inverse—that is, those for whom it would cost more than one dollar to organize to resist losing one dollar in the political process.[174] Without government coercion, the "supply" would not exist; hence, political agents facilitate the process of wealth transfers.[175] Political agents, motivated by the desire to get reelected, supply legislation that concentrates benefits on special interest groups in an attempt to put together a majority coalition of these groups.[176] Although the benefits forwarded to the special interest groups will likely be outweighed by the costs to the voting populace at large, the latter are unlikely to be politically active because of the rational-ignorance phenomenon explained earlier.[177] Evidence of this assertion is suggested by studies that have concluded New Deal spending by state was far more directly linked to the number of electoral votes and the probability of winning the state than to the perceived "need" for New Deal programs.[178]

#### 1. Drawback of Interest Groups: Rent-Seeking

One concern regarding interest groups is the that government officials will respond to their "rent-seeking"[179] and the result will be inefficient

168. *See id.* at 60.

169. *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 5 (1965).

170. *See* PENNINGTON, *supra* note 162, at 60.

171. *See* Robert B. Ekelund, Jr. & Robert D. Tollison, *The Interest-Group Theory of Government*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE 357, 359 (William F. Shughart II & Laura Razzolini eds., 2001).

172. *Id.*

173. *See id.* In simpler terms successful interest groups will be those that can organize and lobby for one dollar for a cost of less than one dollar. *Id.*

174. *See id.*

175. *See id.* at 359, 363.

176. *See* PENNINGTON, *supra* note 162, at 60.

177. *See id.* at 60; *see also supra* Part II.B.

178. *See* Ekelund, Jr. & Tollison, *supra* note 171, at 364.

179. In economics, "rent" is defined as "payments for the use of an economic asset in excess of the market price." Jonathan R. Macey, *Promoting Public-Regarding Legislation*

regulation combined with inefficient expenditure of resources to achieve that regulation.[180]

*Williamson v. Lee Optical*[181] is perhaps the best-known legal case of rent-seeking.[182] In *Williamson*, the Supreme Court reviewed an Oklahoma statute, which prohibited opticians from providing lenses or eyeglass frames without a prescription.[183] The practical effect was that no optician could fit old glasses into new frames or supply a lens—whether it be a new lens or one to duplicate a lost or broken lens—without a prescription.[184] The Supreme Court ultimately held that the legislation was not a denial of due process.[185] Relevant to the rent-seeking inquiry, however, is the fact that the optometrists heavily supported the legislation, and its intended economic effects were to limit competition in the market for eyeglasses and, thereby, increase the prices optometrists could charge.[186] Because this price increase is artificially created by the regulation, it is regarded as a form of "rent."[187]

The *Williamson* case therefore exemplifies the dangers of rent-seeking. The Supreme Court called the resulting regulation "needless" and "wasteful,"[188] but nevertheless it provided a great benefit to optometrists, who heavily supported its passage.[189]

### 2. Benefit of Interest Groups

There are, however, some benefits of interest group government. One such example is the development of factory legislation in the nineteenth century.[190] Despite conventional wisdom, public-interest motives likely did not lead to foreclosing children from textile industry jobs.[191] Instead, it has been argued that the owners of steam-driven mills lobbied for the legislation in order to increase their wealth by restricting competition from

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*Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 224 n.6 (1986). Rent-seeking, by extension simply refers to lobbying for those rents. *See id.* One classic example of rent-seeking is when a domestic industry seeks protective trade laws from foreign competition. All profits gained as a result of those protections are "rent." *See* Michael E. DeBow, *The Social Costs of Populist Antitrust: A Public Choice Perspective*, 14 HARV. J.L. & PUB. POL'Y 205, 214 (1991). *See generally* Gordon Tullock, *The Welfare Costs of Tariffs, Monopolies, and Theft*, 5 W. ECON. J. 224 (1967) (providing a general discussion as to how protective trade laws produce rents).

180. *See* Sterk, *supra* note 155, at 248–49.

181. 348 U.S. 483 (1955).

182. *See* Mark Tushnet, *Public Choice Constitutionalism and Economic Rights*, *in* LIBERTY, PROPERTY, AND THE FUTURE OF CONSTITUTIONAL DEVELOPMENT 23, 37 (Ellen Frankel Paul & Howard Dickman eds., 1990).

183. *See Williamson*, 348 U.S. at 486.

184. *See id.*

185. *See id.* at 487–88.

186. *See* Tushnet, *supra* note 182, at 37.

187. *See supra* note 179 (defining rent and rent-seeking).

188. *See Williamson*, 348 U.S. at 487.

189. *See supra* note 186 and accompanying text.

190. *See* Ekelund, Jr. & Tollison, *supra* note 171, at 366.

191. *See id.*

water-driven mills, which operated longer hours and employed more children.[192] Furthermore, labor interests, particularly male spinner operatives, also opposed the employment of children, in order to limit competition for their jobs.[193] So, ultimately these rent-seeking efforts resulted in a societal and institutional change.[194]

### *D. The Collective Action Problem*

The intuitive response to the interest group theory of government is that voter majorities can outweigh numerically smaller interest groups. In order for this to hold true, however, it must be true that group action and individual action are analytically similar, so that rational individuals will aggregate into rational majority voting groups.[195] Mancur Olson proved this widely held assumption false in his work *The Logic of Collective Action: Public Goods and the Theory of Groups*.[196] Olson argued that individual rationality does not imply collective rationality, especially in larger groups.[197] Olson's main support for this argument is what is known as the "free-rider problem."[198] The free-rider problem occurs when an individual takes advantage of the benefits of the activities of others without paying for those benefits.[199] This naturally leads to the conclusion that in the case of organizing a group, each individual would like to contribute a suboptimal amount because the entire group will share the benefits of her expenditure.[200] Thus, as Olson argues, rational individuals "will not act to achieve their common or group interests," as doing so allows other to free-ride off of their efforts.[201] Olson further contends that smaller groups can sometimes effectively organize around the free-rider problem using "informal arrangements and peer pressure."[202] Larger groups, by contrast, typically require "formal institutions and selective incentives to organize

192. *See id.* at 366–67.
193. *See id.* at 367.
194. *See id.* at 367–68.
195. *See* Omar Azfar, *The Logic of Collective Action*, *in* THE ELGAR COMPANION TO PUBLIC CHOICE, *supra* note 171 at 59.
196. *See* OLSON, *supra* note 169; *see also* Azfar, *supra* note 195, at 59 ("The central point of *The Logic* is that this is a non-trivial and often false assumption.").
197. *See* OLSON, *supra* note 169, at 50–51 ("Accordingly, large or 'latent' groups have no incentive to act to obtain a collective good because, however valuable the collective good might be to the group as a whole, it does not offer the individual any incentive to pay dues to any organization working in the latent group's interest, or to bear in any other way any of the costs of the necessary collective action."); *see also* Azfar, *supra* note 195.
198. *See* OLSON, *supra* note 169, at 50–51, 132–35.
199. JEFFREY M. PERLOFF, MICROECONOMICS 627 (6th ed. 2012).
200. *See* Azfar, *supra* note 195, at 59.
201. *See* OLSON, *supra* note 169, at 2 (emphasis omitted); *see also* Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1171 (1981) (applying the free-rider analysis to shareholder voting and concluding that "[b]ecause other shareholders take a free ride on any one shareholder's monitoring, each shareholder finds it in his self-interest to be passive").
202. Azfar, *supra* note 195, at 59; *see* OLSON, *supra* note 169, at 60.

and act collectively."[203] When coupled with the fact that voters are likely to be ignorant of political issues,[204] the instinctive conclusion is that individuals will not be able to effectively organize in large groups to override the influence of smaller interest groups.[205]

### *E. Rational Ignorance in Local Politics?*

The economist William A. Fischel has provided a strong counter argument to the rational-ignorance theory with regard to local politics.[206] Fischel begins by analogizing municipalities to business corporations.[207] In Fischel's model, the homeowner, like the shareholder, wants the municipality to maximize her asset value.[208] However, unlike the shareholder, the homeowner cannot diversify her assets and therefore bears an inordinate amount of risk in owning her home.[209] Additionally, unlike the shareholder, the homeowner often cannot simply sell at a loss as a result of poor management because the homeowner has a large portion of her wealth tied up in the property.[210] This, Fischel argues, leads to homeowners being more cautious about their decision to sell than almost any other transaction.[211] Homeowners, as a product of their decreased mobility, therefore have a high incentive to be informed about local politics and to organize to prevent local laws that decrease home values.[212]

Critics of Fischel point out that voter participation is generally significantly lower in purely local elections than in national elections.[213] Fischel, however, argues that lower political participation could be a sign of local voter satisfaction[214] and that a serious controversy could significantly increase local voter turnout.[215] For the purposes of this Note, it is sufficient to simply acknowledge the arguments on both sides.

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203. *See* Azfar, *supra* note 195, at 59; *see also* OLSON, *supra* note 169, at 46.

204. *See supra* notes 163–64 and accompanying text.

205. *Cf.* Ekelund, Jr. & Tollison, *supra* note 171, at 366 ("[T]he interest-group theory simply states that well-organized groups win transfers through government at the expense of the less-well-organized or unorganized segments of the polity.").

206. *See, e.g.*, WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS: HOW HOME VALUES INFLUENCE LOCAL GOVERNMENT TAXATION, SCHOOL FINANCE, AND LAND-USE POLICIES (2001).

207. *Id.* at 19.

208. *See id.* at 30.

209. *See id.*

210. *See id.* at 74–75.

211. *See id.* at 75.

212. *See id.* at 75–76.

213. *See, e.g.*, SIDNEY VERBA & NORMAN H. NIE, PARTICIPATION IN AMERICA: POLITICAL DEMOCRACY AND SOCIAL EQUALITY 31 (1972) (finding 72 percent of surveyed people report always voting in Presidential elections compared to just 47 percent in local elections); Zoltan L. Hajnal & Paul G. Lewis, *Municipal Institutions and Voter Turnout in Local Elections*, 38 URB. AFF. REV. 645, 646 (2003) (noting evidence that turnout in city elections may average half that of national elections).

214. *See* FISCHEL, *supra* note 206, at 89–90.

215. *See id.* at 90.

Fischel's analysis could also be read as endorsing the interest group theory of government if homeowners are thought of as a "group," as some commentators suggest they should be.[216] In this paradigm, homeowners can be thought of as a highly successful and influential interest group in local politics.[217]

### *F. Interest Groups and Zoning*

There is evidence to suggest that interest groups are active in the zoning context.[218] In a 2005 study, researchers surveyed city council members from sixty-eight medium-sized (defined as cities with a population of 100,000–300,000) American cities.[219] The results showed that 57 percent of respondents felt interest groups were "very active" in zoning, while 36 percent felt they were "somewhat active," and only 8 percent felt they were "not at all" active.[220] Furthermore, 46 percent of those surveyed felt interest groups were "very" influential in zoning, while 45 felt they were "somewhat" influential, and only 9 percent felt they were "not at all" influential.[221] The study thus provides strong evidence that interest groups take an active and influential role in zoning.

Interest groups have also begun to see the potential for conditional zoning to help them achieve their goals. A recent project by the Center for Law and the Public's Health at Johns Hopkins & Georgetown Universities found that conditional zoning could be used in an effort to ban or restrict fast food outlets.[222] The authors argue that since most courts will uphold conditional zoning so long as it is in the public interest,[223] and promoting public health is undoubtedly in the public interest, conditional zoning is a viable avenue to use to restrict fast food outlets.[224]

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216. *See, e.g.*, Christopher A. Cooper, Anthony J. Nownes & Steven Roberts, *Perceptions of Power: Interest Groups in Local Politics*, 37 ST. & LOC. GOV'T REV. 206, 207 (2005) (treating "neighborhood organizations" as an interest group); David R. Elkins, *The Structure and Context of the Urban Growth Coalition: The View from the Chamber of Commerce*, 23 POL'Y STUD. J. 583, 591–93 (1995) (treating "neighborhood groups" as an interest group).

217. *See* Cooper et al., *supra* note 216, at 212 (including a table displaying the results of a study that concluded that "neighborhood associations" were the most active in local politics and had the highest level of influence).

218. *See id.* at 210.

219. *See id.* at 208.

220. *See id.* at 211.

221. *See id.*

222. *See* Julie Samia Mair et al., *The Use of Zoning To Restrict Fast Food Outlets: A Potential Strategy To Combat Obesity*, CENTER FOR L. & PUB. HEALTH, 22 (Oct. 2005), www.publichealthlaw.net/Zoning%20Fast%20Food%20Outlets.pdf ("[A] municipality could rezone a residential site to allow the development of all types of restaurants except fast food establishments or to allow only supermarkets.").

223. *See supra* notes 67–68 and accompanying text.

224. *See* Mair et al., *supra* note 222, at 24.

### *G. Public Choice Versus Corruption*

Public choice factors should not be treated the same as standard corruption.[225] Quid pro quo politics differ from bribery, fraud, and self-dealing in three ways.[226] First, a political system that encourages legislators to represent the interests of their constituents may also provide an incentive to monitor those legislators for standard corruption.[227] Second, strict rules on legal donations may simply drive those donations underground, thus it is important to maintain a distinction between donations and illegal, secret gifts.[228] Third, some reform proposals designed to counter corruption involve the use of legal incentive payments, and mixing financial incentives with the provision of public services is always corrupt.[229] Therefore, it is important to remember for the purposes of this Note that legislators responding to self-interest incentives should not be understood in the same way as typical corruption is. Typical corruption can be countered with prosecution, institutional reforms, and more effective policing.[230] Public choice factors, by contrast, are inherent in the system and, therefore, a far more complicated restructuring of the political decision-making rules is likely necessary to combat them.[231]

## III. CONTRACT ZONE? CONDITIONAL ZONE? BOTH? NEITHER?

Jurisdictions are currently split on whether to allow contract and conditional zoning, only conditional zoning, or neither. This part outlines the conflict and explains the arguments forwarded by all sides in order to later analyze them through a public choice perspective. It begins with jurisdictions that only allow conditional zoning, then proceeds to jurisdictions that allow both. It next proceeds to jurisdictions that allow neither, and concludes with jurisdictions that have declined to rule on the issue.

### *A. Jurisdictions That Only Allow Conditional Zoning*

The modern trend is for jurisdictions to allow unilateral conditional zoning, but invalidate bilateral contract zoning.[232] The justification for this distinction is that it provides needed flexibility without allowing a

225. *Cf.* Susan Rose-Ackerman, *Corruption*, *in* THE ENCYCLOPEDIA OF PUBLIC CHOICE 67, 67 (Charles K. Rowley & Friedrich Schneider eds., 2004).

226. *See id.*

227. *See id.*

228. *See id.* The Supreme Court's decision in *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010), lifting contribution limits to Super PACs may lessen the prevalence of secret gifts.

229. *See* Rose-Ackerman, *supra* note 225, at 67.

230. *See* Bradley C. Karkkainen, *Zoning: A Reply to the Critics*, 10 J. LAND USE & ENVTL. L. 45, 87 (1994) (discussing how to address corruption concerns in zoning).

231. *See* BUCHANAN & TULLOCK, *supra* note 151, at 283–95.

232. *See supra* note 59 and accompanying text.

bargaining away of the police power.[233] Professor Judith Welch Wegner has suggested that the distinction has little practical meaning and instead serves primarily to describe the ultimate outcome and create an apparent dichotomy of classification, without fully considering the potential overlap.[234] Nevertheless, it is accepted as the modern trend.[235]

1. History of the Modern Trend and the Words of Economic Commentators

The history of how the modern trend emerged is important. Initially, courts and academics were hostile to the idea of contract zoning.[236] Some courts struck down the practice as an illegal bargaining away or abrogation of the police power.[237] Others struck down the practice as inconsistent with uniformity requirements.[238] And others rejected the practice for fear of corruption or favoritism.[239]

Despite the then general rejection of the practice, New York expressed its approval of contract zoning in *Church v. Town of Islip*.[240] In *Church*, neighboring property owners brought suit against the Town of Islip and against its Town Board to have a zoning change from a Residence A classification to a Business classification voided as unconstitutional.[241] The neighbors contended that the rezoning was illegal contract zoning because the Town Board's consent to the rezoning was subject to various conditions.[242] The court recognized the growing population of Suffolk County and held that, "[s]ince the Town Board could have . . . zoned [the]

233. *See, e.g.*, Dacy v. Vill. of Ruidoso, 845 P.2d 793, 797 (N.M. 1992) (holding that "one form of contract zoning is legal: a unilateral contract in which a party makes a promise in return for a municipality's *act* of rezoning"); Chrismon v. Guilford Cnty., 370 S.E.2d 579, 586 (N.C. 1988) (holding that North Carolina now approves conditional zoning and that it will add a "valuable and desirable flexibility" to the zoning process).

234. *See* 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, 980 (1987).

235. *See* Green, *supra* note 50, at 451 ("The modern trend is in favor of upholding conditional zoning.").

236. *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. 3, 21 (2005) ("[C]ourts and academics initially expressed strong disapproval of contract zoning . . . .").

237. *See* V.F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952).

238. *See* Campion v. Bd. of Aldermen, 859 A.2d 586, 601 (Conn. App. Ct. 2004); Bd. of Cnty. Comm'rs v. H. Manny Holtz, Inc., 501 A.2d 489, 493 (Md. Ct. Spec. App. 1985).

239. *See, e.g.*, Hartnett v. Austin, 93 So.2d 86, 89 (Fla. 1956) (stating that if a city could legislate by contract, "each citizen would be governed by an individual rule based upon the best deal that he could make with the governing body"); City of Knoxville v. Ambrister, 263 S.W.2d 528, 530 (Tenn. 1953) (stating that contract zoning destroys "that confidence in the integrity and discretion of public action which is essential to the preservation of civilized society" (quoting Osborne v. Allen, 226 S.W. 221 (Tenn. 1920))).

240. 168 N.E.2d 680 (N.Y. 1960).

241. *See id.* at 681.

242. *See id.*

corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation."[243]

The *Church* court set the stage for the movement toward conditional zoning, and its decision was followed by commentators writing in support of the practice on economic efficiency grounds.[244] A commentator at the forefront of the issue was Professor Robert C. Ellickson, who argued that the goal of land use controls from an economic efficiency standpoint was to minimize "the sum of nuisance costs, prevention costs, and administrative costs."[245] From that premise, Ellickson concluded that zoning would "inevitably result[] in considerable prevention and administrative costs"—meaning it must result in large reductions in nuisance costs to be efficient.[246] From Ellickson's perspective, this is unlikely because market allocations of land could just as effectively reduce nuisance costs as a zoning system; however, the zoning system runs the danger of the zoning drafters attempting to eliminate *all* nuisance costs.[247] Perhaps counterintuitively, it is not desirable for zoning drafters to eliminate all nuisance costs because doing so will impose higher direct and indirect costs on the whole population than benefits on the select few the zoning ordinance is intended to protect.[248] From these observations, Ellickson concluded that mandatory standards in zoning are costly, but such costs could be reduced if zoning prohibitions could be lifted by damage payments.[249] Ellickson endorsed contract and condition zoning as two ways of allowing for prohibitions to be lifted by damage payments.[250]

Professor Lee Anne Fennell also found economic support for bargained-for zoning.[251] Fennell argued that because zoning law is usually based on the subjective views of a political majority, it is unlikely to provide an efficient initial allocation of entitlements between the landowner and the

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243. *Id.* at 683.

244. *See, e.g.*, Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines As Land Use Controls*, 40 U. CHI. L. REV. 681, 708 (1973); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1, 20–25 (2000); Jennifer G. Brown, Note, *Concomitant Agreement Zoning: An Economic Analysis*, 1985 U. ILL. L. REV. 89, 110.

245. Ellickson, *supra* note 244, at 690. Ellickson defines nuisance costs as those resulting from "harmful externalities [that] decrease the utility and thus the value of neighboring property." *Id.* at 688. He defines prevention costs as "nonadministrative expenditures made, or opportunity costs incurred, by either a nuisance maker or his injured neighbor to reduce the level of the nuisance costs." *Id.* And, he defines administrative costs as "both public and private costs of getting information, negotiation, writing agreements and laws, policing agreements and rules, and arranging for the execution of preventive measures." *Id.* at 689.

246. *See id.* at 693.

247. *See id.* at 693–94.

248. *See id.* at 694–95.

249. *See id.* at 708.

250. *See id.* ("[C]onditional use permits [and] contract zoning . . . are actually vehicles by which local governments agree to waive inefficient standards when offered a sufficiently attractive package of donations and preventative measures.").

251. *See* Fennell, *supra* note 244, at 84–85 (concluding that "[e]fficient land use requires more flexibility . . . than . . . judicial bargaining limits can offer").

community.[252] Furthermore, Fennell acknowledged that if the interest group theory of government is accepted, the initial allocation of property rights might diverge even further from the social optimum.[253] Therefore, whether the law represents the subjective view of a majority or an interest group, it is unlikely to allocate property rights at the socially optimal level. However, according to Fennell, Pareto superior[254] improvements from this original poor allocation can be achieved through bargaining.[255] To illustrate this point, Fennell imagines a market setting where the efficient allocation point is where the marginal cost to the landowner equals the marginal benefit to the community at large.[256] The way to achieve said equilibrium point is through a bargaining process where the land use "winner" can compensate the "losers."[257] Thus, Fennell supports bargained-for zoning as a way to make Pareto superior improvements to the suboptimal initial allocation.

Professor Jennifer G. Brown, then writing as a student, also endorsed the Fennell view.[258] Brown argued that a restrictive zoning classification could impose costs on a landowner that exceed potential damage to the community from a rezoning of the landowner's property.[259] Brown

252. *See id.* at 20; *see also* David A. Dana, *Land Use Regulation in an Age of Heightened Scrutiny*, 75 N.C. L. REV. 1243, 1269 (1997) ("[O]ver-regulation may benefit the dominant political majority even though it does not maximize the welfare of the community as a whole.").

253. *See* Fennell, *supra* note 244, at 20 n.81.

254. In economics, "Pareto superiority is the principle that one allocation of resources is superior to another if at least one person is better off under the first allocation than under the second and no one is worse off." Richard A. Posner, *The Ethical and Political Basis of the Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488 (1980).

255. *See* Fennell, *supra* note 244, at 21. The original justification for bargaining in land use comes from the Coase Theorem. The Coase Theorem predicts that, in the absence of transaction costs, only net socially beneficial development projects will occur because whenever current residents value stopping a project more than the developer values proceeding with that project, the current residents will simply purchase the developer's entitlement and thus, a bargain will have occurred that produced the socially beneficial outcome. *See* Dana, *supra* note 252, at 1248 n.15 (explaining the Coase Theorem); *see also* R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960) (finding that where "market transactions are costless . . . a rearrangement of rights will always take place if it would lead to an increase in the value of production").

256. *See* Fennell, *supra* note 244, at 22–25; *see also* William A. Fischel, *Equity and Efficiency Aspects of Zoning Reform*, 27 PUB. POL'Y 301, 304 (1979) (making a similar argument from which Fennell largely borrows).

257. *See* Fennell, *supra* note 244, at 24. A critique of this argument is that it assumes policymakers can measure when the equilibrium point has been reached, but this may in fact be an impossible task as no single individual, or even group of individuals, has the requisite knowledge necessary to know when equilibrium has been reached. *See* F.A. Hayek, *The Use of Knowledge in Society*, 35 AM. ECON. REV. 519, 519 (1945) ("The peculiar character of the problem of a rational economic order is determined precisely by the fact that the knowledge of the circumstances of which we must make use never exists in concentrated or integrated form, but solely as the dispersed bits of incomplete and frequently contradictory knowledge which all the separate individuals possess."). *See generally* PENNINGTON, *supra* note 162, at 35–57 (using Hayek's central argument to advocate for the abolition of all zoning).

258. *See* Brown, *supra* note 244, at 110.

259. *See id.*

asserted that contract zoning, on the other hand, "overcomes this sort of inefficiency by giving the landowner the chance to develop the land more intensively and bear the costs that may result from the more intensive development."[260]

### 2. Acceptance of the Trend: *Chrismon*

Courts in several states have started to accept the economic rationale.[261] The leading case embracing this position is *Chrismon v. Guilford County*.[262] In *Chrismon*, one of the defendants had been operating a business consisting of storing and selling grain and selling and distributing chemicals on a tract of land adjacent to his residence since 1948.[263] In 1964, Guilford County adopted a zoning ordinance, which zoned the property as "A-1 Agricultural."[264] The storage and sale of grain was permitted under the new classification, but the sale and distribution of agricultural chemicals was not.[265] However, because the activity preexisted the ordinance, the nonconforming use was allowed, but that element of the business could not be expanded.[266] The plaintiffs in the case bought land next to an additional tract of land owned by the defendant.[267] In 1980, the defendant expanded his activities onto the land next to the plaintiffs', and the plaintiffs filed a complaint with the Guilford County Inspections Department.[268] The defendant responded by requesting that the County rezone the property to "Conditional Use Industrial District."[269] After holding a public hearing concerning the matter, the Guilford County Board of Commissioners voted to rezone the property as requested.[270] The plaintiffs immediately filed suit alleging, among other things, that the

260. *Id.*

261. *See, e.g.*, Old Canton Hills Homeowners Ass'n v. Mayor of Jackson, 749 So.2d 54, 57–60 (Miss. 1999) (explaining the conflict and holding that the contingency zoning agreement did not bargain away the police power and "was both legal and beneficial"); Chrismon v. Guilford Cnty., 370 S.E.2d 579, 586 (N.C. 1988) ("[W]e are persuaded that [conditional zoning], when properly implemented, will add a valuable and desirable flexibility to the planning efforts of local authorities."); State *ex rel.* Zupancic v. Schimenz, 174 N.W.2d 533, 537 (Wis. 1970) ("The virtue of allowing private agreements to underlie zoning is the flexibility and control of the development given to a municipality to meet ever-increasing demands for rezoning in a rapidly changing area."); *see also* Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249, 258 (Tex. App. 2004), *rev'd on other grounds*, 198 S.W.3d 770 (Tex. 2006); State *ex rel.* Myhre v. City of Spokane, 422 P.2d 790, 796 (Wash. 1967).

262. 370 S.E.2d 579 (N.C. 1988).

263. *See id.* at 581.

264. *See id.*

265. *See id.*

266. *See id.*

267. *See id.*

268. *See id.*

269. *See id.* at 581–82.

270. *See id.* at 582.

County's actions constituted contract zoning.[271] The trial court held that it did not constitute contract zoning, but the appellate court held that it did.[272]

The Supreme Court of North Carolina considered the matter and concluded the court of appeals decision "virtually outlaw[ed]" conditional zoning, thus making it appropriate to address its legality in North Carolina.[273] The court engaged in a discussion of the benefits of conditional zoning, namely that "it permits a given local authority greater flexibility in balancing conflicting demands."[274] While acknowledging the potential concerns,[275] the court adopted conditional zoning in North Carolina and argued that conditional zoning, "when properly implemented, will add a valuable and desirable flexibility to the planning efforts of local authorities throughout [the] state."[276] Later in the decision, the court explained its distinction between contract and conditional zoning, namely that conditional zoning is a unilateral transaction while contract zoning is a bilateral transaction. It further explained that conditional zoning preserves the local zoning authority's decision-making authority, while in contract zoning it abandons that authority by binding itself to the agreement.[277] The *Chrismon* court therefore adopted conditional zoning for its greater flexibility, while drawing the common distinction from contract zoning.[278] Other courts have, like the *Chrismon* court, found that conditional zoning provides needed flexibility and efficiency while still preserving the state's police power.[279]

### *B. Jurisdictions That Openly Permit Both*

As stated earlier, the distinction between conditional and contract zoning may be in name only;[280] however, at least two states, including Washington and Maine, openly permit both.[281] In *City of Redmond v. Kezner*,[282] the Supreme Court of Washington held that a "concomitant agreement contain[ed] no express promise by the city to rezone."[283] The court noted, however, that the distinction for the purposes of validity was

271. *See id.*
272. *See id.*
273. *See id.* at 583.
274. *Id.* at 584.
275. *See id.* at 584–85 (discussing how other courts had objected to conditional zoning on the basis that it constituted illegal spot zoning, that is it not authorized by the state's enabling legislation, and that it results in an improper and illegal abandonment of the local government's police powers).
276. *See id.* at 586.
277. *See id.* at 594.
278. *See supra* notes 67, 233 and accompanying text.
279. *See supra* note 261 and accompanying text.
280. *See* Wegner, *supra* note 234, at 980.
281. *See* ME. REV. STAT. ANN. tit. 30A, §§ 4301, 4352(8) (2010); Chrobuck v. Snohomish Cnty., 480 P.2d 489 (Wash. 1971); *see also* Green, *supra* note 50, at 485–88.
282. 517 P.2d 625 (Wash. Ct. App. 1973).
283. *Id.* at 630.

unimportant.[284] As the Supreme Court of Washington explained in *Chrobuck v. Snohomish County*,[285] "concomitant agreement[s] provide[] a source of flexibility by allowing an intermediate use permit, between absolute denial and complete approval of the petition."[286] In other words, the court felt a zoning ordinance should only be declared invalid if it could be shown that there was no valid reason for the change, if it was clearly arbitrary and unreasonable, or if the city was using the concomitant agreement solely for the benefit of private speculators.[287]

Maine has opted to permit both conditional and contract zoning by statute.[288] The Maine statute requires the planning board to conduct a public hearing on a developer's proposed contract zoning agreement and to provide notice of this hearing to the public and the neighboring landowners.[289]

It has also been suggested that Nebraska accepts both conditional and contract zoning.[290] The leading Nebraska case is *Giger v. City of Omaha*.[291] In *Giger*, the Midlands Development Co. purchased property and sought a rezoning classification to allow it to establish a mixed residential/commercial project on the property.[292] Midlands successfully negotiated four separate agreements with the city, collectively known as the "the development agreement."[293] After the city was hesitant to grant the rezoning application, Midlands offered nineteen acres of its land as parkland, but the planning board still rejected the offer.[294] Midlands then bettered its offer, this time offering to donate twenty-five acres and to contribute over 400,000 dollars for "certain off-site public street improvements."[295] This offer was accepted by the planning board but rejected by the City Council.[296] Eager to have the rezoning completed, Midlands met with City Councilman David Stahmer, an opponent of the project, in an attempt to convince him to support the project.[297] Stahmer agreed to change his vote in exchange for Midlands donating thirty-six acres as parkland and promising to "locate all future residential buildings

284. *See id.* (stating that even "[i]f the city ha[d] made the promises claimed, they [would not be] illegal under the *Mhyre* rationale in which the city promised to rezone.").
285. 480 P.2d 489 (Wash. 1971).
286. *Id.* at 507.
287. *See id.* at 506. (citing State *ex rel.* Myhre v. City of Spokane, 422 P.2d 790, 796 (Wash. 1967)).
288. *See* ME. REV. STAT. ANN. tit. 30A, §§ 4301, 4352(8) (2010).
289. *See id.*
290. *See* Eric Pearson, *Contract Zoning in Nebraska After* Giger v. City of Omaha, 23 CREIGHTON L. REV. 191, 199 (1990) (finding that the holding in *Giger* endorsed contract zoning); Michael Wainwright Whitcher, Comment, Durand v. IDC Bellingham, LLC*: Towns for Sale?*, 39 NEW ENG. L. REV. 871, 878 n.37 (2005) (same).
291. 442 N.W.2d 182 (Neb. 1989).
292. *See id.* at 187–88.
293. *See id.* at 188.
294. *See* Pearson, *supra* note 290, at 197.
295. *Id.*
296. *See id.* at 197–98.
297. *See id.* at 198.

outside the flood plain."[298] Midlands accepted this arrangement and the City Council approved the rezoning.[299] Neighboring landowners brought suit asserting that the rezoning agreement constituted illegal contract rezoning.[300] The court upheld the rezoning and determined that a "city should be permitted to condition rezoning ordinances on the adoption of an agreement between the developer and the city."[301] In order to avoid confusion, the court opted to refer to this rezoning arrangement as "conditional zoning," although the agreement was bilateral.[302]

### *C. Jurisdictions That Permit Neither*

Some jurisdictions permit neither contract nor conditional zoning.[303] Two jurisdictions that consistently prohibit contract and conditional zoning are Connecticut[304] and Pennsylvania.[305]

The leading Connecticut case against contract and conditional zoning is *Bartsch v. Planning & Zoning Commission*.[306] In *Bartsch*, abutting landowners appealed from a Town Commission's grant of a zone change to allow construction of a medical office building in what had been a residential zone.[307] The court ruled that the commission had "grossly violated the statutory uniformity requirement by requiring . . . that a buffer zone be created between the property at issue and the surrounding properties as a prerequisite to its approval of a zone change."[308] Although the court declined to rule on the conditional zoning challenge, its holding has been interpreted as requiring "that zone changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances, and when the regulations are uniformly applied."[309]

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298. *Id.*
299. *See id.*
300. *See* Giger v. City of Omaha, 442 N.W.2d 182, 189 (Neb. 1989).
301. *Id.* at 190.
302. *Id.*
303. *See* Kaufman v. Zoning Comm'n, 653 A.2d 798, 812 (Conn. 1995) ("[Z]one changes may be conditionally granted only when regulations authorize conditions to be imposed in specific circumstances, and when the regulations are uniformly applied."); Carlino v. Whitpain Investors, 453 A.2d 1385, 1388 (Pa. 1982) ("'Contracts . . . have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations.'" (quoting Hous. Petroleum Co. v. Auto. Prods. Credit Ass'n, 87 A.2d 319, 322 (N.J. 1952))).
304. *See* CONN GEN. STAT. ANN. § 8-2 (West 2011) ("[Zoning] regulations shall be uniform for each class or kind of buildings, structures or use of land throughout each district . . . .").
305. *See Carlino*, 453 A.2d at 1388 (declining to accept contract or conditional zoning); *see also* Miravich v. Twp. of Exeter, 54 A.3d 106, 111–12 (Pa. Commw. Ct. 2012) (reiterating Pennsylvania's opposition to contract and conditional zoning).
306. 506 A.2d 1093 (Conn. App. Ct. 1986).
307. *See id.* at 1094–95.
308. *Id.* at 1095.
309. Kaufman v. Zoning Comm'n, 653 A.2d 798, 812 (Conn. 1995) (citing *Bartsch*, 506 A.2d 1093 at 1095–96).

The leading Pennsylvania case is *Carlino v. Whitpain Investors*.[310] In *Carlino*, a developer was constructing an apartment complex across from the appellant's residence.[311] In 1973, the township had agreed to rezone the property from a single-family classification to a multifamily classification; however, unbeknownst to the appellants, in 1978 the township had included a provision that required an access road to a major highway also be built.[312] The appellants sought an injunction alleging that the original rezoning was contractually conditioned on there being no access road.[313] The court declined to uphold conditional zoning, reiterating that "individuals cannot, by contract, abridge police powers which protect the general welfare and public interest."[314]

The courts in Connecticut, therefore, are concerned with the lack of uniformity in contract and conditional zoning, while the Pennsylvania courts are concerned with the state bargaining away its police powers.

### *D. Jurisdictions That Have Declined To Rule on the Issue*

North Dakota,[315] Arkansas,[316] and Indiana[317] have declined to rule on the issue. North Dakota recently did so in *Hector v. City of Fargo*.[318] In *Hector*, the appellants submitted a request to rezone land classified as "agricultural" to "'general commercial,' which would allow the land to be used for retail, service, office and commercial uses."[319] The appellant's initial request sought to change a total of approximately 145 acres of land.[320] City representatives voiced concerns with the initial request—mainly how it might affect road access points, utility easements, and construction issues.[321] In response to these concerns, the appellants submitted a revised application that requested that approximately 132 acres be rezoned.[322] City officials expressed concerns about the second plan regarding storm water retention, and in response the appellants offered a third plan that requested that approximately 128 acres be rezoned.[323] The third plan was submitted to the staff of the City of Fargo Planning

310. 453 A.2d 1385 (Pa. 1982).
311. *See id.* at 1386.
312. *See id.*
313. *See id.* at 1387.
314. *Id.* at 1388.
315. *See* Hector v. City of Fargo, 760 N.W.2d 108, 115 (N.D. 2009) (declining to rule on the legality of contract zoning).
316. *See* Murphy v. City of W. Memphis, 101 S.W.3d 221, 226 (Ark. 2003) (declining to rule on the legality of contract zoning).
317. *See* Ogden v. Premier Props., USA, Inc., 755 N.E.2d 661, 668–70 (Ind. Ct. App. 2001) (noting that Indiana has not ruled on the legality of contract zoning and declining to do so).
318. 760 N.W.2d 108 (N.D. 2009).
319. *See id.* at 109.
320. *See id.*
321. *See id.*
322. *See id.* at 110.
323. *See id.*

Department, which ultimately recommended that the City Commission reject the rezoning request.[324] The City Commission held a public hearing and decided that, although the Planning Department staff had been generally supportive of commercial expansion, neighborhood opposition recommended denial of the request, and therefore the request was denied.[325] On appeal to the Supreme Court of North Dakota, the appellants argued that the city engaged in illegal contract zoning by having the initial negotiations with them.[326] While noting that contract zoning is generally illegal throughout the country and that the court had never ruled on contract zoning in North Dakota, the court declined to set North Dakota precedent on the issue in the case as it held there was "no instance of contract zoning between the City of Fargo and the Hectors."[327]

The Supreme Court of Arkansas also declined to rule on the legality of contract zoning in *Murphy v. City of West Memphis*.[328] In *Murphy*, a company wanted to sell fireworks within the city, but an ordinance made doing so illegal.[329] A competitor company was exempt from the ordinance because it had been grandfathered in.[330] The prohibited company filed suit against the city, and at a public hearing the company agreed to dismiss the lawsuit if the city voted in favor of an ordinance allowing it to sell fireworks at a specified location.[331] The city passed several zoning ordinances to allow this, and the ordinances were subsequently challenged as contract zoning.[332] The trial court found that the only reason the city passed the zoning ordnances was to settle the lawsuit, but held that that was acceptable if the ordinances were passed through a bona fide zoning procedure.[333] The supreme court agreed and found that, although contract zoning was an issue of first impression for Arkansas, none of the circumstances that traditionally give rise to contract zoning were present and therefore declined to hold on the legality of contract zoning in the case.[334]

Indiana has most recently declined to rule on the legality of contract zoning in *Ogden v. Premier Properties, USA, Inc*.[335] In *Ogden* the City Council voted to rezone certain property from residential to commercial.[336]

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324. *See id.*
325. *See id.*
326. *See id.* at 115.
327. *See id.*
328. 101 S.W.3d 221 (Ark. 2003).
329. *See id.* at 223.
330. *See id.*
331. *See id.* at 223–24.
332. *See id.*
333. *See id.* at 224.
334. *See id.* at 226 ("[T]he question of the legality of contract zoning in the State of Arkansas is not an issue that need be addressed by this court in the instant appeal."); *see also* PH, LLC v. City of Conway, 344 S.W.3d 660, 669 (Ark. 2009) (again declining to rule on the legality of contract zoning).
335. 755 N.E.2d 661 (Ind. Ct. App. 2001).
336. *See id.* at 664.

The developer had filed a request to rezone the property four years earlier.[337] That request was recommended for denial by the Area Plan Commission and was subsequently denied by the City Council.[338] The developer then filed another two requests to rezone the property but each was denied.[339] All of the requests "included a use and development commitment . . . which placed restrictions and requirements on the proposed development."[340] The City Council considered the developer's latest request at a hearing where the developer "introduced a document titled 'Covenant' that contained written commitments 'in addition to the covenants set forth in the Use and Development Commitment.'"[341] The commitments were conditioned on the City Council approving the request and were binding on the developer for twenty years.[342] The City Council subsequently voted in favor of the rezoning request.[343] Neighboring landowners filed suit alleging, among other claims, that the rezoning constituted illegal contract zoning.[344]

The court noted that it had never ruled on the legality of contract zoning and declined to do so.[345] The court based its decision on *Prock v. Town of Danville*,[346] where it had previously declined to rule on the legality of contract zoning.[347] In *Prock*, the Town was a party to the agreement and the court still declined to rule on contract zoning.[348] Here, the town was not a party to the agreement, making the case for contract zoning significantly weaker.[349] Furthermore, as in *Prock*, the rezoning was approved before the agreement became effective, meaning it was impossible for the town to have contracted away its police power.[350] Based on these facts, the court found it unwise to rule on the legality of contract zoning at that time.[351]

## IV. EITHER PROHIBIT BOTH CONTRACT AND CONDITIONAL ZONING OR HEIGHTEN THE STANDARD OF JUDICIAL REVIEW

The conflicting positions of some courts,[352] as well as others' hesitation to rule on the issue,[353] demonstrates an overall confusion regarding the

337. *See id.*
338. *Id.*
339. *See id.*
340. *Id.*
341. *Id.*
342. *Id.* at 664–65.
343. *Id.* at 665.
344. *See id.*
345. *See id.* at 668–70.
346. 655 N.E.2d 553 (Ind. Ct. App. 1995).
347. *See id.* at 561.
348. *See id.* at 560–61.
349. *See Ogden*, 755 N.E.2d at 670–71.
350. *See id.* at 669.
351. *See id.* at 668–70 (declining to rule on the legality of contract zoning). This decision has been criticized as "evasive and superficial," but nevertheless Indiana has declined to address contract zoning. *See* Green, *supra* note 50, at 420.
352. *See supra* Part III.A–C.
353. *See supra* Part III.D.

implications of contract and conditional zoning. This part begins by applying public choice principles to the problem and then recommends two solutions for conflicted states. The first solution is to outlaw both contract and conditional zoning because of their vulnerability to public choice concerns. The second solution recognizes that contract and conditional zoning may provide needed flexibility to the zoning process and, therefore, recommends that jurisdictions that opt to permit them apply a *Fasano*-like standard of judicial review when evaluating the decisions in court.

### *A. Public Choice and Contract/Conditional Zoning*

Both contract and conditional zoning are highly vulnerable to capture by interest groups. Because both provide legislators with a wide range of discretion in what they bargain for,[354] it is likely legislators will opt to bargain for conditions favored by influential interest groups in the locality.[355] The high level of discretion makes contract and conditional zoning more susceptible to agency capture than Euclidean zoning. Euclidean zoning, due to its uniformity and lack of discretion,[356] is only vulnerable to capture during the drafting of the original zoning allocation. Once the allocation is set, it is far more costly for interest groups to lobby for a change to the entire code than it is to lobby for a particular contractual condition on an individual parcel.[357] Even accepting Professors Farber and Frickey's argument that ideology plays a major role in legislative decisions,[358] legislators are still likely to appease interest groups so long as those groups' views are consistent with their ideological outlook.

Both scenarios are concerning for two reasons. First, acting to appease interest groups can often result in inefficient and burdensome regulations, or lack thereof, that do not serve the interests of the public at large.[359] And second, even though interest group lobbying may have beneficial results,[360] contract and conditional zoning allow legislators to use the zoning system for purposes outside its intended purpose. The intended function of zoning, as the *Hanna* court eloquently stated, was "to ensure an orderly physical development of the city, borough, township or other community by confining particular uses of property to certain defined areas."[361] While it

354. *See supra* note 49 and accompanying text.

355. *See supra* Part II.A, C.

356. *See supra* notes 28–30 and accompanying text.

357. Recall that interest groups can only be effective when the benefits gained by their lobbying outweigh the costs of lobbying, so interest groups will prefer to lobby when it is cheapest to do so. *See supra* note 173 and accompanying text. Like the situation with legislators, contract and conditional zoning are cheaper for interest groups to lobby for due to their flexibility.

358. *See supra* note 161 and accompanying text.

359. *See supra* Part II.C.1; *see also* Dana, *supra* note 252, at 1269 (discussing the negatives of overregulation).

360. *See supra* Part II.C.2 (discussing how interest group involvement led to laws prohibiting child labor); *see also* notes 222–24 and accompanying text (discussing how conditional zoning could be used to combat obesity).

361. *See supra* note 8 and accompanying text.

is undoubtedly true that SZEA envisions broader purposes of zoning, these purposes are still consistent with a desire to make decisions that improve the general welfare of the community at large, not influential interest groups.[362] So, while it is certainly possible that appeasing influential interest groups may lead to improvements in the general welfare of the community at large, there is no guarantee this will be the case, and making it easier for legislators to act without that purpose only increases the likelihood that rezoning decisions will not be made consistent with the intended goals of zoning.

It is also unlikely that the distinctions drawn by courts regarding the difference between conditional and contract zoning will provide a solution.[363] Courts draw the distinction based on whether the municipality has entered into a bilateral or unilateral contract,[364] or whether it has lost its independent decision-making power.[365] But, from a public choice perspective neither distinction is relevant. The former distinction still allows for legislators to engage in a bargaining process and negotiate for conditions they feel interest groups desire. The latter distinction, while of constitutional importance, is unrelated to public choice issues and, therefore, beyond the scope of this Note.

Both the *Giger* case and the *Durand* case provide evidence of likely agency capture in the unilateral contract realm. Recall in *Giger*, Midlands had to directly negotiate with Councilman Stahmer, and Stahmer did not agree to vote for the rezoning until Midlands agreed to his set of conditions.[366] The individualized discretion Stahmer enjoyed in the negotiation process would have allowed him to advocate for virtually any condition he felt appropriate. Further recall in *Durand*, the Town Administrator made IDC aware that the town was eight million dollars short of what it needed to construct a new school, and only after IDC publicly promised to donate eight million dollars to the town did the town vote to rezone the property.[367] This is not to say that the community did not benefit from the new parkland in the *Giger* case or that a new school did not benefit the community in the *Durand* case, but the discretion given to individual legislators, or a small group of legislators, makes it far too easy to appease the wishes of interest groups.

Furthermore, courts that have expressed concerns with contract and conditional zoning have not done so in the public choice context. Connecticut has expressed concerns due to its statutory uniformity requirement,[368] while Pennsylvania has done so due to fears of bargaining away the police power.[369] While this Note ultimately advocates for the

362. *See supra* notes 39–41 and accompanying text.
363. *See supra* notes 67, 233 and accompanying text.
364. *See, e.g.*, *supra* notes 277–79 and accompanying text.
365. *See, e.g.*, *supra* notes 277–79 and accompanying text.
366. *See supra* notes 294–302 and accompanying text.
367. *See supra* notes 69–80 and accompanying text.
368. *See supra* notes 306–09 and accompanying text.
369. *See supra* notes 310–14 and accompanying text.

same conclusion reached by the courts in Connecticut and Pennsylvania, it is important for courts to reach that conclusion acknowledging public choice concerns. In Connecticut, all it will take is for the legislature to amend the uniformity requirement to allow at least conditional zoning. In Pennsylvania, courts could choose to change course and adopt the modern trend to uphold conditional zoning because the practice does not necessarily bargain away the police power. Rooting the analysis in public choice concerns would provide a stronger resistance to contract and conditional zoning in the states going forward.

Courts that feared contract and conditional zoning due to the potential for abuse and corruption were on the right track.[370] But, they too missed the overall point. As stated earlier, public choice and corruption are not one and the same.[371] By writing in the language of corruption, courts gave proponents of contract and conditional zoning an easy response: corruption can be dealt with through prosecution, institutional reforms, and more effective policing.[372] Stating the fears in terms of public choice makes them more difficult to overcome.[373] If self-interested legislators are an inherent part of the system,[374] then laws within the system will have to acknowledge that reality.

Finally, voters cannot be trusted as an adequate check on legislators from appeasing interest groups. The rational-ignorance effect suggests that voters simply will not devote the adequate amount of time and attention to educate themselves on local issues.[375] That limitation allows for local legislators to appease interest groups without the majority of the voting population even being aware of it. While Fischel does raise a strong theoretical counter argument,[376] the empirical evidence cuts against him.[377] Furthermore, it may be appropriate to view neighborhood associations as an interest group, and doing so leads to the conclusion that they are an influential group, particularly in the zoning context.[378] Even if the majority was educated on local issues and not viewed as an interest group, it is unlikely that it would be able to organize and effectively petition the local government for favorable change due to the collective action problem.[379] Free-riding concerns make it unlikely that a large group of individuals will be able to effectively organize since it is easy to reap the benefits of someone else's activity without paying for those benefits.[380]

370. *See supra* note 239 and accompanying text.
371. *See supra* Part II.G.
372. *See supra* note 230 and accompanying text.
373. *See supra* note 231 and accompanying text.
374. *See supra* Part II.A.
375. *See supra* Part II.B.
376. *See supra* notes 206–12 and accompanying text.
377. *See supra* note 213.
378. *See supra* notes 216–17 and accompanying text.
379. *See supra* Part II.D.
380. *See supra* notes 198–05 and accompanying text.

Analyzing contract and conditional zoning through a public choice lens makes clear that none of the differing views on the issue satisfy public choice concerns. This Note therefore proposes two new solutions to the conflict.

### *B. Solution One: Prohibit Both Contract and Conditional Zoning*

The first, and optimal, solution is to prohibit both contract and conditional zoning and to do so citing public choice concerns. Prohibiting both contract and conditional zoning would take away dangerous discretion from legislators,[381] and therefore make it more difficult for interest groups to capture the rezoning process. Doing so citing public choice concerns would acknowledge the realities of the system and make law accordingly. It would mean a more general return to rigid Euclidean zoning that was not intended to be open to discretionary changes often.[382] This, however, may be too impractical given the contemporary need for flexibility in zoning.[383] As Professors Ellickson, Fennell, and Brown accurately observe, rigid zoning procedures will likely result in inefficient allocations of land rights.[384]

The counter to that problem, as first observed by Professor Coase,[385] and subsequently adopted by Ellickson,[386] Fennell,[387] and Brown,[388] is to allow for a system of bargaining that will likely lead to Pareto superior improvements. While the bargaining model has some criticisms—namely the Hayekian critique that legislators lack the necessary information needed to know when a Pareto superior improvement has been made,[389] and that legislators are likely bargaining not as representatives of the public, but as representatives of themselves and the interest groups that better their odds at reelection[390]—its general logic is strong and is accepted by many commentators and jurisdictions alike.[391] Furthermore, the critiques lend themselves to the more radical solution of outlawing zoning altogether, as the Hayekian criticism suggests that legislators will inevitably misallocate resources in the initial zoning plan, and the public choice criticism suggests that legislators will draft the initial zoning plan in accordance with what

381. *See supra* notes 366–67 and accompanying text (discussing how *Giger* and *Durand* provide evidence of agency capture made easier by the discretion given to legislators).

382. *See supra* note 29 and accompanying text.

383. *See supra* Part III.A (discussing how the desire for flexibility led to the adaptation of contract and conditional zoning and how economically oriented commentators led to push for such change).

384. *See supra* notes 244–60 and accompanying text.

385. *See supra* note 255 and accompanying text.

386. *See supra* notes 245–50 and accompanying text.

387. *See supra* notes 251–57 and accompanying text.

388. *See supra* notes 258–60 and accompanying text.

389. *See supra* note 257 and accompanying text.

390. *See supra* Parts II.A, C.

391. *See supra* Part III.A (discussing the commentators and jurisdictions that accept the bargaining flexibility argument).

interest groups want.[392] While outlawing zoning completely should not be dismissed outright, the implications of such a decision are beyond the scope of this Note.[393] The next section will therefore suggest an alternate solution that is consistent with both flexibility and public choice concerns.

### *C. Solution Two: Allow Contract and Conditional Zoning but Apply a Stricter* Fasano*-like Standard of Review*

The alternate conclusion is to allow contract and conditional zoning, but to apply a stricter standard of review that is shaped after *Fasano*. The benefit of the *Fasano* standard is that it allows legislators the needed flexibility to make Pareto superior improvements to the zoning code, while acknowledging the quasi-judicial nature of rezoning and monitoring for abuse accordingly.[394] As was recognized by the court in *Cooper*, voters are an inadequate check on the legislature, particularly in the rezoning context, because they are "unaware or unconcerned" with such decisions.[395] The judiciary, by contrast, is well suited to engage in an extensive review process of discretionary decisions of this matter.[396] The responses to *Fasano* by the courts in *Wait* and *Cabana* are both grounded in precedent and therefore have failed to openly consider contemporary realities of local zoning boards and voters.[397] Courts should acknowledge and consider the realities of interest group involvement in zoning,[398] the relative ease with which interest groups can capture the discretionary processes of contract and conditional zoning, and the fact that voters have little incentive to actively monitor local politics.[399] Acknowledging these considerations leads to the conclusions of the courts in *Fasano*, *Cooper*, and *Snyder*: rezoning decisions have to be subject to higher levels of review.

In order to apply the *Fasano* standard to contract and conditional zoning, courts should specifically look for instances where evidence of agency

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392. *See, e.g.*, PENNINGTON, *supra* note 162, at 113–14 (concluding that zoning should be outlawed after conducting a Hayekian and public-choice-based analysis); Ellickson, *supra* note 244, at 779 (concluding that zoning is inefficient and that unless efficiency-based changes are made "[t]he elimination of all mandatory zoning controls . . . is . . . probably desirable").

393. It should be recalled that zoning is a common and accepted practice in nearly every jurisdiction in the United States, so outlawing it would require drastic change. *See supra* note 2 and accompanying text.

394. *See supra* notes 96–103 and accompanying text.

395. *See supra* note 116 and accompanying text.

396. *See, e.g.*, Bd. of Cnty. Comm'rs v. Snyder, 627 So.2d 469, 472–73 (Fla. 1993) (discussing how local zoning boards have too much discretion resulting in zoning decisions being political in nature, and how stricter judicial review can counter that problem); Cooper v. Bd. of Cnty. Comm'rs, 614 P.2d 947, 951 (Idaho 1980) (noting that "allow[ing] the discretion of local zoning bodies to remain virtually unlimited in the determination of individual rights is to condone government by men rather than government by law" and how the judiciary is well suited to review such decisions).

397. *See supra* notes 135, 146 and accompanying text.

398. *See supra* Part II.F.

399. *See supra* Part II.B. Empirical evidence suggests that voters do not monitor local politics. *See supra* note 213 and accompanying text.

capture appears present,[400] such as those in *Giger*, *Durand*, and *Hector* where legislators actively negotiate for terms different than those originally proposed. While this Note, like *Fasano*, does not suggest an "absolute standard[] or mechanical test[],"[401] it does suggest a general approach that places the burden of proof on the zoning board to show that the rezoning is consistent with the intended purposes of zoning and is not motivated by interest group lobbying. While this standard will undoubtedly make contract and conditional zoning more costly, and perhaps even lead to municipalities avoiding the practices completely, the dangers of making desirable change more difficult are outweighed by the dangers of interest group capture of the zoning process.[402] Courts should also ignore whether a legislative or administrative body made the contract or conditional rezoning decision, as both are subject to the same general public choice concerns caused by self-interest.[403] Doing so will also deprive administrative acts in contract and conditional zoning of the presumption of validity.[404]

This solution addresses the concerns of all sides of the conflict. Those states and commentators that feel contract and conditional zoning are too beneficial to give up will be able to keep the procedure.[405] States like Connecticut and Pennsylvania, that worry that contract and conditional zoning are inconsistent with statutory uniformity requirements or bargain away the police power,[406] as well as historical decisions that feared corruption and favoritism,[407] will have a mechanism through which to make sure that the particulars of the rezoning are not nonuniform, do not bargain way the police power, and were not the product of corruption, while not losing out on the benefits that the procedures provide.[408] And for states that have yet to decide on the issue, this solution could provide a middle ground on which they are comfortable operating.[409]

400. One "tip off" of rent-seeking, and subsequently agency capture, that judges could be instructed to look for is when the law treats one group differently from another. *See* Randy E. Barnett, *Keynote Remarks: Judicial Engagement Through The Lens of* Lee Optical, 19 GEO. MASON L. REV. 845, 857 (2012).

401. *See* Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23, 30 (Or. 1973).

402. *See id.*

403. *See supra* note 157 and accompanying text.

404. *See supra* note 147 and accompanying text. It may, in fact, be more crucial to eliminate the presumption of validity for administrative acts, as that presumption is based on the questionable logic that persons in those positions are experts. *See supra* note 148 and accompanying text. The general Hayekian observation that decision makers lack the necessary knowledge required would indicate that experts cannot make decisions with as much accuracy as might be perceived. *See* Hayek, *supra* note 257, at 521–22.

405. *See supra* Part III.A–B.

406. *See supra* Part III.C.

407. *See supra* Part III.A.

408. *See supra* Part III.C.

409. *See supra* Part III.D.

## CONCLUSION

The law has, in large part, ignored the realities of human nature as observed by the public choice theorists and instead has opted to rely on a false and romantic vision of lawmakers. Contract and conditional zoning are two areas in which this romantic vision has led to jurisdictions failing to recognize the danger. This Note has advocated, first and foremost, that jurisdictions acknowledge these realities and craft legislation accordingly.

In the contract and conditional zoning realm, this acknowledgement suggests one of two solutions. Either, both contract and conditional zoning should be prohibited completely to avoid self-interested legislators using the system to appease interest groups at the expense of the general public. Or, if the efficiency gains made by contract and conditional zoning are too strong to forego, then courts should review these decisions under a *Fasano*-like standard of review that instructs judges to look for agency capture.