THE "CONTRACT ZONING" METHOD AND PUBLIC POLICY

In 1955, the city of Milwaukee zoned one part of a planned shopping center site "neighborhood shopping," and another part "local business." In 1961, the developers sought to have the portion of land zoned "neighborhood shopping" rezoned to a "local business" classification so that a bowling alley could be constructed. The local homeowners association was opposed to the zoning change, but not to the proposed use. The homeowners and the developers consequently entered into an agreement which provided that the land was to be restricted only to the use of a bowling alley, provided the city approve the application to rezone. Any other use, under the agreement, would have to conform to those allowable under the "neighborhood shopping" classification. Furthermore, the agreement provided that a declaration of restrictions was to be recorded with the city, that the restrictions were for the benefit of the city, and that the restrictions were to run with the land for a period of twenty years. The city was to have the power of enforcement by injunction. After the declaration of restrictions was filed, the city rezoned the land "local business," and the bowling alley was constructed. However, a small parcel, zoned "local business" but subject to the declaration of restrictions, remained unused.

Zupancic,[1] the owner of the unused parcel of land, brought a mandamus action to compel a city building inspector to issue a building permit to construct a car wash. The permit was denied because the proposed use did not conform to the 1961 declaration of restrictions. Zupancic argued that the declaration of restrictions was an incident of "contract zoning," and was therefore unenforceable. In *State ex rel. Zupancic v. Schimenz*[2] the Wisconsin Supreme Court held that the declaration of restrictions was valid and enforceable against the landowner since the "agreement was made by others than the city to con-

1. On January 1, 1968, Zupancic made an offer to purchase the small parcel, which offer was accepted. The offer was subject to the deed restrictions of record. Zupancic did not know of the declaration of restrictions which would not permit a car wash, and the seller did not remember it. State *ex rel.* Zupancic v. Schimenz, 46 Wis. 2d 22, 27, 174 N.W.2d 533, 536 (1970).

2. *Id.* at 22, 174 N.W.2d at 533.

form the property in a way or manner which made it acceptable for the requested rezoning and the city was not committed to rezone . . . ."[3]

In urban areas today, there exists an urgent need for rational and effective methods of dealing with city planning and development. However, in responding to these exigencies, it is of critical importance that legislative bodies work within their constitutional limitations. Therefore, the implementation of new zoning techniques must be subject to careful scrutiny. One such method, often relied upon, is where an agreement is made to restrict the use of land between the developer and other parties, whether they be private citizens or a public body. Many of these situations have come to be termed "contract zoning."[4]

Courts have been divided as to the validity of the "contract zoning" method,[5] generally basing their reasoning on public policy considerations. For the most part, courts have failed to express their specific holdings clearly, necessitating careful examination in order to distinguish certain fact patterns and frequently vague and unarticulated policy considerations which underlie the decisions. A substantial number of courts have struck down zoning ordinances which are subject to any restrictive conditions or concomitant agreements.[6] Other courts have allowed certain concomitant agreements to stand if there is no manifestation of a bargain-type situation.[7] Some courts have al-

3. *Id.* at 30, 174 N.W.2d at 538.

4. "Contract zoning" is a descriptive phrase reflecting a melange of public policy. For this reason, any attempt to define the concept objectively is prone to inaccuracies. An excellent observation on this matter is reflected in Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969). "The phrase 'contract zoning' has no legal significance and simply refers to a reclassification of land use in which the landowner agrees to perform conditions not imposed on other land in the same classification. . . . It has been criticized and defended, nullified in some states, sustained in others." *Id.* at 419, 79 Cal. Rptr. at 878.

5. *See* R. Shapiro, *The Case for Conditional Zoning*, 41 TEMP. L.Q. 267 (1968); D. Trager, *Contract Zoning*, 23 MD. L. REV. 121 (1963); Note, *Zoning Amendments and Variances Subject to Conditions*, SYRACUSE L. REV. 230 (1960); Comment, *Zoning and Concomitant Agreements*, 3 GONZAGA L. REV. 197 (1968); Comment, *The Use and Abuse of Contract Zoning*, 12 U.C.L.A. L. REV. 897 (1965).

6. *See, e.g.*, Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Houston Petroleum Co. v. Automotive Products Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952); Midtown Properties, Inc., v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (Super. Ct. 1961), *aff'd*, 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963).

7. *See, e.g.*, Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

lowed zoning by contract as long as there is no evidence of legislative abuse of discretion.[8] Finally, there are those courts which have invalidated any zoning ordinance which does not permit *all uses* of the land available in the designated zoning district.[9]

Whether the "contract zoning" method is sustained or nullified depends largely on basic assumptions concerning the zoning power which the courts must make. In *Myhre v. City of Spokane,*[10] the court said, "[Z]oning is a discretionary exercise of police power by a legislative authority. Courts will not review, except for manifest abuse, the exercise of legislative discretion."[11] However, many courts have refused to follow this basic premise expressed in *Myhre* and have approached zoning problems from the point of view that the power to zone is a delegated power. In *Midtown Properties, Inc., v. Township of Madison,*[12] the court stated: "A municipality, in exercising the power delegated to it must act within such delegated power and cannot go beyond it."[13]

Different jurisdictions, in considering "contract zoning" cases, have found different expressions of overriding policy considerations which, considered in conjunction with differing judicial approaches, have produced varied results. In striking down "contract zoning," a number of courts have held that concomitant agreements are invalid as not authorized by zoning enabling acts,[14] while others have held that "contract zoning" is a bargaining away of the police power.[15] In

8. *See, e.g.,* Sylvania Electric Products, Inc., v. City of Newton 344 Mass. 428 183 N.E.2d 118 (1962); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963); Myhre v. City of Spokane, 70 Wash. 2d 207, 422 P.2d 790 (1967). *See also* 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 74-10 (Supp. 1970).

9. *See, e.g.,* Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971); Oury v. Greany, — R.I. —, 267 A.2d 700 (1970).

10. 70 Wash. 2d 207, 422 P.2d 790 (1967).

11. *Id.* at 210, 422 P.2d at 792. "Manifest abuse," in the sense used in these cases, involves any arbitrary or capricious conduct. If the validity of the zoning reclassification is fairly debatable, it will be sustained. *See, e.g., id.*

12. 68 N.J. Super. 197, 172 A.2d 40 (Super. Ct. 1961) *aff'd,* 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963).

13. *Id.* at 207, 172 A.2d at 45.

14. *E.g.,* Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959); Sylvania Electric Products, Inc., v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962) (dissenting opinion). This argument is based on the notion that the power to zone is a delegated power to zone by ordinance and any attempt to zone by contractual agreement is beyond the power of the zoning authority.

15. *See, e.g.,* Midtown Properties, Inc., v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (Super. Ct. 1961), *aff'd,* 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963), and cases cited therein.

Midtown Properties, the city had entered into an agreement with the plaintiff not to rezone his property or change building code requirements in consideration for the donation of certain land. The New Jersey court invalidated the agreement, stating that "the defendants [the city] surrender[ed] their inherent power, right and duty, to keep their zoning and planning ordinances mutable by making necessary amendments or changes for the benefit of the public."[16] Some courts have held "contract zoning" illegal on the basis of a "spot zoning" theory,[17] which is based on the premise that legislative bodies must rezone within a framework of a comprehensive plan "so as to confer upon a particular parcel a particular district designation, it may not curtail or limit the uses . . . to be placed upon the lands so rezoned differently from those permitted upon other lands in the same district."[18] Finally, there are several courts which have held that "con-

16. *Id.* at 206, 172 A.2d at 45. The facts of this case disclose an impairment of the city's police power. It is the declared policy of the state of New Jersey not to allow bargaining of this power. "The power to zone is an exercise of police power which the state has granted to all municipalities. This power must be exercised in a reasonable manner and not arbitrarily, discriminately, or capriciously; and it must be exercised so as to secure the public health, safety, morals, and welfare . . . ." *Id.* at 207, 172 A.2d at 45.

17. *See* Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1959), where the court held invalid a rezoning agreement between the landowners and the city, recognizing a *factual* inconsistency of the proposed land use and the general use designated to the district.

18. 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 74-10 (Supp. 1970). In Oury v. Greany, — R.I. —, 267 A.2d 700 (1970), plaintiff applied to the town council to rezone his property from "Residential" to "Business D" for the purpose of constructing a used car lot. The application was approved but the council also resolved that if the car lot was not built, the land would be rezoned back to "Residential." In striking down the ordinance, the court stated that "rezoning of residential property to a business use on the condition that the land rezoned shall be devoted exclusively to the business use for which application to rezone was made, or otherwise remain residential, constitutes zoning without regard to the public health, safety, and welfare, concern for which is basic to that comprehensiveness contemplated in the enabling act." *Id.* at —, 267 A.2d at 702. A variation of the spot zoning theory worthy of notice is Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971). In *Allred,* the city, seeking to exercise an element of control over a proposed high-rise apartment project, rezoned defendants' property with the understanding that they would voluntarily submit plans and specifications for approval by the city. These assurances were made because of the necessity for immediate commencement of the project and the legislative delay which would be required to pass a site plan approval ordinance. The *Allred* court invalidated the ordinance, predicating the decision on the theory that a landowner is legally entitled to make any use of his land permissible in a designated zoning district. There was a factual determination by the court that the council did not decide the land justified rezoning to permit *all uses,* but that the rezoning was grounded on the approval of the specific plans of defendants. The court

tract zoning" is not in the public interest because a concomitant agreement is not incorporated in the zoning amendment.[19] "The restriction on property rights must be declared as a rule of law in the ordinance and not left to the uncertainty of proof by extrinsic evidence whether parol or written."[20]

In *Zupancic,* the Wisconsin Supreme Court explicitly defined a policy of that state: "[A] municipality may not surrender its governmental powers and functions or thus inhibit the exercise of its police or legislative powers."[21] But the thrust of the decision, which upheld the declaration of restrictions, was based on the factual situation that the city of Milwaukee was not a party to the agreement.[22] Assuming that the court would have held the agreement illegal if the city had been a party, a drastically different result, based solely on the issue of privity, would have occurred. In light of Wisconsin's declared policy, the rule expressed in *Zupancic*[23] is highly questionable. The court made no attempt to substantiate factually whether there was an impairment of the city's police power. Ignoring the view advanced by Zupancic that the facts of the case gave rise to a *quid pro quo,* the court stated, "[W]hile this view of invalidity is taken by the courts in New Jersey, Maryland, Michigan, and Florida, we think this is a too rigid view."[24]

The *Zupancic* court cites with approval *Church v. Town of Islip,*[25] a case dealing with a zoning change conditioned on recording of re-

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held that "[r]ezoning on consideration of assurances that a particular tract or parcel will be developed in accordance with restricted approved plans is not a permissible ground for placing the property in a zone where restrictions of the nature prescribed are not otherwise required or contemplated." *Id.* at 545, 178 S.E.2d at 441.

19. *See, e.g.,* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Sylvania Electric Products, Inc., v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962) (dissenting opinion); Houston Petroleum Co. v. Automotive Products Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952).

20. Hartnett v. Austin, 93 So. 2d 86, 89 (Fla. 1956).

21. 46 Wis. 2d at 28, 174 N.W.2d at 537.

22. *Id.* at 29, 174 N.W.2d at 537. "In the instant case, there is no agreement with the city. Neither its common council nor the city plan commission agreed to rezone." *Id.* at 28, 174 N.W.2d at 537.

23. We hold that when a city itself makes an agreement with a landowner to rezone the contract is invalid; this is contract zoning. However, when the agreement is made by others than the city to conform the property in a way or manner which makes it acceptable for the requested rezoning and the city is not committed to rezone, it is not contract zoning . . . .

Id. at 30, 174 N.W.2d at 538.

24. *Id.* at 32, 174 N.W.2d at 539.

25. 8 N.Y.2d 254, 168 N.E.2d 680, 203 N.Y.S.2d 866 (1960).

strictive covenants. However, the *Church* approach to the "contract zoning" problem is very different from that in *Zupancic*. The foundation of *Church* is that zoning is a legislative act entitled to the strongest possible presumption of validity, if there is any factual basis for it.[26] The court upheld the ordinance, stating:

> Surely these conditions were intended for the benefit of the neighbors. Since the town board could have, presumably, zoned [the] corner for business without any restrictions, we fail to see how reasonable conditions invalidate the legislation. Since the owners have accepted them, there is no one in a position to contest them. All contract zoning is invalid in the sense that a legislature cannot bargain away or sell its powers. *But we deal here with actualities not phrases.*[27] (Emphasis added)

Church succinctly expresses the crux of the "contract zoning" problem: "actualities not phrases." This scrutinizing approach has recently been articulated in *Scrutton v. County of Sacramento*.[28] In *Scrutton*, the county approved a zoning change subject to conditions of land dedication and street paving at the owner's expense. The California court upheld this procedure notwithstanding the absence of an express agreement, reasoning that

> when the zoning agency exacts a concomitant contract from the landowner, it holds out an implied or moral assurance that it will not quickly reverse or alter its decision. In a sense this assurance tends to freeze the property's status. *The suspension of continuing police power is theoretical rather than real. . . .* The contract zoning procedure pursued here entails neither a formal nor a practical surrender of the police power.[29] (Emphasis added)

The facts in *Zupancic* are nearly identical to those in *Bucholz v. City of Omaha*,[30] where landowners applied to the council for rezoning and the council ordered protective covenants submitted before rezoning would be approved. The Nebraska court, expressing a policy of the state, declared that "a city has no right or power to enter into contracts which curtail or prohibit an exercise of its legislative or administrative authority."[31] However, the court concluded that "*the evidence in this case does not show a bargain* or agreement between

26. *Id.* at 258, 168 N.E.2d at 682, 203 N.Y.S.2d at 869.
27. *Id.* at 259, 168 N.E.2d at 683, 203 N.Y.S.2d at 869.
28. 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969).
29. *Id.* at 419-20, 79 Cal. Rptr. at 878.
30. 174 Neb. 862, 120 N.W.2d 270 (1963).
31. *Id.* at 873, 120 N.W.2d at 277.

the applicants and the city. There is evidence that the applicants made *certain representations* to the city council."[32] (Emphasis added)

In *Church, Bucholz, Scrutton,* and *Zupancic,* there are *expressed* policies against bargaining police power. However, the *Church, Bucholz,* and *Scrutton* courts, unlike the *Zupancic* court, have specifically required evidence of bargaining. *Bucholz,* in line with *Scrutton* and *Church,* permits a determination of "contract zoning" cases on their merits on a case by case basis. The *Zupancic* approach, however, forces a decision based on a neat dichotomy of form and not substance: agreements with the city are invalid; agreements with the neighbors (private individuals) are valid. The *Zupancic* court has dealt with phrases, not actualities.

The strong probability that the city of Milwaukee would not have rezoned the land to a "local business" classification if the declaration of restrictions had not been filed is very important to the *actuality* of a bargain, yet the *Zupancic* court refused to consider this aspect, undoubtedly relevant under the *Church* or *Bucholz* approach. Instead of examining the record for evidence of a bargain, the Wisconsin court speaks of the fiction that a zoning authority is "motivated" to zone by the "voluntary" filing of restrictions by the owner.[33] As a practical matter, to distinguish between "bargain language" and "motivation-inducement language" is simply a problem in semantics.[34] Under the *Zupancic* holding, it will now be possible for a Wisconsin municipality to violate the state's no-bargain policy by subtly suggesting to an applicant for rezoning that he and the neighbors "talk it over" and that he "voluntarily" submit a declaration of restrictions. Since there would be no agreement with the city, there would be no "contract zoning." It is clear that under these circumstances, the holding in *Zupancic* is inflexible.

Zupancic is an attempt to provide a workable tool for problems in

32. *Id.*

33. 46 Wis. 2d at 29, 174 N.W.2d at 537.

34. Since on almost every application for a downzoning, the applicant is required to state the specific use and method of use which he would make of the property, were his application granted, it would be difficult to draw the line between valid and invalid conditions on the basis of who initiated the discussion as to conditions, *i.e.,* whether on his application the applicant offered to submit to certain limitations upon the general rights conferred by the new zoning classification or whether these limitations were demanded by the legislative body. 3 A. RATHKOPF, THE LAW OF ZONING AND PLANNING 74-10 (Supp. 1970).

urban change by encouraging private agreements limiting land use.[35] While a practical method is needed for solving these problems, *Zupancic* has not gone far enough.[36] The court, while recognizing the validity of private agreements, and rejecting public agreements, has furnished zoning boards with a vague and possibly unjust rule with built-in methods of abuse. Courts in the future should recognize the public policy considerations at the heart of their rules, and base the validity or invalidity of public and private zoning agreements on *actualities, not phrases.*

Steven B. Fishman

35. The court implied that the use of restrictive agreements in zoning were possibly of some importance if kept within certain limitations, stating that "[c]ontract zoning is illegal not because of the result but because of the method." 46 Wis. 2d at 28, 174 N.W.2d at 537.

36. "The virtue of allowing private agreements to underlie zoning is the flexibility and control of the development given to a municipality to meet the ever-increasing demands for a rezoning in a rapidly changing area." *Id.* at 29, 174 N.W.2d at 537.