

20th RMLUI CONFERENCE
CONTRACT ZONING--(LET'S MAKE A DEAL)
Materials for March 4TH, 2:30 p.m. session
Orlando E. Delogu, Emeritus Prof. Of Law

Introductory Notes:

The concept of contract zoning pits some very traditional points of view in the law against one another. On one hand there is the desire for certainty, predictability in the law--a rule of law, not of men, where standards, criteria, the so-called rules of the game are largely spelled out in advance. On the other hand there is a desire and need for flexibility— the prudent use of discretion to fine-tune, to adjust to the dynamics of the marketplace, changed conditions, to balance reasonable public and private interests. It is never a question of having one or the other, certainty or flexibility; we always need and must have some of both. It is a question of degree. Contract zoning is a tool that leans in the direction of flexibility and discretion. In the minds/hands of some, it affords too much of these characteristics. Others use the tool prudently; they see it as an essential part of the mix of land use controls mechanisms.

The critics of contract zoning worry that ill-defined discretion is an invitation to arbitrariness and random decision making. The public and even developers are never quite sure where they stand. Moreover, they argue, broad discretion almost always invites governmental overreaching. Supporters of this tool would suggest that driving a hard bargain, a fair bargain, on behalf of the public makes sense. Proponents of contract zoning further argue that it offers a more realistic approach to development and the fashioning of necessary controls, particularly in complex urban settings where patterned zoning and subdivision controls simply cannot keep up with the changing realities of the marketplace, and where today's penchant for mixed uses and higher density of use (particularly in urban core areas) is very much where we want, and need to be. They would fashion an array of procedural safeguards which can be built into a contract zoning process to keep this approach open, honest, and above board. They also point out that this would not be the only area of law where procedural safeguards become a substitute for well intentioned, but often too rigid standards, prohibitions, regulations, and rules of law.

It's a close call, and individual feelings on the matter may reflect more one's philosophical biases than anything, but some empirical observations are possible. More and more state enabling legislation invites and allows the use of contract zoning. Theoretical support for the approach is increasing in the law reviews and planning literature. See the bibliography at the end of these materials. There is also increasing case law support for this approach— some examples will be provided later in these materials.

Finally, it should be recognized that contract zoning is actually the rezoning of a particular land area— a valid legislative undertaking. All law can, should be revisited from time to time—

it should be open to improvement. Contract rezoning is often the only legal and creative way to say YES, to what may be a very desirable development opportunity that would otherwise be impermissible, and have to be turned down because it doesn't fit into any of the presently permitted zoning categories that a community may have fashioned for itself at a given point in time. The Sylvania case, *infra*, is a perfect example of this. Most small town zoning can not anticipate and does not make suitable space for multi-million dollar commercial or industrial facilities employing hundreds of people and encompassing literally thousands of square feet of plant/commercial space, on a land parcel even larger in size. But if such a development opportunity presents itself, few, if any, towns would allow the limitations of an existing zoning ordinance to bar the development. Contract zoning allows a tailored zoning amendment to be put in place. The key is openness and fairness. Contract zoning cannot emerge from a back room deal. The fairness required must encompass not only the needs of the developer, but the needs of abutting property owners, the larger community, and employees of the facility, many of whom will become residents of the municipality and/or of adjoining municipalities.

Some Early and More Recent Contract Zoning Cases:

1. Church v. Town of Islip, 168 N.E.2d 680 (N.Y. 1960)

Synopsis of the case:

The plaintiffs in this case were neighboring property owners who, though they benefitted from certain conditions attached to a 1954 rezoning of a corner lot from residential to business, sought revocation of the rezoning on the grounds that it was not in accordance with a comprehensive plan and that it constituted zoning by contract. The trial court agreed with plaintiffs and struck down the rezoning characterizing it as illegal spot zoning and the conditions attached as illegal contract zoning. A divided intermediate appellate court reversed noting that the business developer had on his own recorded an agreement to the conditions and had in fact complied with them. Moreover the town's legislative body had found that the character of the neighborhood was changing. This latter fact was borne out by the record and in the court's view justified the rezoning. New York's highest court affirmed the lower intermediate appellate court reasoning. On the question of the permissibility of contract zoning, the court pointedly noted that it dealt with actualities, not phrases. It held that there was nothing unconstitutional about the town's effort, through discussions with land owners and appropriate zoning amendments, to cushion the effects of changing conditions.

This is one of the earliest and most frequently cited contract zoning cases. The appellate court's reasoning is summed up in the last paragraph of its opinion wherein it notes that the conditions imposed were intended to be and were for the benefit of the neighbors, and that the Board could have rezoned this corner property for business without any restrictions. Given these facts the court could not see how reasonable conditions incorporated into the rezoning, even though they grew out of discussions and tentative agreement with the developer, could invalidate

the legislation. Both appellate courts placed emphasis on the fact that a rezoning is a legislative act; it is entitled to a presumption of validity. Moreover, legislative findings, (the changed conditions in the neighborhood) particularly when supported by record evidence as was the case here, are all but conclusive and may not be summarily overturned by a lower court.

This case typifies the essence of all contract rezoning—the imposition of reasonable conditions on the use of a particular property, conditions often suggested, and/or agreed to, by a developer, conditions which benefit abutters and the larger public, conditions which become the justifying basis for the rezoning amendment. Merely because the substance of the conditions and/or the amendment grew out of discussions by and between the developer and city officials does not justify invalidating the amendment. Increasingly, courts look at the substance of the amendment, not pejorative labels such as “contract zoning” or “spot zoning”. Nor are they moved by potential for abuse— if actual abuse can be shown the rezoning can be invalidated. But if there is no abuse, contract zoning becomes a useful tool that allows flexibility, the creative use of zoning amendment powers. The Islip court seems to have fully grasped these concepts.

2. *Sylvania Electric Products Inc. v. City of Newton*, 183 N.E.2d 118 (Mass. 1962)

Synopsis of the case:

The plaintiffs in this case were a group of adjacent landowners opposed to the reclassification of Sylvania's land from residential to limited manufacturing. An aspect of their challenge focuses on the conditions, agreed to by Sylvania, that accompanied, and undoubtedly made more attractive, the rezoning amendment. The lower court sustained the rezoning on all grounds of challenge. It was not invalid spot zoning. It did not violate the requirement of uniform classification. It did not violate any justifiable reliance of nearby residential landowners. On the contract zoning issue, the lower court noted and found persuasive the reasoning in *Church v. Town of Islip*, and was not moved by contrary holdings in other jurisdictions. Massachusetts' highest court affirmed the decision below. They too found *Islip* persuasive.

This early contract rezoning case demonstrates how this tool may be used to deal with a totally unanticipated, but very desirable major development activity that offered itself to the community. As stated in the introductory note, there is no way that even the most sophisticated municipal planning and land use control process can anticipate, make plans for, and appropriately control facilities of the size, character, and type that Sylvania proposed to build. Unless a creative site-specific rezoning process is allowed to go forward, the town's only option would be to say NO to the developer on the grounds that the community's land use controls did not permit, and thus must be deemed to bar facilities of the type Sylvania proposed to build. No municipality wants to be in this position— it stands the whole concept of planning/ land use control on its head— rather than being a flexible set of tools for accommodating growth, zoning controls become a millstone around the municipal neck, a vehicle which would bar the very sort of growth municipalities need, want, often go out of their way to attract.

A dissent in *Sylvania* was prepared to hold that Newton could not accomplish the ends it sought to achieve here by any lawful means. The dissent recognized but would ignore the mutual advantages to *Sylvania* and the town which these arrangements gave rise to. In its view contract zoning was beyond the scope of the state's zoning enabling legislation—Newton's actions were thus invalid. The dissent would have left the matter up to the state legislature to broaden or not, as they chose, the state's zoning enabling legislation to incorporate contract zoning as a permissible tool in the panoply of land use control tools available to local governments. But unless, and until the legislature acted, the dissent would not allow Newton or any other Massachusetts municipality to utilize contract rezoning. The majority saw this reasoning as too wooden, too inflexible.

Many states today have fashioned express legislation authorizing contract zoning, but it seems a cumbersome way to proceed.¹ It certainly doesn't help municipalities that find themselves in Newton's position. Some states have found contract rezoning permissible under home rule powers. Most states have proceeded as the majority did here. The majority reasoning recognized the mutual advantages to Newton and *Sylvania* that contract rezoning made possible. They recognized the uniqueness of the undertaking and of the site. They found that nothing done was contrary to the best interests of the city, and that abutters were amply protected—there was no unfairness. They looked at the broader purposes of zoning. They read the zoning amendment process flexibly.

3. *Chrismon v. Guilford County*, 370 S.E.2d 579 (No. Car. 1988)

Synopsis of the case

Plaintiffs who live in proximity to the rezoned area brought a declaratory judgment proceeding which sought to invalidate the rezoning of some 8.57 acres of land from agricultural to conditional use industrial. The rezoning would allow expansion of a non-conforming agricultural fertilizer and feed store business serving the surrounding farmlands. The trial court held for the defendant finding both the rezoning itself, and the subsequent issuance of a conditional use permit, pursuant to the new zoning, valid. The intermediate court of appeals reversed. It characterized the rezoning as illegal spot zoning and illegal contract zoning. The latter issue arose because the owner of the rezoned parcel bound himself to certain limitations in his conditional use application. The Supreme Court of North Carolina reversed this holding finding spot zoning to be a neutral term and the rezoning here, very sustainable. The high court also found conditional zoning (a term often used interchangeably with contract zoning) to be a

¹ Massachusetts today, without using the term contract or conditional zoning appears to allow something very similar in the form of special zoning permits, which may "impose conditions, safeguards and limitations on time or use", pursuant to legislation adopted initially in 1975, see Mass. Gen. L. Ann. Chap. 40A §9.

useful and necessary tool that changing conditions in a modern society requires. The court states: "Comprehensive zoning systems, though effective in preserving the character of ongoing uses, are often criticized for not allowing the degree of flexibility needed to allow local officials to respond appropriately to constantly shifting conditions and public needs". *Id.* at 583. The court emphasized the softening and ameliorating effects that conditions can have on what might at first appear to be a more drastic zoning change.

This case offers a more recent example of a court rejecting unduly rigid approaches to land use control. The highest court of North Carolina recognized that so-called spot zoning (the rezoning, usually of a small area) is not invalid *per se*; such amendments to a zoning ordinance stand or fall on their merits. In this case the rezoning was deemed appropriate. The court also held that so-called conditional/contract zoning (the rezoning of a parcel with conditions attached) is also an approved practice where (as it was here) the rezoning is reasonable, not arbitrary, is in the public interest, and the conditions protect public and abutting property interests. The court goes on to note that this case does not represent an example of invalid contract zoning because the legislative body here did not enter into a bilateral agreement and did not abandon its role as the independent decision-maker. The court supports its holding with citations to a growing body of case law and law review articles supporting use of this tool and expresses no hesitation joining this "...trend of jurisdictions in recognizing the validity of properly employed conditional use [contract] zoning." *Id.* at 585.

Contemplating the Use of Contract Zoning? Some Questions to be Asked and Answered:

1. Are there— should there be, any articulated state or local legislative policies, general rules as to when, where, under what circumstances contract zoning may be used?

Answer: Yes. In states that have enacted contract zoning enabling legislation there are almost certainly going to be some broad guidelines that local governments in such states must follow if they would use contract zoning. Maine, for example, (tit. 30-A, §4352 (8)) makes clear that such zoning must be consistent with a comprehensive plan, be compatible with preexisting uses, and may only be adopted with conditions addressing underlying physical realities/needs/operation of the proposed new development(s). The state statute also imposes broad notification and public hearing requirements prior to adoption of a contract zone. In states where municipal use of contract zoning grows out court cases, or home rule provisions, it would seem prudent for the local government to put in place some (if not all) of the limitations noted above; this should be done by adoption of a contract zoning ordinance. A local ordinance might also want to consider some additional constraints— whether contract zoning should be barred in certain geographic areas (healthy, built-up neighborhoods, for example); whether contract zoning would require a minimum number of parcels (two, or more), or a minimum acreage requirement (3, 5, 10 acres); whether an approved contract zoning proposal is a transferable property right, and/or

whether a time frame for the start of implementation, and completion, of the proposed new development should be imposed (2-3 years at the front end, 5, 7, 10 years at the back end). There may well be other broad constraints on the use of contract zoning that a municipal ordinance should address— but not too many— the constraints should not overwhelm, chill the use of contract zoning as a tool to foster a more dynamic pattern of development in the community.

2. What is the appropriate role of the municipal legislative body vis-a-vis the planning board in dealing with a contract zoning proposal?

Answer: Once we recognize the fact that contract zoning involves an amendment to an existing zoning ordinance (a legislative act), it must be clear to everyone involved that the final say—to amend the ordinance, or not, rests with the elected municipal (legislative) body. The planning board's role can never be more than administrative and/or advisory. It may be a city council's designated body to receive contract zoning proposals, to determine if, and when a proposal is complete, to conduct any and all required public hearings with respect to a proposal, to compile a record with respect to a proposal, to make a recommendation with respect to a proposal— **BUT** it should not be clothed with the power to accept or reject a proposal— these are legislative/policy determinations (to amend or to not amend an existing ordinance) which are beyond the power of a planning board. When, whatever tasks delegated to a planning board are completed, the municipal legislative body is free to decide the question on the record before it, or it may choose to conduct further hearings, augment the record, and only when it feels that it has a full grasp of all dimensions of the contract zoning proposal before it, decide the question.

3. Can should elected city officials, a planning board, negotiate with developers as to the scope of, and/or the conditions that might attach to, a contract zoning proposal?

Answer: Yes, but some care needs to be taken here. A planning body (board or staff) can not itself rezone land or dictate the terms of a rezoning. They can not make deals. They can not determine what level of public benefit might justify a rezoning. A planning body is only a conduit— they may handle a range of face to face discussions with developers and/or the public; they convey technical data, and the policies and views of a city council to all of the principles (developer, public, press) with respect to the proposal and the type of conditions that would make a rezoning attractive--nothing more. Critical decisions, including passage of the rezoning, or not (as noted above) must be made by the council. My city (Portland, Maine) has developed some useful steps to facilitate this process: Contract zoning proposals are received by the planning board, but copies are immediately forwarded to the city council; if the proposal is one of magnitude (likely to engender public debate, and/or push back) the proposal will be committed to the council's development committee; this committee will hold one, or more, workshop hearings on the proposal; these hearings are invariably open to the public (including the press), on the record, and will allow the developer, council members, the planning board and staff to identify

issues, reservations, benefits, possible conditions to be attached to the proposal. The exchange is usually free-wheeling; no votes are taken; no promises are made by anyone; no hard and fast positions are taken at this point. The public is usually given some opportunity to ask questions, raise issues that they see. With these workshop proceedings in hand/mind the planning board then proceeds with the public hearing process on the contract zoning proposal, at the conclusion of which, it will tender a recommendation to the city council. The council may then proceed as outlined in 2. above. This approach has worked well for the city. In more than ten years no contract rezoning, or denial, has been successfully challenged—and developers seem willing to keep coming back to the city to lay new proposals on the table.

4. Are there, should there be some meaningful standards that alert a reasonably intelligent developer to the criteria by which his contract zoning proposal will be judged?

Answer: Yes and No. The very essence of contract zoning precludes the development of standards that might apply in more conventional Euclidian zoning and/or subdivision approval settings. It is often relief from existing zoning/land use control strictures that the contract zoning proposal seeks—this relief invariably raises policy questions that do not lend themselves to resolution by the fashioning of precise standards. Each contract zoning proposal will have its own unique setting, problems to be overcome, public benefits, necessary conditions—the sum of which may, or may not, justify the rezoning. That said, there are at least two areas where developers (indeed all parties participating in the disposition of a contract zoning proposal) should be able to rely on some rather fixed standards: the first, involves the due process safeguards that should attend the process—full and timely notice of the proposal, and of all hearings which, of course, should all be open to the public,² and the procedure leading to a final disposition of a proposal should be available to all involved. A full and complete record must be fashioned. Interested parties must be given ample/reasonable time to speak and/or to rebut opposing testimony (orally or in writing). Any recommendation of a planning body, and the final disposition of the proposal by the municipal legislative body should be predicated on facts in the record, and/or on the municipality's comprehensive plan. The technical/engineering aspects of a contract zoning proposal is a second area where more firm standards should operate. Contract zoning is not a tool intended to avoid existing building and safety codes, the engineered standards for road, sewer, and water improvements. The line here cannot be drawn precisely in advance—there may be a need, for example, to modify building heights, set back requirements, street widths, the density of development—developers can make the case with respect to these

² Nothing will taint a contract zoning process more (making the outcome susceptible to legal challenge) than the disclosure that there were closed door hearings, or that private discussions were held involving some of the principals but not others. Contract zoning can not succeed if it smacks of closed door, back room deals.

issues. Generally, however, developers who tender contract zoning proposals should plan on meeting most (if not all) engineered standards that touch on health and safety.

5. Is there any way to insure that contract zoning proposals will be dealt with in a fair, an even handed way?

Answer: No, the legislative process is a political process; it does not, can not, guarantee a perfect outcome, an outcome based on full and objective factors (if obtaining this level of information is even possible). What is being decided is a set of policy questions— questions with respect to which reasonable people may differ. These policy questions will be resolved by elected municipal officials each time out on the basis of the information at hand, their open mindedness, and the philosophical disposition that each member of an elected body brings to the table. We call it the democratic process. But we needn't think of this process as totally random. The fact that a municipality is willing to entertain a contract zoning proposal is some evidence that they are open to imaginative proposals intended to alter/improve the tax base, jobs, the well being of the community. The use of a planning board and technical staff to flesh out as many aspects as possible of a contract zoning proposal bodes well for a reasonable outcome; so too does the openness of proceedings, the preparation of a record, all leading up to a final decision. At this point, it might be useful to suggest that a contract zoning ordinance should include some mechanism allowing for judicial review of contract zoning dispositions. These might not be used often, and assuming attention has been paid to building a record, and predicating decisions on that record, judicial challenges will even less often be successful. But the fact that contract zoning imposes a full and open process on municipal officials, followed by the possibility that their actions will be judicially reviewed, will (more times than not) produce outcomes that most people in the community will regard as fair, justified by the facts of the particular case, and over time— even handed. In short, municipal officials are by and large not interested in making fools of themselves; they are interested in acting in the public interest as that interest is posed in any given contract zoning proposal. That's the best we can do in a democracy.

Some Final Notes:

Contract zoning, like other land use control tools, may not be needed or appropriate in many municipalities--fine--don't use it. However, in those communities where the pace of change is rapid, where development pressures are acute and increasing, where there is an inherent complexity that almost defies conventional planning strategies and techniques, contract zoning, by inviting the private sector to imagine whole new urban landscapes, can be very beneficial to all concerned. If one focuses on the potential for abuse, one may be too easily scared away. Any system of land use control can be abused--contract zoning is only marginally, if at all, more risky. Moreover, the safeguarding mechanisms discussed in responding to the five questions posed above will go a long way toward insuring that this approach will not be abused, but instead, will

serve both developers and the public as intended.

The first use of a frontal-edge land use control tool such as contract zoning should not be undertaken in reaction to some developer's proposal. Municipalities that contemplate even occasional use of contract zoning should take the initiative--put the policy guidelines and procedural safeguards in place, catalogue the harms to be avoided and the type of public benefits that would make rezoning areas within the municipality an attractive proposition from the municipality's perspective. Then invite developers to look at their situation, the new flexible tools which exist, and to submit whatever proposals, if any, they will.

The initial use of contract zoning may provoke legal challenge. This challenge should not be feared, nor should it deter use of this tool. If the safeguarding mechanisms suggested above, are in place, the rezoning (or refusal to rezone) will stand or fall on the merits of the proposal, and the candor the municipality brought to bear in disposing of the proposal. There is no substitute for openness, attention to detail, data gathering to support all aspects of the rezoning process. If a negotiation process is made to look like ill-considered backroom cronyism, it will not survive legal challenge, nor should it. If, on the other hand, it is openly and carefully undertaken in the manner suggested, courts will almost certainly sustain the process. Courts understand that the police power is a broad and expansive power--they are not averse to new applications of this power, particularly when it can be shown that the new tool, contract zoning, is needed and useful. But courts know too that there are limits--the absence of, or inadequate, procedural due process safeguards, attaching onerous conditions to a rezoning, the passage of a rezoning amendment at odds with the comprehensive plan, the failure to mitigate harms and provide adequate public benefits, the failure to open the rezoning process to any and all; these are potential pitfalls that will force a reviewing court to strike down the offending contract zoning. The latter, however, should be the exception and not the rule--the rule quite simply, as suggested above and throughout these materials, is that contract zoning done well, done carefully, is imminently sustainable.

Finally, let's be clear--the suggestion by some critics of contract zoning that the practice amounts to little more than a selling of the power to legislate is inaccurate. First of all there is no exchange of money here. There is no profiting by any member of the legislative body or by the body as a whole. Nothing is being sold. There is no enforceable contract or bargain. There is not even an enforceable promise for a promise. A legislative body cannot be bound to legislate in any particular manner. A legislative body is, however, entitled to think out loud--to state publically that if certain conditions existed a zoning change would seem appropriate, would be in the public's best interest. A developer then is free to determine (without any firm or enforceable assurances--the essence of a sale, bargain, or contract) whether he/she wishes to bring those conditions into existence. If the developer so acts, the necessary and desired rezoning will very likely be enacted by the legislative body, not because they are legally bound or because anything

has been sold, but because the rezoning is in best interest of the municipality.

Finally, finally, a point made earlier bears repeating. Perhaps the most important justification for contract zoning is that it allows us to do things in a development sense that are sometimes very creative and attractive— things that would otherwise be impermissible under an existing framework of land use controls. If the choice is between having to say NO, because a particular activity or a particular design was not contemplated by the original zoning authorities and thus is not permitted by the ordinance, and working out an appropriate zoning amendment that allows us to say YES, in a way that protects both the developer and public interests, the public interest would be better served with the latter option . Contract zoning provides that option.

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