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# ZONING FOR DOLLARS: NEW RULES FOR AN OLD GAME? COMMENTS ON THE *MUNICIPAL ART SOCIETY* AND *NOLLAN* CASES

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Faced with mounting social needs and continuing fiscal constraints, more and more cities “mint” money through their zoning codes to finance a wide array of public amenities. Through the land use regulatory technique formally known as “incentive zoning,” cities grant private real estate developers the legal right to disregard zoning restrictions in return for their voluntary agreement to provide urban design features such as plazas, atriums, and parks, and social facilities and services such as affordable housing, day care centers, and job training. Since its inception some thirty years ago,<sup>1</sup> incentive zoning has enjoyed broad support from developers and their attorneys, avoiding the legal challenges commonly brought against land use regulations requiring

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1. New York City's 1961 zoning resolution, a massive rewrite of the city's (and the country's) first zoning ordinance of 1916, introduced the incentive zoning concept. See J. GETZELS & M. JAFFE, *ZONING BONUSES IN CENTRAL CITIES* 1 (Planning Advisory Service Report No. 410, 1988); Barnett, *Introduction to Part III: Case Studies in Creative Urban Zoning*, in *THE NEW ZONING: LEGAL, ADMINISTRATIVE, AND ECONOMIC CONCEPTS AND TECHNIQUES* 127 (N. Marcus & M. Groves eds. 1970) [hereinafter *THE NEW ZONING*].

the provision of public amenities.<sup>2</sup>

In an unlikely convergence of timing, topic, and result, two 1987 judicial decisions, one from a state trial court, the other from the United States Supreme Court, have fixed an ominous cloud over certain applications of incentive zoning. In *Municipal Art Society v. City of New York*,<sup>3</sup> a New York trial judge invalidated the sale of city-owned land to a private developer, on the basis that the incentive zoning component of the deal constituted improper zoning for sale. In *Nollan v. California Coastal Commission*,<sup>4</sup> the Court struck down a state agency's request to a private landowner for a public easement, using reasoning that appears to apply to incentive zoning. On the surface, the decisions differ in many respects. One involves the high-flying world of Manhattan real estate development and an express incentive zoning ordinance. The other concerns a couple desiring to build a home on the California coast and does not even mention the words "incentive zoning." Nonetheless, both decisions pose the same troubling question to advocates of the technique's recent efforts to encourage private provision of social facilities and services: what is the relationship between the government-offered incentive and the developer-provided amenity? Not surprisingly, the cases suggest that the more tenuous the relationship, the more suspect the exercise.

This article explores the extent to which these decisions undermine incentive zoning. First, the article canvasses the empirical record of incentive zoning. Next, the article critiques the analyses of the two decisions insofar as they apply to the technique. Moreover, the article argues that statutory and constitutional analysis of exercises of incentive zoning for "unrelated amenities"<sup>5</sup> should not differ from that accorded incentive zoning for "related amenities." Finally, the article concludes that ameliorative public policies should address the legitimate concerns raised by the "unrelated amenities" question.

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2. Indeed, only one law review article devotes itself exclusively to legal issues presented by incentive zoning. See Benson, *Bonus or Incentive Zoning — Legal Implications*, 21 SYRACUSE L. REV. 895 (1970).

3. 137 Misc. 2d 832, 522 N.Y.S.2d 800 (Sup. Ct. 1987).

4. 483 U.S. 825 (1987).

5. For purposes of this article, the phrase "unrelated amenities" refers to a category of amenities described *infra* text accompanying notes 15-17. The phrase is not meant to prejudice whether the amenities are unrelated in the legal sense of the word.

## I. EMPIRICAL RECORD OF INCENTIVE ZONING

Many large and medium size cities throughout the United States employ incentive zoning.<sup>6</sup> New York City pioneered its use in 1961, allowing construction of ten square feet of additional office space in exchange for each square foot of plaza, and three bonus office square feet in exchange for each square foot of arcade.<sup>7</sup> New York's list of bonusable amenities expanded during the 1960s and 1970s to include through-block arcades, covered pedestrian spaces, elevated walkways, and theatres.<sup>8</sup> Developers responded favorably to the city's enticements. More than two-thirds of all major office buildings constructed between 1963 and 1975 received zoning bonuses.<sup>9</sup> Statistics compiled for that twelve-year period indicate that the city granted more than 12 million square feet of bonus office space to ninety-one buildings.<sup>10</sup>

Other cities tailored incentive zoning to fit their specific environments. San Francisco, California, for example, offered zoning bonuses to encourage developers to provide rooftop observatories for tourists.<sup>11</sup> Anchorage, Alaska provided incentives for climate-controlled plazas and courtyards.<sup>12</sup> Miami, Florida developed incentives to encourage retail activity at street level.<sup>13</sup> Cincinnati, Ohio granted incentives for historic preservation of important structures.<sup>14</sup>

While cities used incentive zoning during the 1960s and 1970s principally to stimulate construction of "urban design" amenities such as plazas and arcades, more recent applications of the technique en-

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6. See J. GETZELS & M. JAFFE, *supra* note 1, at 1-8. Cities frequently obtain public amenities through informal negotiations with developers, without the existence or authority of formally enacted incentive zoning. Although this article focuses on formally enacted incentive zoning, its analysis applies to informal negotiations as well.

7. See J. KAYDEN, *INCENTIVE ZONING IN NEW YORK CITY: A COST-BENEFIT ANALYSIS 10* (Policy Analysis Series No. 201, 1978). Although floor area (density) bonuses remain the dominant incentive today, cities have employed other incentives to encourage provision of amenities, such as height limitation waivers and parking ratio reductions. This article refers to floor area (density) bonuses when discussing incentives.

8. *Id.* at 10-14.

9. *Id.* at 11.

10. *Id.* at 11, 23.

11. See Svirsky, *San Francisco: The Downtown Development Bonus System*, in *THE NEW ZONING*, *supra* note 1, at 145.

12. See R. COOK, *ZONING FOR DOWNTOWN URBAN DESIGN* 109 (1980).

13. See J. GETZELS & M. JAFFE, *supra* note 1, at 6.

14. *Id.* at 8.

courage "social" amenities such as low-income housing, day care centers, cultural facilities, and job training. Newton, Massachusetts allows larger residential apartment complexes than otherwise permissible in order to obtain low and moderate-income housing.<sup>15</sup> Seattle, Washington offers floor area bonuses to office developers who provide day care facilities and affordable housing.<sup>16</sup> Hartford, Connecticut gives bonuses to encourage job training and the provision of visual and performing arts spaces.<sup>17</sup>

As individuals have begun to understand better the connection between land use regulations and the quality of local physical environments, criticism of incentive zoning has increased.<sup>18</sup> Where zoning administration was once left to planning-oriented professionals,<sup>19</sup> zoning today excites neighborhood activists, political leaders, and newspaper reporters. Government approval of new development routinely triggers complaints that streets and sidewalks are already too congested, that neighborhoods have lost their human scale, and that indispensable open space is disappearing. Because incentive zoning definitionally tampers with baseline zoning rules by allowing developers to construct buildings larger than otherwise permitted, the technique has become a lightning rod for general discontent with local land use policies.<sup>20</sup>

The central criticism alleges that incentive zoning corrupts orthodox planning and zoning models by persuading planners to greenlight

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15. See *Iodice v. City of Newton*, 397 Mass. 329, 491 N.E.2d 618 (1986).

16. See Lassar, *Seattle's Zoning Saga*, URB. LAND, Sept. 1988, at 34.

17. See J. GETZELS & M. JAFFE, *supra* note 1, at 8-9.

18. Noted urban observer William H. Whyte has written the most pungent attacks against incentive zoning. See W. WHYTE, CITY 229-55 (1988); Whyte, *What Price Sunlight: Designing a Livable Midtown*, NEW YORK, Mar. 9, 1981, at 24-30.

19. See, e.g., Randle, *Professors, Reformers, Bureaucrats, and Cronies: The Players in "Euclid v. Ambler"*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 43-47 (C. Haar & J. Kayden eds. 1989).

20. In the early 1980s, two of incentive zoning's most fervent practitioners, New York City and San Francisco, significantly reduced their reliance on the technique, in part because of its inherent bias toward additional development to provide desired amenities. See, e.g., Dep't of City Planning, City of New York, *Midtown Development* 12 (June 1981). In contrast, economically depressed cities anxious to stimulate job creation and local tax revenues usually view any development whatsoever as an asset. Cf. Kayden, *Planning Gain: Developer Provision of Public Benefits in Britain*, in PRIVATE SUPPLY OF PUBLIC SERVICES 164 (R. Alterman ed. 1988) (quoting planning agency official from economically depressed northern England, "Getting the developer to build anything is, in our eyes, [an amenity]."). For such cities, incentive zoning is a luxury they cannot afford.

otherwise undesirable projects solely to obtain the privately financed amenities.<sup>21</sup> Zoning expresses conclusions about theoretically objective physical planning criteria such as street, sidewalk, sewer, and water pipe capacity; light and air availability at ground level; and compatibility of new buildings with the existing neighborhood. Thus, any overriding of that zoning, no matter what the proposed amenity, intrinsically delegitimizes the entire regulatory system. This critique gains particular currency when the amenity is geographically or conceptually unrelated to the development project obtaining the incentive. For example, while the community-at-large benefits from the provision of affordable housing or an arts center, the neighborhood immediately surrounding the bonused project suffers from greater congestion and loss of light and air attributable to the bonus office space. Good physical planning, underpinned by objective criteria, is sacrificed on the altar of unrelated amenities. Consequently, one set of city residents or employees unfairly suffers for the benefit of all.

Additionally troubling to some is incentive zoning's inherent dependence on a philosophy of sanctioned bribery, abiding a private sector that can "buy" its way out of legal restrictions. If the public amenities are so important, goes the argument, then government should require developers to provide them without a zoning payoff, or alternatively, should finance them from tax revenues.<sup>22</sup>

In defense of incentive zoning, it first must be observed that physical planning objectives arguably undermined by the technique are not the only interests important to communities. Other values, including those represented by social amenities, contribute to the quality of life. For example, a city might resolve that it will tolerate taller buildings and greater congestion in return for more low-income housing and day care facilities. Furthermore, most land use regulatory decisions, not just incentive zoning transactions, pose difficult tradeoffs between neighborhood and citywide concerns. The placement of a drug treatment center in one neighborhood, for example, will disproportionately burden that neighborhood for the good of the whole city. Similarly, the zoning of one district for one class of use may adversely affect property values in that area relative to other areas. Moreover, the sanctioned bribery crit-

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21. See J. GETZELS & M. JAFFE, *supra* note 1, at 12.

22. Still other criticisms focus on the inferior design quality of amenities that actually have been provided, see W. WHYTE, *supra* note 18, at 234, and the excessive financial value of incentives actually awarded to developers in relation to the financial cost of amenities. See J. KAYDEN, *supra* note 7, at 59-65.

icism could apply to any government program of inducement to the private sector, not just incentive zoning.<sup>23</sup> Finally, the technique enjoys a superior track record for creating amenities which otherwise might not exist.<sup>24</sup>

## II. THE MUNICIPAL ART SOCIETY CASE

The policy debate embroiling incentive zoning recently has taken a back seat to the legal debate. In *Municipal Art Society v. City of New York*,<sup>25</sup> a state trial judge delivered a blow against what he considered a violation of fundamental principle: the sale of zoning for general revenue purposes by a municipality. The opinion would appear to outlaw the practice of incentive zoning for unrelated amenities. To evaluate the court's legal reasoning, and to draw conclusions about its ultimate impact, a thorough understanding of the facts is essential.

Prominently situated at the southwest corner of Central Park in midtown Manhattan, Columbus Circle is a tangled web of streets, buildings, and monuments. Through exercise of its eminent domain authority in 1953, New York City acquired a two-block parcel of land, between 58th and 60th Streets immediately to the west of Columbus Circle, for construction of a convention center.<sup>26</sup> The Triborough Bridge and Tunnel Authority (TBTA), a state-created agency, took control of the project and built the New York Coliseum, home to countless auto shows and similar programs during the 1960s and 1970s.<sup>27</sup>

With completion of a new and larger convention center scheduled for 1986, the old Coliseum became surplus public property which the city and the TBTA jointly elected to sell to a private developer for redevelopment.<sup>28</sup> Acting as lead agency for the sale, the TBTA, in

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23. Bribery implies a secretive back-door deal. In contrast, formal incentive zoning generally operates in the sunlight, with a formal process and record open to public scrutiny.

24. Contrary to the claims of some critics, *see, e.g.,* W. WHITE, *supra* note 18, at 229-55, the empirical record of incentive zoning is not all bad. *See, e.g.,* Haar & Kayden, *Zoning, After 70 Years*, N.Y. Times, Nov. 24, 1986, at A19, col. 2.

25. 137 Misc. 2d 832, 522 N.Y.S.2d 800 (Sup. Ct. 1987).

26. *Id.* at 833, 522 N.Y.S.2d at 801. The facts are drawn principally from *Municipal Art Society*.

27. *Id.* The TBTA also constructed an office building on the site.

28. *Id.* at 833-34, 522 N.Y.S.2d at 801. Designed by architect I. M. Pei, the new convention center was named after the late Senator Jacob Javits of New York and opened in 1986.

February, 1985, issued a Request for Proposals (RFP) announcing criteria governing the sale.<sup>29</sup> The RFP stated, *inter alia*, that the amount offered for the property would be the "primary consideration," and that other considerations would include "the economic viability of the proposal, the developer's experience and financial capacity, [and] the overall benefit to the City."<sup>30</sup> Such criteria are typical of public land disposition RFPs issued by cities across the country.<sup>31</sup>

The Coliseum RFP also enumerated special criteria regarding the use of incentive zoning that, in the trial judge's eyes, fatally tainted the sale. Under the existing zoning governing the site, a developer could build at a base matter of right density of fifteen Floor Area Ratio (FAR), meaning that buildings could contain a maximum number of square feet equivalent to fifteen times the square feet of the site itself.<sup>32</sup> A 1982 zoning amendment affecting midtown Manhattan, including the Coliseum parcel, authorized the City Planning Commission, in its discretion, to award developers a floor area bonus up to twenty percent above the base fifteen FAR, or an additional three FAR, if the developer agreed to provide "major improvements for adjacent subway stations."<sup>33</sup> "Adjacency" meant that "the zoning lot for the development . . . on which a floor area bonus is requested" be "adjacent to the mezzanine or concourse of the subway station for which the improvement is proposed or an existing connecting passageway to the station."<sup>34</sup> Under detailed procedures outlined in the zoning amendment, developers would apply to the City Planning Commission for the bonus, which the city would grant by special permit after public notice and hearing and subject to Board of Estimate action.<sup>35</sup>

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29. *Id.* at 834, 522 N.Y.S.2d at 801.

30. *Id.*

31. See Gruen, *Public/Private Projects*, URB. LAND, Aug. 1986, at 2.

32. *Municipal Art Soc'y*, 137 Misc. 2d at 833, 522 N.Y.S.2d at 801. At a 15 FAR, without regard to other dimensional restrictions in the zoning ordinance, a building covering the entire site would rise 15 stories, a building covering half the site would rise 30 stories, and so forth.

33. *Id.* (quoting NEW YORK, N.Y., ZONING RESOLUTION OF THE CITY OF NEW YORK § 81-53 (1982)). The 1982 incentive zoning amendments were part of a package of zoning changes designed to discourage development on the east side and encourage development on the west side of Manhattan. See New York City Planning Commission, MIDTOWN ZONING, Mar. 1982, at 20.

34. *Municipal Art Soc'y*, 137 Misc. 2d at 833, 522 N.Y.S.2d at 801 (quoting NEW YORK, N.Y., ZONING RESOLUTION OF THE CITY OF NEW YORK § 81-53 (1982)).

35. See NEW YORK, N.Y., ZONING RESOLUTION OF THE CITY OF NEW YORK § 81-53 (1982). The improvements must comply with design standards announced in

The RFP announced that the selected developer would be required to “apply for and use its best efforts to obtain the maximum twenty percent Subway Bonus,” calculated to be 448,500 square feet, in return for improvements expressly described in the RFP to the 59th Street subway station located adjacent to the Coliseum.<sup>36</sup> The RFP further instructed bidding developers to “assume the maximum twenty percent FAR Subway Bonus [would] be granted.”<sup>37</sup> In case the City Planning Commission granted a portion, but not all, of the bonus, the developer would remain obligated to provide all promised subway station improvements, but the site’s purchase price would be reduced according to a specified formula.<sup>38</sup> Under this formula, the maximum purchase price reduction forthcoming if no bonus was granted amounted to \$57 million.<sup>39</sup> In that event, the city and TBTA would enjoy the right to cancel the entire deal with the developer.<sup>40</sup>

Following review of the fifteen development proposals submitted by

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the New York City Transit Authority’s “Station Planning Guidelines,” *id.* § 81-533, and applicants must submit schematic or concept plans to the Metropolitan Transportation Authority, the Transit Authority, and the City Planning Commission. *Id.* § 81-534(a). The ordinance required that “[t]he special permit application to the Planning Commission shall include information and justification sufficient to provide the Commission with a basis for evaluating the benefits to the City from the proposed improvement and determining the appropriate amount of bonus *floor area*. . . .” *Id.* § 81-534(c) (emphasis in original). To determine how much bonus floor area would be awarded, the ordinance stated:

The amount of the *floor area* bonus shall be in the discretion of the City Planning Commission and may range from no bonus *floor area* to the maximum amount allowable by special permit. . . . In determining the precise amount of *floor area* bonus, the Commission shall make findings on the following:

- (a) the degree to which the station’s general accessibility, rider orientation and safety will be improved by the provision of new connections, additions to circulation space or easing of circulation bottlenecks;
- (b) improvements in the station’s environment by provision of daylight access, better orientation of riders, or improvements to noise control, air quality, lighting or other architectural treatments;
- (c) provision of escalators where justified by traffic or depth of mezzanine or platform below *street* level;
- (d) convenience and spaciousness of *street* level entrance and compatible relationship to the *development’s* or the *enlargement’s* ground floor uses.

*Id.* § 81-535 (emphasis in original).

36. *Municipal Art Soc’y*, 137 Misc. 2d at 834, 522 N.Y.S.2d at 801 (quoting the RFP).

37. *Id.* (quoting the RFP).

38. *Id.* (quoting the RFP).

39. *Id.* (quoting the RFP).

40. *Id.* (quoting the RFP).



the May, 1985 deadline, a joint committee of city and Metropolitan Transportation Authority (MTA) officials chose a bid of \$455,100,000 from Boston Properties, a real estate company headed by developer Mort Zuckerman.<sup>41</sup> Boston Properties proposed a mixed-use development anchored by a headquarters office building for the investment banking firm of Salomon Brothers,<sup>42</sup> with additional office space, apartments, movie theatres, retail stores, and a parking garage.<sup>43</sup> Architect Moshe Safdie's design proposed a sixty-eight story tower and a fifty-eight story tower, with a total floor area of 2,689,569 square feet including the three FAR 448,500 square foot bonus.<sup>44</sup> In September, 1985, the parties signed a contract of sale which, in compliance with the RFP, included a provision stating that the \$455 million purchase price would be reduced by up to \$57 million if the developer was unable to secure the subway bonus.<sup>45</sup> Boston Properties subsequently applied for and obtained from the City Planning Commission in December, 1986, a special permit awarding the maximum subway floor area bonus.<sup>46</sup> By this time, the original cost estimate of \$20-\$25 million for the subway improvements had risen to \$35-\$40 million.<sup>47</sup> The entire Coliseum project won approval from the TBTA and the city's Board of Estimate in February, 1987.<sup>48</sup>

Several additional agreements pertained to disposition of the sale

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41. *Id.* The committee rejected a \$477 million bid from a competing developer, because that developer had not found a prime commercial tenant for the project. *Id.* See Taylor, *The Shadow: The Uproar Over the Big Coliseum Project*, NEW YORK, Oct. 5, 1987, at 40, 46. The Metropolitan Transportation Authority is the parent agency of the TBTA.

42. Salomon Brothers subsequently withdrew from the project after the stock market's notorious "Black Monday" crash of October 19, 1987. See N.Y. Times, Dec. 5, 1987, at 31, col. 1.

43. *Municipal Art Soc'y*, 137 Misc. 2d at 834, 522 N.Y.S.2d at 801-02.

44. See *id.* at 834, 522 N.Y.S.2d at 802; see also Application for a Zoning Bonus (Nov. 19, 1986), reprinted in 2 Respondent-Appellants' Appendix, at A584, A586, *Municipal Art Soc'y v. City of New York*, 137 Misc. 2d 832, 522 N.Y.S. 2d 800 (Sup. Ct. 1987) (No. 13443-87); Resolution of City Planning Commission Regarding Application for Grant of Special Permit for Floor Area Bonus, (Dec. 19, 1986), reprinted in 2 Respondent-Appellants' Appendix, at A494, *Municipal Art Soc'y v. City of New York*, 137 Misc.2d 832, 522 N.Y.S.2d 800 (Sup. Ct. 1987); *infra* note 69.

45. *Municipal Art Soc'y*, 137 Misc. 2d at 834-35, 522 N.Y.S.2d at 801-02.

46. *Id.* at 835, 522 N.Y.S.2d at 802.

47. *Id.*

48. *Id.* In 1989, the Supreme Court ruled that the city's Board of Estimate violated the "one person one vote" principle. See *Board of Estimate v. Morris*, 485 U.S. 986 (1989). Following that decision, the city adopted a new charter eliminating the old

revenues. Under an early agreement signed in December, 1984, the city and TBTA determined to share the sale's net proceeds equally.<sup>49</sup> The TBTA would "spend its proceeds solely for MTA capital projects in the City of New York," while the city would "spend its proceeds over a five year period solely for [Transit Authority] capital projects."<sup>50</sup> At the time of the sale's final approval, however, the city, MTA, and TBTA altered their understanding as to how proceeds would be spent.<sup>51</sup> The half of net proceeds originally earmarked for MTA capital projects would be spent instead for Transit Authority operating purposes, satisfying the city's existing statutory obligation to fund such operations.<sup>52</sup>

The Municipal Art Society of New York, a well-established non-profit organization interested in city design and historic preservation issues, filed suit on June 4, 1987 to invalidate the sale.<sup>53</sup> The Society alleged, *inter alia*, that the city illegally sold a zoning bonus.<sup>54</sup> Behind the legal allegations lay one overriding substantive objection: the project was too big. The shadow it would cast over neighboring Central Park quickly became a symbolic rallying point against what many considered to be development out of control.<sup>55</sup>

#### A. *The State Court's Analysis*

For state supreme court Justice Edward H. Lehner, the deal's ruinous flaw, what he characterized as "a 'cash sale' of a zoning bonus,"<sup>56</sup> revolved around the \$57 million contingent adjustment to the sales price as described in the RFP and sales agreement.<sup>57</sup> Under Justice

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Board of Estimate and redistributing its authority for land use decisions to an expanded city council. *See* Wall St. J., Nov. 13, 1989, at B4A, col. 2.

49. *Municipal Art Soc'y*, 137 Misc. 2d at 834, 522 N.Y.S.2d at 801.

50. *Id.* The city obligated itself to spend the proceeds at a rate of 28% in the first year, and 18% in each of the next four years. *Id.*

51. *Id.* at 835, 522 N.Y.S.2d at 802.

52. *Id.*

53. Other plaintiffs in the suit were individuals.

54. Additional claims related to the applicability of the State Environmental Quality Review Act. *Id.* at 835-36, 522 N.Y.S.2d at 802. The trial court found it unnecessary to reach such claims. *Id.* at 838, 522 N.Y.S.2d at 804.

55. *See* Taylor, *supra* note 41 (cover of magazine).

56. *Municipal Art Soc'y*, 137 Misc. 2d at 838, 522 N.Y.S.2d at 804.

57. Justice Lehner stated:

Although the transaction may well have been structured to paint a different picture, the clear fact of the matter is that in return for the grant by the CPC of the

Lehner's interpretation, the only legitimate way for the city to obtain the so-called "additional \$57 million in cash" would be to earmark that sum for adjacent subway station improvements as defined in the zoning ordinance. However, agreements pertaining to use of the \$455 million generated from the sale dictated that all funds, by definition including the "additional \$57 million," be spent for citywide capital and operating mass transit purposes. Therefore, the judge ruled the city's approval of the sale "null and void."<sup>58</sup>

Unfortunately, Justice Lehner's misunderstanding of the city's multifaceted role in this transaction fatally taints his legal conclusion. His analysis founders precisely on its failure to apprehend the crucial distinction between a "pure" incentive zoning transaction and the elaborate public-private interactions factually presented by the Coliseum deal. In the former, the city acts strictly as a regulator, while in the latter, the city acts first as land seller, and then as regulator.

In a manner transcending legal correctness, however, Justice Lehner's opinion bears witness to the formidable complication posed by the "two hat" problem: the conflict of interest in the public sector's identity as both land seller and land regulator. At its simplest, the conflict arises because the city's interests in selling as opposed to regulating land are almost invariably at odds. Consequently, the city's motivations as seller may improperly influence its actions as regulator. Justice Lehner's opinion also invites legitimate speculation about incentive zoning's innate friction with traditional planning and zoning models, especially when the technique is used to encourage provision of amenities geographically or conceptually "unrelated" to the incentive. To disentangle the opinion's constructive insights from its analytical confusions, it is helpful first to hypothesize a "pure" incentive zoning transaction not presented by the *Municipal Art Society* case, and then to distinguish it from the actual arrangements of the Coliseum sale.

### B. A "Pure" Incentive Zoning Transaction

Imagine a scenario in which the private owner of a large site in midtown Manhattan, intending to develop an office building, applies for a

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twenty percent floor-area-ratio-bonus, the City is obtaining not only \$35 to \$40 million of local subway improvements, but an additional \$57 million in cash to be employed for other purposes. This is not contemplated by the New York City Zoning Resolution.

*Id.* at 837, 522 N.Y.S.2d at 803.

58. *Id.* at 838, 522 N.Y.S.2d at 804.

subway bonus. With no ownership interest in the land, the city acts exclusively in its regulatory capacity to administer the zoning laws. In this role, the city grants an FAR bonus to the private developer pursuant to section 81-53 of the Zoning Resolution.<sup>59</sup> In return for the FAR bonus, the developer agrees to provide both adjacent subway improvements costing \$35-40 million and an additional \$57 million cash contribution to be used in the city's discretion for citywide mass transit purposes.

Justice Lehner would be correct to strike down such an exercise of incentive zoning because section 81-53 authorizes the city to award bonuses only to encourage "major improvements for adjacent subway stations."<sup>60</sup> Although the city might amend its zoning ordinance to permit exchanges of bonuses for cash payments (as it did, for example, in its Special Greenwich Street District zoning legislation,<sup>61</sup>) a bonus granted under the existing language of section 81-53 in exchange for money not designated for adjacent subway improvements would be *ultra vires* of section 81-53. Indeed, were the developer to offer anything but adjacent subway improvements, the same conclusion of illegality would apply. In short, the hypothetical "pure" incentive zoning case precisely fits the mold of Justice Lehner's "cash sale" of a zoning bonus." His conclusion that, "in return for the grant by the CPC of the twenty percent floor-area-ratio-bonus, the City is obtaining not only \$35 to \$40 million of local subway improvements, but an additional \$57 million in cash to be employed for other purposes," would ring true.

In contrast, the *Municipal Art Society* case presents a fundamentally different situation. As Justice Lehner himself outlined the facts, the Coliseum deal involved the city first as selling landowner. Only after the city and Boston Properties signed the sales agreement would the city wear its regulator hat in a separate and on-its-own-merits regulatory proceeding to consider Boston Properties' application for the subway bonus. While the city's real life ability to perform its two roles separately and independently remains open to skepticism, especially when its relative success or failure in one role directly depends on its

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59. See *supra* notes 33 & 35 and accompanying text.

60. *Id.*

61. See NEW YORK, N.Y., ZONING RESOLUTION OF THE CITY OF NEW YORK §§ 86-0410 to 86-0411 (1971); Office of Lower Manhattan Development, Office of the Mayor, City of New York, *Special Greenwich Street Development District 30* (Oct. 1971).

actions in the other, it is instructive at this stage of the discussion to assume such ability.<sup>62</sup> Seen, then, through a selling landowner's eye, the city's conduct appears perfectly understandable. Like a typical seller, the city wanted to maximize sale revenue. Indeed, the RFP expressly stated that the primary consideration in selecting a winning bid would be the price offered for the property.<sup>63</sup> Whether that goal was appropriate or wise as a matter of public policy is, of course, an important question,<sup>64</sup> but its legality is undisputed even by Justice Lehner's opinion.<sup>65</sup> The pivotal question, then, is whether the means chosen to achieve the revenue maximization goal were legal. In order to answer this question, it is necessary to understand the nature and effect of the city's \$57 million contingent price refund.

### C. *Understanding the \$57 Million Contingent Price Refund*

The city faced a "chicken-egg" dilemma: the Coliseum site would be worth substantially more if the subway bonus was granted, but the city would not render a bonus decision until after it selected a winning bid

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62. See *infra* note 81 and accompanying text discussing the city's capacity to act separately and independently.

63. See *supra* text accompanying note 30.

64. Disposition of publicly owned land raises difficult public policy issues. Too often, cities reflexively adopt revenue maximization as their paramount goal. To the nightmarish distress of accountants, some cities have even utilized public land sales to close annual operating budget deficits. See, e.g., City of Boston, *Redevelopment Proposals for Four Municipal Garages: An Interim Report passim* (Oct. 1983) (discussing sale to private sector of four municipally owned garages). Revenue maximization is frequently pitted against physically appropriate levels of development, because achievement of one generally comes at the expense of the other. The Coliseum sale itself poses the question whether occasional shadows cast over Central Park constitute an acceptable tradeoff for extra municipal revenue. See Taylor, *supra* note 41, at 42. In the heightened polemics of a Mayor Koch, are not more police and a little less light and air better? In the equally charged response of environmental critics, the answer is a resounding no. Neither side is a fortiori correct, but the debate highlights the need for a public land disposition procedure that identifies and considers the public values implicated by a given sale. While acknowledging that certain aspects of public-private negotiations need some degree of privacy, much of this "apples and oranges" balancing should occur in the sunshine. Ultimately, the process must determine whether receiving the most money from the sale and spending it wisely best promotes the public interest, or whether sacrificing some revenue to promote alternative goals results in a superior final outcome. See generally Municipal Art Society, *Restoring the Balance: A Report on the Disposition of City-owned Land passim* (June 1989).

65. See *Municipal Art Soc'y*, 137 Misc. 2d at 837, 522 N.Y.S.2d at 803 ("When disposing of its property, government, of course, has an obligation to maximize the revenue it receives, consistent with its governmental responsibilities.").

and both parties signed the sales agreement. As the city understood its situation, it would financially be out of the picture at the financially critical juncture. Accordingly, if the city awarded the bonus, the new private owner would be left with the exclusive enjoyment of any forthcoming land value premium.<sup>66</sup> In a prime midtown Manhattan location like Columbus Circle, that land value premium would be substantial.

Framed within the operational context of incentive zoning, the city's choice of the \$57 million figure for its contingent price refund furnishes the basis for making an educated guess about the value of the FAR bonus. The essential thrust of incentive zoning is to encourage private developers to engage in behavior not otherwise rewarded in the marketplace. Unless developers perceive a financial benefit in the tradeoff between incentive and amenity, incentive zoning will not work. Calculated by the "cost-plus" formula, the value of the incentive must cover the amenity's cost plus an additional amount sufficient to motivate the developer to participate in the transaction.<sup>67</sup> While imbuing that fact with a negative inference for his overall conclusion, Justice Lehner himself recognized that an incentive's value would be worth more than the amenity's cost.<sup>68</sup>

66. See *infra* text accompanying notes 72-79 for a fuller understanding of the economics of the bidding process.

67. See J. GETZELS & M. JAFFE, *supra* note 1, at 21 (describing J. Kayden's "cost-plus" formula). The "cost-plus" formula calculates the amount of bonus floor area to be granted for a desired public amenity:

$$\text{Bonus floor area} = \frac{\text{Cost of amenity}}{\text{Net capitalized value of bonus s.f.}} \times \frac{\text{Conversion}}{\text{Ratio}} \times \frac{\text{Plus}}{\text{Factor}}$$

By dividing the capital cost of the amenity by the net capitalized value of a bonus square foot, the total amount of rentable bonus floor area necessary to cover the cost of the amenity is calculated. The "conversion ratio" translates this total from rentable square feet to zoning square feet, in recognition of the fact that the bonus is delivered in zoning square feet. Finally, the "plus factor" adds an amount above that necessary to cover the amenity's cost. By employing unit costs of the amenity per square foot in the numerator, the formula can compute the amount of bonus floor area adequate to encourage provision of a square foot of amenity.

68. Justice Lehner stated:

Although the members of the CPC may well in good faith have approved the full 20% FAR bonus as a fair incentive for the developer agreeing to make \$35 to \$40 million of subway station improvements, the developer and the City officials who approved the contract obviously recognized that *this bonus was worth a great deal more.*

*Municipal Art Soc'y*, 137 Misc. 2d at 838, 522 N.Y.S.2d at 804 (emphasis added). Thus,

What, then, is the value of the incentive? A developer receiving the full three FAR bonus would incur additional expenditures of \$35-\$40 million in subway improvements, as well as \$57 million in cash (the price reduction foregone upon award of the full bonus), totalling \$92-\$97 million. In order to satisfy the "cost-plus" formula, the bonus floor area would have to be worth this "cost" plus some incremental amount. Dividing the \$92-\$97 million cost by 448,261 square feet (the actual amount of bonus floor area represented by the three FAR bonus)<sup>69</sup> yields a net capitalized value per bonus FAR square foot of at least \$205-\$216.<sup>70</sup>

Not surprisingly, a comparison of this incentive value with the square foot value reflected by Boston Properties' actual marketplace offer confirms its reasonableness and thus supplies an important empiric check. Boston Properties effectively offered \$490-\$495 million for the site, consisting of the \$455 million purchase price and the \$35-\$40 million in subway improvements. Dividing the \$490-\$495 million by the eighteen FAR floor area of 2,689,569 square feet produces a net capitalized value per overall FAR square foot of \$182-\$184. The above-determined bonus FAR square foot's slightly higher value (\$205-\$216) may reflect capitalization of a rent premium resulting from the ability to charge more rent for higher bonus floors.<sup>71</sup>

Attempting to secure for itself a share of the additional land value that would result if it did award a bonus, the city elected the pro-active strategy, designed to influence bidding behavior, of the \$57 million contingent price refund. The idea appeared simple enough. Bids for the site rested largely upon the market's assumption about applicable zoning restrictions. For example, the site would yield higher bids as-

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any reflexive comparison of the \$35-\$40 million subway improvement cost with the \$57 million contingent price refund amount would reveal a fundamental misunderstanding of the operation of incentive zoning.

69. Multiplied by 15 FAR, the 149,420 square foot site produces a base building of 2,241,307 square feet. The three FAR bonus of 448,261 square feet results in a total project of 2,689,569 square feet. All figures are slightly off because of rounding. The bonus figure contained in Justice Lehner's opinion, 448,500 square foot, is slightly larger than the actual bonus.

70. "Net capitalized value per bonus square foot" means the capitalized value of a square foot of office space less the cost of constructing that square foot. To obtain the capitalized value, operating expenses are deducted from net income, and the resulting amount is capitalized at an appropriate cap rate.

71. Because of their better views, higher floors usually earn a rent premium. See Pollard, *Topographic Amenities, Building Height, and the Supply of Urban Housing*, 10 REGIONAL SCI. AND URB. ECON. 181, 196 (1980).

suming the bonused eighteen FAR rather than the matter of right base fifteen FAR. Yet, bidders could not know whether to ground their offers on the matter of right base fifteen FAR, the bonused eighteen FAR, or somewhere in between. By guaranteeing financial reimbursement for the value of the amount of bonus not awarded, the contingent price refund permitted potential buyers to offer, at no risk to themselves, an amount based on the bonused FAR. Functioning much like an insurance policy, the strategy indemnified bidders against any potential loss and shifted that financial risk to the city.

*D. On Further Reflection: The Economic Effect of the \$57 Million Contingent Price Refund*

Closer scrutiny of the city's contingent price refund strategy reveals an ironic twist: the strategy would not necessarily yield additional revenue to the city beyond that forthcoming had the city put the property up for sale without conditions. With no \$57 million contingent price refund stipulation, incoming offers would reflect uncertainty as to the applicable FAR. Potential buyers would bid the site's value at the matter of right base fifteen FAR, plus the net value of the bonus three FAR discounted by the probability of obtaining the bonus. The following equation describes the bid amount calculation:<sup>72</sup>

$$\text{Equation One: } B = V_1 + p(V_2 - C)$$

where:

$B$  is the expected bid amount;

$V_1$  is the site's expected value at the matter of right base FAR;

$p$  is the bidder's expectation of the probability the bonus would be granted;

$V_2$  is the expected value to the bidder of the bonus floor area;

$C$  is the expected cost to the bidder of the subway improvements amenity.

Expressed as a percentage,  $p$  represents the bidder's best guess about the likelihood of obtaining the bonus and would be predicated on such indicators as the city's past record in granting bonuses, the need for adjacent subway improvements, and so forth.<sup>73</sup>  $V_2$  equals the annual income less annual expenses of the bonus floor area, capitalized at an

72. This equation assumes that all bidders have similar expectations about the site's value, the probability the bonus would be granted, and so forth.

73. Section 81-535 of the zoning ordinance lists the specific criteria for the City Planning Commission to consider. See *supra* note 35. Those with a more cynical bent would add, first and foremost, the bidder's political connections.



appropriate cap rate,<sup>74</sup> less the capital cost of constructing the bonus floor area.

Although the RFP instructed potential buyers to bid at the bonused eighteen FAR, that instruction, standing alone without a refund guarantee, would not in fact have influenced bidders.<sup>75</sup> Instead, as discussed above, the \$57 million contingent price refund would influence bidders to offer a higher amount because of the assurance of recouping up to \$57 million if the bonus was not forthcoming.<sup>76</sup> The following equation describes the effect of the contingent price refund on bidding behavior:

$$\text{Equation Two: } B = V_1 + p(V_2 - C) + (1 - p)R$$

where:

$B$  is the expected bid amount;

$V_1$  is the site's expected value at the matter of right base FAR;

$p$  is the bidder's expectation of the probability the bonus would be granted;

$V_2$  is the expected value to the bidder of the bonus floor area;

$C$  is the expected cost to the bidder of the subway improvements amenity;

$R$  is the contingent price refund amount promised by the city.<sup>77</sup>

As Equation Two suggests, the bidder would be willing to bid an additional amount  $(1-p)R$  (the contingent price refund discounted by the probability the bonus would not be granted, which is the condition precedent triggering the refund payment). The bidder is thus protected up to \$57 million against the possibility of overbidding in reliance upon a bonused FAR value and subsequently failing to receive the bonus. By

74. The capitalization computation asks how much a person would be willing to pay for the income stream represented by the bonus floor area. The cap rate reflects the rate of return an investor would generally demand for that category of investment. See, e.g., W. BRUEGGEMAN & L. STONE, REAL ESTATE FINANCE 331 (1981).

75. Although the RFP required the winning bidder to apply for the bonus, that application presumably could be structured to assure City Planning Commission rejection.

76. The winning bidder could subsequently obtain an amount of bonus floor area ranging from zero to a maximum of three FAR. The sliding scale formula outlined in the RFP attempted to assure the buyer that if only some, but not all, of the three FAR bonus was awarded, the price would be adjusted correspondingly. For purposes of the immediate analysis, the bidder is assumed to calculate only the possibility of receiving the full three FAR bonus.

77.  $B$ ,  $V_1$ ,  $p$ ,  $V_2$ , and  $C$  are the same as specified in Equation One. See *supra* text accompanying note 72.

mitigating the insured's risk of making a mistake, this "policy" thus alters the insured's behavior in ways the city desires.

Compare two bidders. Both expect that there is a seventy-five percent chance of procuring the subway bonus. Bidder X is not told about a contingent price refund. Bidder Y is told that the sales price will be subsequently reduced by \$57 million if the city does not grant the bonus. Bidder Y is able to increase its bid by the expected value of the contingent price refund, *i.e.*, the refund discounted by the probability of receiving it, and still be in as good a position as Bidder X. In this example, Bidder Y's bid would be increased by \$57 million multiplied by the twenty-five percent chance of receiving the \$57 million, or by more than \$14 million.

But the story does not end here. That the contingent price refund would cause potential buyers to bid more for the Coliseum site is not the same as saying that the city would ultimately end up with more money than it would have had it not offered the refund. Although the contingent price refund operated to decrease the downside risk of overbidding for the bidder, it simultaneously introduced a downside risk for the city by creating a potential obligation. The city would keep the higher bid amount only if the bonus was ultimately granted. If, on the other hand, the bonus was not granted, then the \$57 million refund would have to be paid, and the initially higher sale proceeds would be commensurately reduced. Recalling the insurance analogy, the insurer does best when it does not have to pay out on its policy. As described by Equation Three, the additional bid amount would be exactly offset by the potential price refund:

Equation Three:

$$\begin{aligned} S &= V_1 + p(V_2 - C) + (1 - p)R - (1 - p)R \\ &= V_1 + p(V_2 - C) \end{aligned}$$

where:

$S$  is the city's expected proceeds from the sale;

$V_1$  is the site's expected value at the matter of right base FAR;

$p$  is the bidder's expectation of the probability the bonus would be granted;

$V_2$  is the expected value to the bidder of the bonus floor area;

$C$  is the expected cost to the bidder of the subway improvements amenity;

$R$  is the contingent price refund amount promised by the city.<sup>78</sup>

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78.  $V_1$ ,  $p$ ,  $V_2$ ,  $C$ , and  $R$  are the same as specified in Equations One and Two. See *supra* text accompanying notes 72 & 77.

While the city would receive a bid increased by  $(1-p)R$  (the contingent price refund discounted by the probability the bidder would ultimately receive it), the city's liability would increase by  $(1-p)R$  (the likelihood the city would have to pay the refund).<sup>79</sup> Arithmetically, the last two elements in Equation Three,  $(1-p)R$  and  $(1-p)R$ , cancel each other out, and Equation Three's  $S$ , the city's expected sales proceeds, is exactly the same as Equation One's  $B$ , the bid amount forthcoming had no contingent price refund been announced.

### E. *The "Two Hat" Problem*

Yogi Berra is reputed to have said, "It ain't over 'til it's over." As the above equations make clear, the city's ultimate revenue from its sale of the Coliseum parcel would remain uncertain at the time the sales agreement was reached, and would only be resolved once the City Planning Commission concluded its bonus deliberations. Thus, the city's claim to Boston Properties' winning offer did not necessarily include what Justice Lehner described as an "additional \$57 million in cash." Any such amount would be subtracted from the \$455 million bid by refund upon a negative bonus decision. However, because Justice Lehner knew by the time of his opinion that the city in fact had granted the bonus, he could make his *ex post ex ante* characterization about an "additional \$57 million in cash," and thereby implicate the "two hat" problem. As he saw it, "government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit upon a developer. Zoning benefits are not cash items."<sup>80</sup>

Should the single fact that the city's retention of \$57 million in sale proceeds causally depended upon the outcome of its bonus decision render the entire deal illegal? A comparison of the city's conduct with that of a hypothetical private seller is illuminating. Imagine the same Coliseum transaction except that the land is originally owned by a private party. The hypothetical private owner agrees to sell the Coliseum site to Boston Properties for \$455 million, contingent on Boston Properties' subsequent success in obtaining the three FAR subway bo-

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79. Equation Three assumes that the bidder's forecast of  $p$  (the probability the bonus would be granted), is the same as the actual probability the bonus would be granted. Although the bidder in fact may have a higher or lower forecast of probability than the actual probability, the assumption provides a reasonable simplification for purposes of this discussion.

80. *Municipal Art Soc'y*, 137 Misc. 2d at 838, 522 N.Y.S.2d at 804.

nus. Boston Properties agrees to apply for and make its best efforts to obtain the bonus, and the private seller agrees to reduce the \$455 million purchase price by \$57 million if no bonus is ultimately obtained. No one, presumably not even Justice Lehner, could object to such a transaction. It neither violates the zoning ordinance nor any other conceivable law on the books. To the contrary, land sales agreements between private parties commonly include contingency clauses about "condition subsequent" events such as zoning approvals and financing.

Identical in every respect to the actual Coliseum transaction except for the seller's identity, the above hypothetical singularly trains the legal inquiry on whether the city's original ownership of the site, as opposed to a private party's original ownership, should make the dispositive difference. Of course, there is an obvious distinction between a city government and a private owner selling property: private owners do not control zoning, whereas city governments do. By increasing allowable density on a site, for example, the city can commensurately increase the price it receives for the site. The concurrent city identity as seller and regulator, and the consequent tension between revenue-maximizing and regulatory goals, could encourage local governments to abandon good city planning practices, or even to disregard statutorily defined planning guidelines, in order to maximize revenue from land sales.

The "two hat" problem, with its troublesome identity of seller and regulator, lurks close to the surface of Justice Lehner's opinion.<sup>81</sup> It raises one of three potential conflicts of interest: a demonstrated, structural, or appearance conflict. In a demonstrated conflict, a city makes a zoning decision for the express purpose of increasing the price it obtains for selling its land, thereby subverting traditional planning justifications underlying land use regulation. In a structural conflict, the specific public agency responsible for land sales also makes the zoning decisions and is presumed incapable of divorcing land value from planning implications. In an appearance conflict, the mere possibility that improper considerations influenced the city's zoning decision, even if separate and insulated agencies are involved, contaminates the decision.

In the *Municipal Art Society* case, the city's dual role implicates all three potential conflicts, raising the question whether the relevant city

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81. Of course, the "two hat" problem exists even when the city is not selling land, because the city has an incentive to zone permissibly in order to realize maximum property tax revenues from a parcel.

agencies granted the special permit for the zoning bonus in order to preclude payment of the \$57 million contingent price refund to the developer, thereby assuring the city maximum revenue from the sale. However, Justice Lehner's opinion never specifically addresses these conflicts. With respect to the demonstrated conflict, his opinion makes no finding that the City Planning Commission or Board of Estimate diverged from the ordinance's listed criteria when granting the special permit for the subway improvements bonus. The fifty-page City Planning Commission report on Boston Properties' application includes detailed and express findings on each of the elements that section 81-53 requires.<sup>82</sup> Nor did Justice Lehner evince any direct or circumstantial evidence that the Commission or Board awarded the bonus partially or wholly to preclude payment of the \$57 million price refund. To the contrary, Justice Lehner stated that "*the members of the [City Planning Commission] may well in good faith have approved the full 20% FAR bonus as a fair incentive for the developer agreeing to make \$35 to \$40 million of subway station improvements. . .*"<sup>83</sup> Thus, actual bad faith cannot be said to have muddied the waters. As for structural or appearance conflicts, the opinion never discusses the inherent impossibility of insulating the Commission's zoning bonus decision from its revenue maximization implications, or the inherent unbelievability of such separation in the mind of a reasonable public.

Justice Lehner invalidated the Coliseum Center transaction because the contract of sale provided for what he deemed an "illegal payment,"<sup>84</sup> "illegal" because it was not contemplated by the zoning resolution.<sup>85</sup> With no discussion of conflicts problems or other irregularities in the subsequent grant of a bonus pursuant to section 81-53, however, the opinion fails to answer satisfactorily how the city, as seller, acted illegally when it accounted for the site's increased value at an eighteen FAR. If the technical correctness of Justice Lehner's legal analysis and conclusion is doubtful, his failure to discuss the conflicts issues nonetheless should not obscure their significance. Stripping away formalistic excuses, the city's defense of its actions rings hollow at the gut level. Yes, the city's sales and zoning bonus procedures were

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82. See Resolution of City Planning Commission Regarding Application for Grant of Special Permit for Floor Area Bonus, *supra* note 44, at A490-540.

83. *Municipal Art Soc'y*, 137 Misc. 2d at 838, 522 N.Y.S.2d at 804 (emphasis added).

84. *Id.*

85. *Id.* at 837, 522 N.Y.S.2d at 803.

largely separate, even if the Board of Estimate played a final approval role in both. Yes, the City Planning Commission, designated to make the initial special permit decision on the subway improvements bonus application, did not play any formal role in the selling of the site. Yes, nothing in the record suggests that the subway improvements bonus was not fully justified on its own merits. In the end, however, no amount of formalistic defense can disguise the salient fact that the city qua city controlled its own destiny for purposes of final disposition of the \$57 million refund. The city alone could trigger or quash the refund. Is it believable that the City Planning Commission, whose members the mayor appoints, would not grant the bonus when it knew that \$57 million in municipal revenue was riding on its decision? Is it believable that the Board of Estimate, responsible for approving both the sales transaction and the bonus, could effectively partition the two decisions? No matter how high or impervious a chinese wall existed between relevant city agencies, the parties knew what the bonus decision meant to the city coffers. In short, this case makes a clarion call for the fashioning of new policy and legal frameworks to govern the disposition of publicly owned land.<sup>86</sup>

#### F. *The Relationship Issue*

Justice Lehner's faulty conception of the \$57 million, as part of the incentive zoning transaction, propelled him to focus on another aspect of the technique: the nature of the relationship between incentive and amenity. For Justice Lehner, the city's failure to earmark the \$57 million for adjacent subway improvements caused an improper decoupling between the incentive's burden on the surrounding Columbus Circle neighborhood and the amenity's potentially offsetting neighborhood benefits.<sup>87</sup>

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86. See Municipal Art Society, *Restoring the Balance*, *supra* note 64 *passim*.

87. Justice Lehner declared:

Increasing the bulk of a project imposes a certain burden on the local community. The Zoning Resolution provides a means by which, in return for the imposition of that burden, a benefit is granted to the community.

Here, the major portion of the benefit which the purchaser is willing to pay for the right to construct a building of greater density than is permitted "as of right" is to be paid to the City *to be employed for purposes other than local improvements*. A proper *quid pro quo* for the grant of the right to increase the bulk of a building may not be the payment of additional cash into the City's coffers *for citywide use*.

*Municipal Art Soc'y*, 137 Misc. 2d at 837-38, 522 N.Y.S.2d at 803-04 (emphasis added). Earlier in his opinion, Justice Lehner quoted a 1982 City Planning Commission report

As discussed earlier,<sup>88</sup> if classified as an amenity the developer offers in return for a three FAR bonus, a cash payment of \$57 million or, for that matter, a proffer of anything but adjacent subway improvements, would violate section 81-53 of the zoning ordinance. However, when the \$57 million is correctly understood as part of the incentive's value to the landowner, and thus as legitimately retainable by the city in its capacity as land seller, the \$57 million becomes equivalent to ordinary revenue generated by public land sales. As such, the money would face no geographical or other earmarking restriction and could fund city-wide municipal budgetary activities such as police, fire, and sanitation, without contravening zoning or other laws governing city conduct.

Tethered to the specific tradeoff authorized by the express language of section 81-53, extra floor area for adjacent subway improvements, Justice Lehner's broad dictum, "[a] proper *quid pro quo* for the grant of the right to increase the bulk of a building may not be the payment of additional cash into the City's coffers *for citywide use*,"<sup>89</sup> is unexceptional.<sup>90</sup> Untethered to section 81-53—and Justice Lehner's opinion leaves open this interpretation—his rule has the dramatic effect of grounding the newest statutorily authorized exercises of incentive zoning through which bonus floor area is traded for funding or provision of such arguably "unrelated" amenities as low-income housing, cultural facilities, day care centers, and job training. These amenities are "unrelated" in the sense that they predominantly serve citywide needs, fail to mitigate the negative physical impacts of the bonus floor area on the immediate neighborhood, and are frequently located off-site from the bonus floor area.

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that explicitly rejected use of incentives to encourage provision of non-adjacent subway improvements:

A floor area bonus is provided for a substantial subway entrance improvement adjacent to a development site. . . . An off-site subway-station improvement does not provide any compensating reduction in density. The proposed bonus is justified because it improves direct access to the larger development. For off-site subway improvements direct financial incentives appear to be more appropriate than zoning measures.

*Id.* at 836, 522 N.Y.S.2d at 803 (quoting New York City Planning Commission, MIDTOWN ZONING, Mar. 1982, at 36-37).

88. See *supra* text accompanying notes 59-61.

89. *Municipal Art Soc'y*, 137 Misc. 2d at 838, 522 N.Y.S.2d at 803-04 (emphasis added).

90. See *supra* text accompanying note 60 (discussing section 81-53 authorizing the award of bonuses exclusively to encourage major improvements of adjacent subway stations).

Although Justice Lehner's opinion contains no legal foundation for a sweeping interpretation of his rule, it is easy to comprehend his visceral discomfort with the lack of a relationship between incentive and amenity. That disconnection raises substantial questions about fundamental fairness and planning policy. For example, if a neighborhood must endure the burdens associated with the incentive, then why should it not garner the lion's share of the benefits associated with the amenity? Should not the amenity mitigate, in some fashion, the bonus floor area's local impact — extra street and sidewalk congestion and the loss of light and air at ground level? Does not the grant of an incentive for an unrelated amenity ultimately undermine the zoning ordinance's basic integrity?

### G. *The Traditional Physical Planning Approach*

Justice Lehner's relationship declaration resonates with the traditional physical planning approach to zoning.<sup>91</sup> Applied to specific sites and neighborhoods, zoning is a marriage of the sacred and the profane. Because zoning decisions can cause monumental financial gains or losses for private developers, it is not surprising that the profane sometimes overrules the sacred. The numerous real life examples of zoning actions unjustifiable on any traditional physical planning ground reflect the push and pull of diverse private, neighborhood, and public interests within a city.<sup>92</sup> At the same time, traditional physical planning criteria play an important role in zoning decisions. City planners, the usual final decision-makers on zoning's trio of use, height, and bulk restrictions, explore numerous quantitative and qualitative features in formulating zoning recommendations for elected officials. They measure the capacity of public infrastructure such as sewer and water pipes, streets, sidewalks, and mass transit. They weigh the area's characteristics, including existing buildings' uses, heights, and bulks. They review new

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91. The rhetoric of the traditional physical planning approach, which monopolized zoning professionals during the first decades of zoning, more recently has given way to the reality of zoning's inherent impact on social and economic concerns. *See, e.g.*, 5 N. WILLIAMS, *AMERICAN LAND PLANNING LAW* § 163.23, at 877 (1985):

Land use controls may be used, and are now probably used, as much for influencing economic development and the social structure as for physical planning goals. In many situations, social and economic factors are in fact the most important elements in a decision. . . . It is therefore a little late to start a debate on whether such factors should be taken into consideration in physical planning decisions.

*Id.*

92. *See, e.g.*, R. BABCOCK, *THE ZONING GAME passim* (1966).



development's impact on light and air at street level. While it would be naive to describe such traditional physical planning criteria as neutral, objective, or precise in an absolute sense, they nonetheless represent the professionally developed and accepted source materials informing the planner's judgment about the appropriate level of development for a given geographical location.<sup>93</sup>

When encouraging the provision of "unrelated" amenities, incentive zoning inherently undermines this regime. The most popular incentive, the floor area bonus, promotes buildings that exceed the density that traditional physical planning criteria dictate. If the amenity is "unrelated" to the incentive, in the sense that it fails to mitigate the incentive's harmful physical impacts on the surrounding area,<sup>94</sup> then the status of traditional physical planning criteria is depreciated. New York City's original 1961 incentive zoning plazas and arcades represented classic prototypes of "related" amenities.<sup>95</sup> The on-site provision of these effectively larger sidewalks made them "density-ameliorating," more than offsetting additional sidewalk congestion created by the extra employees occupying the incentive's bonus floor area. Similarly, section 81-53's amenity of adjacent subway improvements mitigates the impact of additional office employees by expanding the capacity of mass transit facilities.<sup>96</sup> Of course, neither of these amenities addresses all deleterious impacts of bonus space. For example, the subway improvements do not redress loss of light and air at street level. At the same time, the amenities presumably address broader problems than those which the bonus space alone causes.<sup>97</sup> If not perfect, the relationship between an incentive's burden and an amenity's benefit is sufficient.

Citywide social amenities such as low-income housing, cultural facilities, day care centers, and job training, however, differ from "density-

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93. Planners and public officials also assess the city's fiscal and economic development needs before setting levels of development.

94. For a quantitative estimate of some of the impacts bonus floor area has on a city, see J. KAYDEN, *supra* note 7, at 54-57.

95. See NEW YORK, N.Y., ZONING RESOLUTION OF THE CITY OF NEW YORK §§ 33-131, 33-151 (1973).

96. Assuming a "rule of thumb" of 200 square feet per office employee, the 448,261 square feet of bonus floor area awarded to the Coliseum development would generate 2,241 additional employees, many of whom would use mass transit to commute to and from work.

97. It would be strange indeed for a city to encourage amenities whose sole purpose would be mitigation of the incentive's deleterious impact.

ameliorating” amenities. Although these amenities may constitute vital public benefits to the city as a whole, they do not strictly mitigate the incentive’s localized physical burden. For example, the provision of low-income housing across town does not lessen the additional congestion caused by the floor area bonus. Even though provided on-site within the Times Square area, New York City’s celebrated incentive zoning amenity of theatres lacks the “density-ameliorating” qualities that distinguish urban design amenities of plazas and arcades.<sup>98</sup> These types of regulatory trades are not unlike a floor area bonus given to an office tower in one section of a city in return for provision of a plaza in another, easily understood as a clear severing of the favored physical relationship.

#### H. *An Alternative to the Traditional Physical Planning Approach*

Stemming from the traditional physical planning approach to zoning, in which physical values are implicitly preferred above others, the foregoing discussion ignores the fact that incentive zoning for unrelated amenities does nothing more than pit a different set of public values against the traditional physical planning values. Listen to incentive zoning’s “Tale of Two Cities.” Assume that a city authorizes a maximum matter of right fifteen FAR in its central business district. Under one scenario, the city employs incentive zoning strictly for related amenities such as plazas and arcades. The average built FAR on most sites in its central business district is now eighteen, including the three FAR bonuses, but the buildings are surrounded by the related plazas and arcades. Under another scenario, the city employs incentive zoning for unrelated amenities of low-income housing, cultural facilities, and day care centers. The average built FAR on most sites in its central business district is also eighteen. Unlike the city in the first scenario, however, this city does not have plazas and arcades surrounding its buildings. Instead, it contains an alternate set of amenities: 1,000 units of low-income housing, two theatres, and five day care centers dispersed throughout its jurisdiction. Has the city in the second scenario made a less valid public choice than the city in the first? Is it illegal or improper for citizens choosing the second scenario to decide they are willing to tolerate more congestion in order to obtain a substitute array of public benefits? Is it not within the province of communities to make exactly such judgments about the kinds of environments they

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98. See NEW YORK, N.Y., ZONING RESOLUTION OF THE CITY OF NEW YORK § 81.00 (1973).

want?<sup>99</sup>

Moreover, the focus on a traditional physical planning connection between incentive and amenity overlooks the possibility of social and economic linkages as well. For example, office development may generate harmful short-term price impacts on existing city residents by accommodating employees who consume housing in nearby neighborhoods.<sup>100</sup> New office towers may replace light industrial and warehouse structures, creating a job-skill mismatch for dislocated blue collar workers. The high rents office space fetches may crowd out convenient day care centers which would otherwise make it easier for employees with children to take office jobs. If such connections are conceptually more complex<sup>101</sup> and empirically more elusive,<sup>102</sup> they are no less worthy of consideration than the connections more easily

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99. *But see infra* text accompanying notes 104-60 discussing *Nollan's* impact on the legality of incentive zoning for unrelated amenities.

100. *See Kayden & Pollard, Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127, 132-36 (1987).

101. For example, economists would express efficiency concerns only about "real" externalities of office development, such as its impact on public infrastructure and light and air at street level, and not about its "pecuniary" externalities, such as its price impact on housing or job availability. *See Kayden & Pollard, supra* note 100, at 134 n.29. *See generally* S. RHOADS, THE ECONOMIST'S VIEW OF THE WORLD 269 (1985). Under that view, office developments should internalize only the costs imposed upon "collective goods" of infrastructure and light and air, and not those imposed upon "private goods" of housing and jobs. On the other hand, third parties suffering negative price impacts because of office development may marshal equity arguments to support claims for compensatory relief of affordable housing or job training amenities. *See Kayden & Pollard, supra* note 100, at 134 n.29.

Other questions arise regarding the appropriateness of asking office developers to provide facilities and services, such as day care and theatres, that the private sector itself has traditionally provided. Because employees eat and go to movies, may office developers be asked to build supermarkets and cinemas? In addition, are office developments themselves responsible for increased pressure on housing markets, or are employers who rent space and hire employees, or consumers who purchase goods and services, ultimately responsible? In incentive zoning transactions, where developers voluntarily provide such amenities, these questions hold less significance than in situations forcing developers to provide such amenities. *But see infra* notes 104-160 and accompanying text discussing *Nollan*.

102. For example, owing to imperfect or unavailable data, the determination of housing price impacts associated with office development requires assumptions that undermine the definitive nature of quantitative study results. *See Kayden & Pollard, supra* note 100, at 135 n.31 (qualifying conclusions drawn from study of Boston housing market).

documented in the strict accounting sense between bonus floor area and plazas.

The traditional physical planning assault on incentive zoning for unrelated amenities ultimately is disappointing because it fails to recognize the political economy of cities. To maintain economic competitiveness and a good working and living environment, cities find it necessary to burnish the social and economic as well as the physical aspects of their jurisdictions. Local governments routinely decide between conflicting "apples and oranges" public values whenever they review a proposed real estate development project. Veterans of the rhetoric and substance of "growth" versus "no growth" debates, today's city officials are accustomed to balancing the need for increased jobs and property tax revenues against the maintenance of existing community character and acceptable levels of congestion. The zoning map itself intrinsically reflects the community's advance judgment about such tradeoffs. Disparate value tradeoffs are hardly confined to regulatory decisions about development. When cities allocate more tax dollars for police and less for libraries, or when they build a convention center and eliminate a drug treatment facility, they are necessarily choosing between diverse public interests. If public officials may balance police against libraries, then it is difficult to contend that they may not pit additional congestion against social amenities.<sup>103</sup>

### III. THE *NOLLAN* CASE

On its face, *Nollan v. California Coastal Commission*<sup>104</sup> appears quite unlike *Municipal Art Society v. City of New York*.<sup>105</sup> *Municipal Art Society* comprised a high-profile cast of characters, millions of dollars in potential private profit and public revenue, and a threatening shadow over the city's beloved Central Park. *Nollan* entailed a conflict between a couple's desire to replace their oceanfront bungalow with a new house and the California Coastal Commission's efforts to obtain an easement for the public to walk along the couple's beach. Moreover, where Justice Lehner expressly scrutinized and condemned an exercise of incentive zoning, the *Nollan* opinion does not even mention the words "incentive zoning." Thus, it is ironic that *Nollan*, not *Municipal Art Society*, ultimately represents the crucial watershed for the

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103. *But see infra* text accompanying note 136.

104. 483 U.S. 825 (1987).

105. 137 Misc. 2d 832, 522 N.Y.S.2d 800 (Sup. Ct. 1987).

technique. If the *Nollan* opinion applies, then Justice Lehner's statutory interpretation about the necessary relationship between incentive and amenity is endowed with a constitutional foundation, and the appecart of incentive zoning for unrelated amenities is nationally upset. If *Nollan* does not apply, however, then Justice Lehner's views reach beyond his opinion only to the extent they persuade other judges confronted with similar legal challenges.

The facts of *Nollan* are central to the inquiry. Pat and Marilyn Nollan leased, with an option to buy, a small beachfront lot containing a 521 square foot bungalow, located north of Los Angeles on the Pacific coast in Ventura County.<sup>106</sup> Wanting to replace the bungalow with a new 1,674 square foot two-story single-family home,<sup>107</sup> the Nollans applied to the California Coastal Commission for the required coastal development permit.<sup>108</sup> The Commission granted the permit, subject to the condition that the Nollans provide an easement allowing the public to walk north and south on their beach between the mean high tide line and their seawall.<sup>109</sup> The Commission imposed the easement condition because it found that the new house would block views to the ocean, would contribute to "a 'wall' of residential structures [preventing the public] psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit," and would add to

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106. *Nollan*, 483 U.S. at 827, 856 (Brennan, J., dissenting). Although Justice Scalia's majority opinion referred to the bungalow as having 504 square feet, *id.* at 827, the correct figure (used by Justice Brennan in his dissent) appears to be 521. See Appellant's Jurisdictional Statement at E-36, *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

107. In order to exercise their purchase option, the Nollans were required by deed restriction to demolish the bungalow and replace it with a new structure. *Nollan*, 483 U.S. at 828. Apparently included in the original subdivision and conveyancing agreements for a large land holding along the coast, this restriction operated to ensure that all lot owners built and maintained quality properties, in effect a good neighbor policy.

108. *Id.*

109. *Id.* Under California law, the historic mean high tide line demarcated the boundary between private and public domains. *Id.* at 827. Thus, at low tide, the public could walk along the coast, between the low and high tide lines, without trespassing on the Nollans' beach. At high tide, however, beachcombers would have to swim north and south, insofar as the only beach above water would be on the Nollans' property. At its maximum distance, the Nollans' seawall lay 10 feet east of the mean high tide line. *Id.* at 853 (Brennan, J., dissenting). The easement condition would make it easier for the public to walk directly between the Faria County Park public beach, one quarter mile up the coast from the Nollans' beach, and the Cove public beach, 1,800 feet to the south. *Id.* at 827.

private use of the coast.<sup>110</sup> The Nollans sued the Commission, arguing that the imposition of the permit condition effected a taking of their private property in violation of the fifth amendment's just compensation clause.<sup>111</sup>

In its five-to-four decision, the United States Supreme Court sided with the Nollans.<sup>112</sup> Writing for the majority, Justice Scalia found that the easement condition failed to substantially advance the same assumed legitimate state interests harmed by construction of the new house, and thus violated the just compensation clause.<sup>113</sup> He first asserted that the Commission could not have demanded outright the conveyance of an easement had the Nollans simply maintained their existing bungalow use, because government actions causing a "permanent physical occupation" defeat the landowner's cardinal property right to exclude others.<sup>114</sup> Thus, he continued, the question for the Court was whether requiring the conveyance of the easement as a condition for issuing a land use permit altered the constitutional judgment.<sup>115</sup>

Assuming the legitimacy of the Commission's declared public purposes, Justice Scalia reasoned that the Commission either could have refused permission altogether to construct the new house if construction would "substantially impede" such purposes,<sup>116</sup> or could have at-

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110. *Id.* at 828-29 (quoting California Coastal Commission's factual findings).

111. The just compensation clause states, "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The California Superior Court ruled in the Nollans' favor on statutory grounds, concluding that the Commission's administrative findings as to the burden on beach access caused by the new house were inadequate. *Nollan*, 483 U.S. at 829. The Court of Appeals reversed that ruling, and also held that the condition did not violate the just compensation clause. *Id.* at 830. The California Supreme Court declined to review the case.

112. Justice Scalia, joined by Chief Justice Rehnquist and Justices White, Powell, and O'Connor, delivered the Court's opinion. Justice Brennan, joined by Justice Marshall, filed a dissent. Justice Blackmun filed a dissent and also joined one authored by Justice Stevens.

113. The Court assumed, without deciding, the legitimacy of the declared Commission purposes. *Id.* at 835.

114. *Id.* at 831 (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 432-33 n.9 (1982)). See, e.g., *Loretto*, 458 U.S. at 434-35; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979). But see *infra* note 118.

115. *Nollan*, 483 U.S. at 834.

116. *Id.* at 837. Presumably to flag the "economic viability" prong of just compensation clause jurisprudence, Justice Scalia's majority appended the caveat, "unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." *Id.* at 836 (citing *Penn Central Transp. Co. v. New York City*, 438 U.S.

tached a condition to the construction that “serves the same governmental purposes as the development ban.”<sup>117</sup> Thus, in service of the Commission’s stated goals of protecting the public’s ability to see the beach, overcoming the “psychological barrier” caused by coastal development, and preventing congestion on the public beaches, the Commission could have banned the new house, or imposed, for example, the following conditions actually suggested by Justice Scalia: height and width limitations, a fence ban, or most remarkably because it would constitute a permanent physical occupation, a requirement that the Nollans provide “a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere.”<sup>118</sup> Because the actual easement condition failed to advance any

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104 (1978)); *see, e.g., Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). As a boilerplate reminder that owners are generally entitled to economically viable use of their property, no matter how significant the public purpose underlying the regulation, the caveat is virtually axiomatic. *See, e.g., Agins*, 447 U.S. at 260; *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). As an ironclad guarantee of property rights in all cases, however, the caveat conflicts with the idea that owners are not entitled to economically viable use of their property if such use causes a nuisance or similarly harms the public interest. *See First English Evangelical Lutheran Church v. County of Los Angeles*, 210 Cal. App.3d 1353, 258 Cal. Rptr. 893 (1989), *cert. denied*, 110 S. Ct. 866 (1990); *cf. Hadacheck v. Sebastian*, 239 U.S. 394 (1915); *Mugler v. Kansas*, 123 U.S. 623 (1887). Indeed, one may argue that such uses are not part of the individual’s private property right at all. Thus, to the extent that substantial impediments to legitimate public purposes arising from the Nollans’ new house might be analogized to a nuisance, a ban on the new house might not effect a taking even under the economic viability analysis.

117. *Nollan*, 483 U.S. at 837. Justice Scalia sprinkled his opinion with several formulations of the test. For example, “The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition,” thereby severing “that essential nexus.” *Id.* He agreed with the Commission’s own version that the condition must “serve the same legitimate police-power purpose[s] as a refusal” to grant the permit. *Id.* at 836. He talked about the “lack of nexus between the condition and the original purpose of the building restriction.” *Id.* at 837.

118. *Id.* at 836. Justice Scalia’s declared willingness to countenance a public viewing spot on the Nollans’ front lawn (presumably equipped with oversized steel binoculars on stanchions that cost a quarter per view) should be treated warily. After all, it must be remembered, the Court only assumed the legitimacy of the Commission’s visual access public purpose constituting the predicate for upholding a ban on the new house, or alternatively, a viewing spot condition.

Taken at face value, however, Justice Scalia’s approval of a physical invasion invites further speculation. Previously, he argued that, had the Nollans retained the existing bungalow, the Commission could not have required outright the easement, because government actions causing a “permanent physical occupation” defeat the owner’s property right to exclude others. *Id.* at 831-32. What if, however, the definition of a nuisance altered over time to cover uses of private property blocking significant views?

of the asserted purposes — permitting people to walk along the Nollans' beach would not mitigate burdens on visual access to the ocean caused by the new house, or presumably, address the two other Commission goals — the Court struck down the condition.<sup>119</sup>

A. THE *NOLLAN* RATIONALE AND INCENTIVE ZONING:  
VOLUNTARINESS DENIED

At first glance, *Nollan* would appear to have little relevance to incentive zoning. Where the technique involves landowners who voluntarily provide amenities in return for incentives, were not the Nollans forced to provide the beach access easement? Appearances can be deceiving. The majority's rationale effectively recasts the voluntary operation of all incentive zoning transactions. Consequently, the opinion threatens to prohibit exercises of the technique for unrelated amenities.

Justice Scalia argued that, because "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit,'" the Commission's attempt to trade the new house permit for the beach easement could not a priori reflect a "voluntary 'exchange.'"<sup>120</sup> If his predicate "right to build on one's own property," subject to "legitimate permitting requirements," means nothing more than the boilerplate right to use one's property, subject to government regulations serving the public interest, then this part of his argument is axiomatic.<sup>121</sup> The theory that the sovereign grants private property

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At that point, one might suppose, the Commission could ban the existing offending bungalow (assuming it blocked the view), just as government banned the existing brick yard use in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), and the existing brewery use in *Mugler v. Kansas*, 123 U.S. 623 (1887), without running afoul of the Constitution. Cf. *Pendoley v. Ferreira*, 345 Mass. 309, 315, 187 N.E.2d 142,145 (1963) (in face of growing suburbanization, non-negligently run piggery found to be a nuisance and ordered to shut down within reasonable time). Property owners have never enjoyed a private property right to maintain nuisances. See, e.g., Kmiec, *The Original Understanding of the Taking Clause Is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630, 1635 (1988) (citing Blackstone and Madison). Under this analysis, a government-authorized physical invasion condition imposed on an existing use of property that served the same interest as a ban on the existing use would be equally constitutional under Justice Scalia's reasoning.

119. *Nollan*, 483 U.S. at 839. The Court did not elaborate on the inadequate relationship between the beach easement and the "psychological barrier" and "public beach congestion" concerns.

120. *Id.* at 833 n.2 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1007 (1984)).

121. If the "right to build" literally meant the "right to build," then owners of



rights, making them “governmental benefits,” and thus can take all of them away without compensation, is upended by the express language of the just compensation clause and the legion of Supreme Court opinions interpreting its scope.<sup>122</sup>

As a matter of logic, however, it does not follow from Justice Scalia’s “right to build” axiom that a “voluntary exchange” of property rights for public amenities could never take place, in *Nollan*, or more broadly, in other land use cases involving special permits with conditions. The definition of “voluntariness” is fraught with conceptual and linguistic

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properties fully developed under existing zoning conceivably could claim that this “right” allowed them to exceed zoning. Of course, to the contrary, there may even be cases where all building would be unacceptable. *Cf.* First English Evangelical Lutheran Church v. County of Los Angeles, 210 Cal. App. 3d 1353, 258 Cal. Rptr. 893 (1989) (although the court unconvincingly urged as an alternative holding that the Church retained viable use of its property), *cert. denied*, 110 S. Ct. 866 (1990).

122. *See, e.g.*, Keystone Bituminous Coal Ass’n v. DeBenedictis, 480 U.S. 470 (1987); Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Although property rights “are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law,” *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)), a state could not pass a law automatically making all private property public.

Against the backdrop of *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), Justices Scalia and Brennan debated the precise nature of the *Nollans*’ property interest. In *Ruckelshaus*, a chemical company applying for pesticide registration under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) alleged that certain provisions of the Act effected a taking of its property. The provisions authorized the Environmental Protection Agency to use data one applicant submitted for pesticide registration in evaluating a subsequent application, and to disclose publicly some of the submitted data. Although the Court agreed that the company’s trade secrets submitted to support its registration application were property deserving protection under the just compensation clause, *id.* at 1003, the Court found that FIFRA did not effect a taking. *Id.* at 1013. The Court reasoned:

[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Government interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking.

*Id.* at 1007. Likening the *Nollans*’ application for a coastal development permit to Monsanto’s application for pesticide registration, Justice Brennan argued that the rationale in *Monsanto* should equally apply here. *Nollan*, 483 U.S. at 860 n.10 (Brennan, J., dissenting). To Justice Scalia’s reply that the “right to build on one’s own property . . . cannot remotely be described as a ‘governmental benefit,’” *id.*, Justice Brennan scoffed at the hint of a “privileged natural rights status” for property development and invoked Locke’s labor theory of value for the proposition that Monsanto would have a superior claim over the *Nollans* in any event. *Id.*; *see* J. LOCKE, THE SECOND TREATISE OF CIVIL GOVERNMENT AND A LETTER CONCERNING TOLERATION 15-26 (1946).

challenges.<sup>123</sup> On what basis did Justice Scalia determine that the exchange of the new house for the beach easement amenity was not voluntary? He neither reviewed the statutory framework governing the Commission's issuance of coastal permits to establish the matter of right property use, nor canvassed the Nollans' expectations regarding their property. Furthermore, Justice Scalia did not elucidate a core constitutional property rights theory rendering such inquiries nugatory. Instead, he appears to have assumed *sub silentio* that the "right to build . . . subject to legitimate permitting requirements" included construction of the Nollans' new house, thereby converting the beach easement into a requirement imposed upon a right.<sup>124</sup>

Thus defined, Justice Scalia's unremarkable axiom becomes a novel constitutional principle: owners are entitled to whatever property use government conditionally authorizes as a matter of constitutional right, subject only to conditions serving the same public interest as that served by prohibiting the conditional use. Even if the Commission assumedly could have banned the new house altogether, its conditional willingness to allow it "constitutionalized" the Nollans' right to the house. At that point, a house for beach easement trade definitionally could not reflect a "voluntary exchange," because the Commission could not trade something to which the Nollans were already entitled.

Justice Scalia's property rights approach reduces the rest of his opinion to a foregone conclusion, commanding a constitutional analysis no

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123. See, e.g., Kreimer *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293, 1351-78 (1984); Nozick, *Coercion*, in *PHILOSOPHY, SCIENCE, AND METHOD* 440-50 (S. Morgenbesser, P. Suppes & M. White eds. 1969); Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1428-56 (1989) (discussing theories of coercion in cases, philosophy, and private law).

124. Justice Brennan's dissent embraced the opposite conclusion. In a factual characterization reminiscent of incentive zoning, Justice Brennan wrote:

[T]he character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any pre-existing property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' (sic) not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

*Nollan*, 483 U.S. at 855-56 (Brennan, J., dissenting). Justice Scalia's assumption may be factually more correct than Justice Brennan's assumption. See *infra* text accompanying notes 147-52.

different than when government directly imposes burdens on matter of right development. As a general rule, government may not force landowners to solve problems not of their own making. Otherwise, the just compensation clause's fundamental purpose, to ensure that individuals do not bear burdens more properly borne by society at large, would be thwarted. To prevent this occurrence, the clause's heavy machinery roars into action and limits government to the appending of burdens proportionally addressing harms or needs which the proposed development has generated.<sup>125</sup> The Commission could no more compel the Nollans to provide the beach easement than it could compel them to provide a small maritime museum, because neither of these amenities mitigates the harm to the Commission-declared public interest in visual access assumedly caused by the conditional property use of a new house. Justice Scalia's string citation of twenty state court mandatory subdivision exaction and impact fees cases, in which providing amenities is a precondition to any development whatsoever, merely underscores the understanding that he viewed the beach easement as an imposition on a right.<sup>126</sup> His choice of words is similarly pointed. For example, he stated that, "[u]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.'" <sup>127</sup> Framed in such terms, the debate would naturally shift from whether to how much of a relationship would be required.<sup>128</sup>

Applied to incentive zoning, however, Justice Scalia's reasoning produces nothing less than a radical reconception. To fully appreciate this impact, it is helpful to recapitulate the paradigmatic incentive zoning transaction. By universally accepted definition, incentive zoning posits that the landowner voluntarily, as opposed to mandatorily, provides the public amenity.<sup>129</sup> Through express statutory language, the tech-

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125. See, e.g., *Banberry Development Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1141-46 (1964). See generally Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385 *passim* (1977).

126. *Nollan*, 483 U.S. at 839-40. Justice Scalia's "legitimate permitting requirements" presumably constitute related conditions. See *id.* at 834 n.2.

127. *Id.* at 837.

128. Compare *Nollan*, 483 U.S. at 834 n.3 ("substantial" standard) with *id.* at 843-44 n.1 (Brennan, J., dissenting) ("reasonable" standard). The 20 state mandatory subdivision exaction and impact fee cases which Justice Scalia cited run the gamut from loose to tight relationship tests.

129. Commentators consistently refer to incentive zoning as "voluntary." See, e.g.,

nique establishes two tiers of governmental regulation of private property use. Landowners are entitled as a matter of right to a first tier maximum zoning-defined density without obligation to provide amenities. At their option, landowners seek the incentive of exceeding that maximum zoning-defined density, in return for their agreement to provide specified amenities. Government invents *ex nihilo* development rights above the first tier and offers them strictly in its discretion.<sup>130</sup> Landowners solicit such rights only if they envision a financial benefit in the tradeoff between the incentive's value and the amenity's cost.<sup>131</sup> Private and public participants alike would agree that bonus development rights do not belong to the landowner until the exchange is consummated.

What makes incentive zoning voluntary, then, is that landowners may remain at the first tier with no obligation to ascend to the second tier and tender the desired public amenity. This touchstone of voluntary provision has made irrelevant the frequent resort to courts enveloping mandatory land use regulations of subdivision exactions, linkage, and inclusionary zoning, each of which requires private developers to

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2 R. ANDERSON, AMERICAN LAW OF ZONING 3D § 9.23, at 175 (3d ed. 1986); J. GETZELS & M. JAFFE, *supra* note 1, at 14; 2 A. RATHKOPF & D. RATHKOPF, THE LAW OF ZONING AND PLANNING § 17.06(2), (3)(a) (4th ed. 1986); 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 163.63, at 909 (1985); Alterman & Kayden, *Developer Provision of Public Benefits: Toward a Consensus Vocabulary*, in PRIVATE SUPPLY OF PUBLIC SERVICES 25 (R. Alterman ed. 1988); Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1028, 1036-65 (1976). Incentive zoning ordinances themselves make clear that landowners are not required to apply for floor area bonuses. In some instances, however, a nominally voluntary ordinance may be empirically mandatory. For example, Boston's housing linkage payment attaches only when office developers seek a "variance, conditional use permit, exception or zoning map or text amendment. . . ." BOSTON, MASS., ZONING CODE art. 26A, § 26A-3, at 3 (1986). As a practical matter, however, developers argue that every project in Boston requires some discretionary action from the city government in order to proceed, thereby converting a *de jure* voluntary contribution into a *de facto* requirement. See Kayden & Pollard, *supra* note 100, at 130 n.17.

130. One way to conceptualize these rights is that they reside in a public development rights bank, whose assets may be sold to individual property owners in return for desired public amenities. Another way is to assume that the city decides to sell unused air rights above publicly owned buildings and land. Public policy questions aside, it is clear that private owners have no constitutional claim of right to these development rights. Owners end up with larger buildings, the city with whatever amenities it wants, a scenario essentially no different from what would occur if incentive zoning were used for unrelated amenities.

131. See *supra* note 67 describing J. Kayden's "cost-plus" formula to calculate the amount of incentive.

provide public amenities before they can develop at all.<sup>132</sup> In any event, prior to *Nollan*,<sup>133</sup> just compensation clause jurisprudence would not have favored legal challenges from landowners involved in incentive zoning transactions. As long as such owners retained a first tier property use reasonable within the meaning of the clause,<sup>134</sup> then the voluntary nature of an incentive zoning deal would a fortiori defeat a traditional takings claim.<sup>135</sup>

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132. See, e.g., *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (exactions), *appeal dismissed*, 404 U.S. 878 (1971); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (exactions); *Bonan v. General Hosp. Corp.*, No. 76438 (Mass. Super. Ct. Mar. 31, 1986), (linkage) *rev'd sub nom.*, *Bonan v. City of Boston*, 398 Mass. 315, 496 N.E.2d 640 (1986); *Call v. City of W. Jordan*, 606 P.2d 217 (Utah 1979) (exactions); *Board of Supervisors v. DeGroff Enterprises*, 214 Va. 235, 198 S.E.2d 600 (1973) (inclusionary zoning); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (fees), *appeal dismissed*, 385 U.S. 4 (1966). See also Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381 (1985); Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987); Diamond, *The San Francisco Office/Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVTL. L. REV. 449 (1983); Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981); Heyman & Gilhool, *supra* note 125, at 1119.

Unlike landowners who voluntarily participate in incentive zoning transactions, however, neighbors of bonused developments may have ample reason to file suits. After all, it is their light and air and sidewalks and streets which are impacted. See, e.g., *Municipal Art Soc'y v. City of New York*, 137 Misc. 2d 832, 522 N.Y.S.2d 800 (Sup. Ct. 1987) (look to "et al." named plaintiffs). Would they be able to file a just compensation clause action against the transaction when their property rights are only indirectly affected? See Kayden, *Judges As Planners: Limited or General Partners?*, in ZONING AND THE AMERICAN DREAM: PROMISES STILL TO KEEP 250 n.160 (C. Haar & J. Kayden eds. 1989).

133. See Kayden, *supra* note 132, *passim* for a fuller discussion of *Nollan* and its transformation of pre-existing just compensation clause jurisprudence.

134. Under the just compensation clause, property owners are normally entitled to "economically viable use" of their property. *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980). See e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124, 131 (1978). Thus, as long as the first tier use delivered economically viable use of property, there could be no violation of the just compensation clause. See *Montgomery County v. Woodward & Lothrop, Inc.*, 280 Md. 686, 376 A.2d 483 (1977) (rejecting developer's argument that matter of right first tier zoning under incentive zoning was too restrictive).

135. In a Massachusetts case, a developer voluntarily applied for and received special permits to construct an additional 32 units of market rate housing in return for eight units of low-income housing pursuant to the city's incentive zoning ordinance. See Brief for Defendant-Appellee at 56, *Iodice v. City of Newton*, 397 Mass. 329, 491 N.E.2d 618 (1986) (No. 3908). He charged, *inter alia*, that the deal violated the just compensation clause. Disregarding the value of the bonus market rate units, the developer alleged the tautology that his low-income units were unprofitable and therefore

As applied, Justice Scalia's majority opinion stands for the proposition that the Constitution, as the Court interprets it, does not recognize incentive zoning's paradigm of "voluntariness." By thinking about the bonus development rights residing between the first and second tiers as the owner's private property, instead of newly created rights, the opinion vitiates the technique's operating presumption of owners who voluntarily provide amenities in return for such rights. In the end, *Nollan's* constitutional right to the second tier overrules incentive zoning's statutory right only to the first. This is not to say that developers may now march into city hall and demand second tier development rights without amenity obligation. But, by enmeshing private property rights with governmental prerogatives, *Nollan* creates the constitutional justification for overriding city hall's judgment about which legitimate state interests it may promote. The Court invalidated a government land use permit with conditions because the condition (amenity) was unrelated to the burden which additional development (incentive) imposed on a legitimate state interest. Thus, the Court could similarly strike down exercises of incentive zoning for such unrelated amenities as low-income housing, theatres, and job training because, like the beach easement, such amenities do not serve the same legitimate police power purposes as a refusal to grant the bonus floor area incentive in the first place.<sup>136</sup> Specifically, such amenities fail to

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deprived him of his constitutionally required economically viable use of property. The court never reached this issue, resolving the case on procedural grounds.

In any event, the developer's claim should fail. He made the voluntary real estate financial decision to supply eight units of low-income housing for 32 bonus market rate units, plainly believing that he would be better off financially. The just compensation clause does not guarantee a profit for speculative real estate investments. Moreover, the correct focus for purposes of takings analysis is on the "parcel as a whole," *i.e.*, his entire residential development, and not just the eight low-income units. See *Penn Central Transp. Co.*, 438 U.S. at 130-31.

As an empirical matter, developers do extremely well in incentive zoning transactions. See J. KAYDEN, *supra* note 7, at 59-65. This is understandable. Unlike a city's decision to grant a bonus, which depends upon a complex balancing of public gains and losses, the developer's decision to seek a bonus is based purely on a relatively straightforward calculus of dollars and cents.

136. Cf. Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1614 n.63 (1988) (contributions from landowners must address purposes of initial regulation). A New York City bar association special committee interpreted *Nollan* to limit the use of incentive zoning to related amenities. See The Special Committee on the Role of Amenities in the Land Use Process, The Association of the Bar of the City of New York, *The Role of Amenities in the Land Use Process* 10-11 (1988).

mitigate the negative impacts of congestion, light and air loss, and overburdened capital infrastructure generated by bonus floor area.

### B. *Unconstitutional Conditions*

A companion analytical framework for evaluating Justice Scalia's related amenities requirement springs from the doctrine of unconstitutional conditions.<sup>137</sup> Under that doctrine, government generally may not attach to benefits or permissions conditions that infringe upon constitutional rights, even though government has no initial obligation to grant such benefits or permissions.<sup>138</sup> A gloss on the doctrine is that "germane" conditions, *i.e.*, conditions related to the benefit or permission, are preferred to non-germane conditions.<sup>139</sup> Thus, assuming that the Commission had no obligation to grant permission to build the new house in the first place, the Commission nonetheless could not condition such permission on the forfeiture of the just compensation clause right to be free from government-authorized physical invasions, any more than it could ask the Nollans to forego first amendment free

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137. Several commentators have classified the *Nollan* case under the unconstitutional conditions doctrine. *See, e.g.*, L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 9-4, at 598 n.18 (2d ed. 1988); Epstein, *The Supreme Court, 1987 Term — Foreword: Unconstitutional Conditions, State Power, and the Limits of Consent*, 102 HARV. L. REV. 4, 60-64 (1988) (second best theory to one that returns police power to its "traditional confines"); Sullivan, *supra* note 123, at 1457 & n.180, 1463-64. Although one article acknowledges that the case could be understood as broadly adopting the analysis employed for review of subdivision exactions and impact fees, it affirmatively urges an interpretation based on unconstitutional conditions doctrine. *See Note, Municipal Development Exactions, The Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992, 998-1012 (1989).

138. *See, e.g.*, *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 U.S. 583 (1926); *Terral v. Burke Constr. Co.*, 257 U.S. 529 (1922); *Western Union Tel. Co. v. Kansas ex rel. Coleman*, 216 U.S. 1 (1910); *see also* Epstein, *supra* note 137, at 6-7; Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 COLUM. L. REV. 321 (1935); Kreimer, *supra* note 123, at 1293; Rosenthal, *Conditional Federal Spending and the Constitution*, 39 STAN. L. REV. 1103 (1987); Sullivan, *supra* note 123, at 1427; Note, *Unconstitutional Conditions*, 73 HARV. L. REV. 1595 (1960).

As the Court stated in *Frost*:

It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited; and one of the limitations is that it may not impose conditions which require the relinquishment of constitutional rights.

271 U.S. at 593-94 (invalidating state's conditioning of highway usage on, *inter alia*, carrier's agreement to common-carrier liability).

139. *See, e.g.*, Kreimer, *supra* note 123, at 1350 & n.217.

speech rights. On the other hand, Justice Scalia's "viewing spot," no less an "unconstitutional" physical invasion than the beach easement, would survive as a condition germane to the Commission's declared visual access goal.

Although *Nollan* is facially about a condition on a government permit, and although Justice Scalia impressed a first amendment unconstitutional conditions analogy,<sup>140</sup> the case does not unambiguously fit the unconstitutional conditions doctrine mold.<sup>141</sup> In particular, an unconstitutional conditions analysis conflicts with Justice Scalia's property rights approach because it posits that the owner has no entitlement whatsoever to the new house, even as it demands germane conditions. On the other hand, the property rights approach posits that the Nollans enjoy a right to the new house, and thus may not be directly burdened with obligations addressing harms to the public interest which their development does not cause. Justice Scalia's express statement that "the right to build on one's own property . . . cannot remotely be described as a 'governmental benefit,'" and the implicit equation of the right to build with the Nollans' right to the new house, instead suggest an analysis deriving from direct burdens on constitutional rights rather

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140. Analogizing the Commission's actions to a state law that "forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute \$100 to the state treasury," Justice Scalia observed that, while "requiring a \$100 tax contribution in order to shout fire is a lesser restriction on speech than an outright ban, it would not pass constitutional muster." *Nollan*, 483 U.S. at 837. For him, the \$100 "shout fire" treasury contribution condition would be unconstitutional because it (like the beach easement) lacked any relationship to the underlying purpose served by the ban, to wit, preventing panic in the theater (like preventing impairment of the Commission's goal of preserving visual access to the coast).

This is a gossamer analogy. Would Justice Scalia truly be satisfied if the state earmarked the money to an extra police detail to quell the panic or to a special fund to recompense the trampled for their injuries? The constitutional standard for reviewing regulation of speech is different than that employed for reviewing regulation of property. Speech restrictions are subject to the highest level of judicial scrutiny. Property restrictions, even post-*Nollan*, are subject to lesser scrutiny, although some might wish it otherwise. See, e.g., R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 263-82 (1985). Unlike the government's ubiquitous role in defining permissible property uses, the government's role in regulating speech is strictly limited to the margins. When government willingly allows an exception to the "shout fire" ban, for a related or unrelated \$100 contribution, it intrinsically demonstrates that the ban itself is not strictly necessary. In contrast, while public goals furthered by a new house ban are undercut when an exception allowing construction is granted, a more lenient standard of constitutional review may tolerate a balancing of disparate public interests. See *infra* note 159 discussing the *Metromedia* case.

141. The doctrine itself is fraught with analytical inconsistencies. See, e.g., Sullivan, *supra* note 123, *passim*.



than unconstitutional conditions.<sup>142</sup> His citation of state subdivision exaction and impact fee cases employing the direct burden analysis sustains this view. Although Justice Scalia assumed for purposes of discussion that the Commission could have denied permission for the new house altogether, that authority was itself limited by constitutional dictates protecting underlying private property rights.<sup>143</sup> *Nollan* surely does not trigger unconstitutional conditions doctrine in its purest and most intriguing form, where government has no constitutional obligation whatsoever to give permission or grant a benefit, such as National Endowment for the Arts awards or housing tax credits, but is nonetheless prevented from attaching non-germane restrictions requiring relinquishment of constitutional rights. In the end, however, both the property rights and unconstitutional conditions approaches would generally restrict government to requests for related (germane) amenities.<sup>144</sup>

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142. In dissent, Justice Brennan did not read the Scalia majority as adopting an unconstitutional conditions analysis. He noted:

The Court suggests that *Ruckelshaus v. Monsanto* . . . is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a government benefit."

*Nollan*, 483 U.S. at 860 n.10 (Brennan, J., dissenting). In *Monsanto*, the company argued that FIFRA's contested provisions placed an unconstitutional condition on the right to a valuable governmental benefit. *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 998-99 (1984).

143. The Commission assumedly had authority to withhold permission, but only if the house substantially impeded realization of the Commission's goals. Even then, however, the Commission would have to grant permission if "the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking." *Nollan*, 483 U.S. at 836. *But see supra* note 116 for a discussion of the "economic viability" prong of the just compensation clause.

144. Attempts to distinguish between a "germaneness" requirement drawn from unconstitutional conditions cases and a "relationship" requirement drawn from subdivision exaction and impact fee cases ultimately are beside the point. *See Note, supra* note 137, at 998-1000. Justice Scalia makes clear in *Nollan* that government may not ask landowners to address problems which their own development does not create. His test comes in two parts: (1) does the proposed development substantially impede promotion of legitimate state interests justifying denial of the development; and (2) if so, then government may require the developer to mitigate the harm caused by the proposed development. For the land use lawyer, this test broadly sounds just like the traditional subdivision exaction test.

C. *The Nollan Facts and Incentive Zoning: A Way to Limit the Rationale*

While the *Nollan* rationale enervates the exercise of incentive zoning for unrelated amenities, it would be rash to sound the death knell. The reason is that, while the facts of the case superficially lend themselves to the technique's argot, the Court did not squarely face a traditional incentive zoning transaction. It is true that the Nollans sought to build a house larger than that which the pertinent land use regulations authorized as a matter of right.<sup>145</sup> Further, the Commission wanted to obtain beach access for the public. Just as a private developer applies for a floor area bonus in return for providing a plaza or low-income housing, the Nollans applied for a floor area bonus which the Commission would grant in exchange for the beach access amenity.<sup>146</sup> This linguistic characterization glosses over several points. To begin with, the Court never explored or discussed the statutory matter of right use. While the Nollans needed a development permit in order to replace the existing bungalow with a new house,<sup>147</sup> the Commission did not have unbounded discretion to grant or deny the permit.<sup>148</sup> As long as their proposed house met announced statutory criteria, the Nollans would have received the permit.<sup>149</sup> On the basis of the available record, one may therefore contend that the Nollans were statutorily entitled to their new house.

More significantly, neither the Nollans nor the Commission conceived or argued the case in the armature of incentive zoning. With lawsuit as testament, the Nollans themselves would be the first to bridle at any "voluntary" styling.<sup>150</sup> They were, after all, only asking to

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145. For purposes of this discussion, the pertinent land use regulations are the state laws controlling coastal development, not the underlying zoning of local jurisdictions. See CAL. PUB. RES. CODE §§ 30196, 30212, 30600 (West 1986).

146. The floor area of the new house (1,674 square feet) was more than three times the floor area of the original bungalow (521 square feet).

147. While proceedings were pending before the California Court of Appeals, the Nollans built their new house without notifying the Commission or acquiescing to its demand for the beach easement deed restriction. See *Nollan*, 483 U.S. at 830. This makes for an interesting question about whether the Nollans effectively waived their legal right to challenge the restriction, a question not fully considered by the Court in its opinion.

148. See CAL. PUB. RES. CODE §§ 30196, 30212, 30600 (West 1986).

149. *Id.*

150. In any event, linguistic presentations alone are deceiving. Just as the Nollans' interaction with the Commission can be described in incentive zoning's voluntary language, commonplace incentive zoning transactions can be couched in "mandatory" ter-

substitute a new home for an old one, not to develop a fifteen-unit condominium project. The Commission never asserted in incentive zoning terms that it was trading the new house for the unrelated amenity of the beach easement.<sup>151</sup> Instead, it maintained that the beach easement sufficiently related to the impact of the new house to pass constitutional muster.<sup>152</sup>

What, then, would the Court do if cleanly presented with incentive zoning for unrelated amenities? The previously recounted "Tale of Two Cities" presents a useful test case.<sup>153</sup> In that Tale, it may be recalled, city planners and elected officials meet to establish zoning FARs for the city's central business district. After reviewing governmental fiscal requirements and traditional physical planning concerns, the officials set a base matter of right maximum zoning of fifteen FAR.<sup>154</sup> Thus far, even Justice Scalia would concede that private property owners are not constitutionally entitled to anything more than that level of development, assuming the FAR restriction provides owners reasonable use of their property within the meaning of the just compensation clause.<sup>155</sup>

As the meeting progresses, the planners make various incentive zoning proposals. Under one, owners would receive three FAR floor area bonuses for plazas and arcades. The planners justify this bonus on the basis that the plazas and arcades would more than make up for deleterious impacts caused by the bonus floor space. Another proposal offers

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minology. After all, in order to obtain the incentive of an FAR bonus, a developer is forced to provide adjacent subway improvements. Words frequently reflect and convey normative, rather than empirical, conceptions (penalty vs. nonsubsidy; right vs. privilege).

151. Would there be anything wrong with the Commission deciding it is willing to tolerate harm A (less visual access to the coast) in return for benefit B (more beach access)? See *supra* text accompanying note 99.

152. Indeed, under the prevailing lenient standard of review prior to *Nollan*, the Commission was probably correct. See *Nollan*, 483 U.S. at 863 (Brennan, J., dissenting) ("[t]he State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's police power."). The Court's myopic concentration on view blockage, only one of several proffered Commission justifications, and not surprisingly the one with the least connection to the beach easement, largely predetermined the judicial outcome. See Kayden, *supra* note 132, at 231-32.

153. See *supra* text accompanying notes 98-99.

154. See *supra* text accompanying notes 92-93 explaining that traditional physical planning concerns include street, sidewalk, mass transit, and sewer capacity, ground light and air, and existing neighborhood character.

155. See *Agin v. City of Tiburon*, 447 U.S. 255, 260 (1980).

three FAR floor area bonuses for low-income housing, theatres, and day care centers. Some planners oppose this proposal on the grounds that the amenities fail to mitigate the incentive's negative physical impacts. Others respond, however, that notwithstanding such impacts, the city is on balance better off with these amenities. Following contentious debate, the city adopts only the second incentive zoning proposal. Thus, the city intentionally decides to accept greater congestion and less light and air in order to obtain an alternate set of public benefits.

Does the Constitution bar the city from making this choice? Two principal objections come to mind. First, government will manipulate the base matter of right zoning FAR to a lower level than otherwise necessary in order to obtain amenities at no marginal physical planning cost. Justice Scalia himself verbalized the danger of such manipulation and, *Rashomonlike*, portrayed another vision of the Tale.<sup>156</sup> In his over-leveraged city, the planners and elected officials might set a base FAR at an artificially low twelve rather than a planning-supported fifteen, and then offer three FAR bonuses in exchange for desired amenities. Alternatively, they might downzone a district's existing FAR from fifteen to twelve, and then offer incentives for amenities that allow developers to achieve the original fifteen. The sole reason for selecting the twelve FAR in both cases would be to fire up incentive zoning's economics without incurring the additional congestion, light and air, and other physical planning costs incurred with FARs in excess of fifteen. The city would have its cake, a fifteen, rather than eighteen, FAR central business district density, and eat it too, because developers would have provided desired amenities. At that point, the three FAR would no longer constitute a true bonus, and the situation would be no different than had the city zoned a fifteen FAR and directly burdened owners with amenity requirements. Not only could Justice Scalia express lofty concerns about a "lesser realization of the land use goals" served by the "more lenient (but nontradeable) development re-

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156. *Nollan*, 483 U.S. at 837 n.5. Justice Scalia stated:

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce *stringent* land-use regulations which the State then waives to accomplish *other purposes*, leading to lesser realization of the land-use goals purportedly sought to be served that would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice. *Id.* (emphasis partially in original and partially added).

strictions” of the fifteen FAR, but, more significantly, he could correctly assert that property rights had been unconstitutionally appropriated.<sup>157</sup> Although Justice Scalia is correct as to the real world possibility of the over-leveraged city, his scenario does not rise to the level of a judicially noticeable fact justifying a blanket conclusion about whose property rights are at stake. Justice Scalia sounds a bit like a character from another Dickens story, the Ghost of Christmas Future, warning about things that might but do not have to be. Ever vigilant to the over-leveraged city scenario, courts can and should sift the evidence to assure that incentive zoning ordinances feature real incentives.<sup>158</sup>

The second objection is that government’s willingness to sacrifice physical planning goals served by the base FAR regulation demonstrates a lack of seriousness about such goals. If such goals are expendable, goes the argument, then so is the base regulation. In a world of scarce resources, however, cities routinely decide to advance one public interest over another, even though each interest may be important. Governing is centrally about choices from a basketful of apples and oranges. When a city openly, seriously, and intentionally chooses a mixture of more low-income housing and more congestion over a mixture of less congestion and less low-income housing, then that city has engaged in routine decision-making. Nothing in the just compensation clause elevates the goals underlying the base regulation to a more sacred position than the goals underlying the unrelated amenities.<sup>159</sup> In-

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157. This analysis assumes that the city would have no constitutional justification for imposing the amenity requirements on existing property uses, and that low-income housing, theatres, and day care centers are indeed unrelated amenities.

158. The burden should be on the property owner to prove the over-leveraged city, not on the city to prove real incentive zoning. In any event, FARs are indicative, not scientifically precise, figures. As with all government regulation, or, for that matter, constitutional adjudication, the drawing of lines has its arbitrary side.

159. The issue of alternative public goals arises in other constitutional contexts as well. In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), for example, the city’s billboard ban exempted on-premise business identification signs. *Id.* at 493. Although such signs obviously undercut the city’s traffic safety and aesthetics goals underlying the general ban, they promoted an alternative goal of convenience to the public. *Id.* at 512. In a concurring opinion, Justice Brennan observed that “a city can have special goals the accomplishment of which would conflict with the overall goals addressed by the total billboard ban.” *Id.* at 532 n.10. (Brennan, J., concurring in the judgment). Justice Brennan reasoned that “[i]t would make little sense to say that a city has an all-or-nothing proposition — either ban all billboards or none at all.” *Id.* In the first amendment commercial speech context, Justice Brennan would have applied the following test to approve an exception:

terestingly, a ban on unrelated amenities interferes not only with the preferences of city mothers and fathers, but potentially with those of property owners as well.<sup>160</sup> Given the choice between the “unrelated” beach easement and the “related” viewing spot, for example, the Nollans might very well have selected the beach easement. In the typical incentive zoning transaction, the developer’s choice between related and unrelated amenities would reduce to an economic calculus in which developers, in return for a bonus, would prefer to provide an inexpensive unrelated amenity rather than an expensive related one.

Any constitutional assessment of incentive zoning under the just compensation clause ultimately falls prey to the circularity of private property rights definitions.<sup>161</sup> Determination of rights depends on the level of government regulation, and the level of government regulation depends on avoiding improper infringement of private property rights. The idea that owners are constitutionally entitled to use their property as they see fit, but subject to government regulation promoting the health, safety, morals, and general welfare of its citizens, yields scant insight. Incentive zoning plays in the twilight of this guarantee, mixing two scenarios of the public interest with two levels of private property rights. The fundamental purpose of the just compensation clause, to ensure that individuals do not bear burdens more properly borne by society at large, proves equally unhelpful. Contingent upon one’s assessment of who owns property rights nominally created by incentive zoning, the technique either does or does not impose such burdens when it attempts to encourage unrelated amenities.

Justice Scalia proffers no convincing theory to justify constitutional attribution of the bonus rights to the owner. Moreover, *Nollan* itself does not involve a classic incentive zoning transaction. Consequently, Justice Scalia’s opinion represents a weak basis upon which to upset

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[I]f a city can justify a total ban, I would allow an exception only if it directly furthers an interest that is at least as important as the interest underlying the total ban, if the exception is no broader than necessary to advance the special goal, and if the exception is narrowly drawn so as to impinge as little as possible on the overall goal. To the extent that exceptions rely on content-based distinctions, they must be scrutinized with special care.

*Id.*

160. Economists have criticized *Nollan* for prohibiting mutually satisfactory bargains. See, e.g., Fischel, *Introduction: Utilitarian Balancing and Formalism in Takings*, 88 COLUM. L. REV. 1581, 1588 (1988).

161. See C. HAAR & J. KAYDEN, *LANDMARK JUSTICE: THE INFLUENCE OF WILLIAM J. BRENNAN ON AMERICA’S COMMUNITIES 194-95* (1989).

widespread acceptance by local governments and private developers of the technique. As long as Justice Scalia's over-leveraged world remains a case-by-case proposition, the technique does not deny landowners rights which should be ascribed to them. In the end, the result in *Nollan* is most understandable when described as a case about a family wanting to replace an old house with a new one. The five members of the Court majority thought this "right" to the new house could not be encumbered with obligations having nothing to do with the new house. Extending that proposition to the barter world of incentive zoning would likely surprise some, if not all, members of Justice Scalia's majority as much as it would surprise regular practitioners of the technique.

#### IV. THE NEED FOR RULES FOR UNRELATED AMENITIES

The constitutional acceptance of incentive zoning for unrelated amenities should not obscure the technique's potential shortcomings and the resulting importance of policy guidelines. Questions of who gains and who loses demand explicit and rigorous examination, especially as the disconnection between an incentive's burden and an amenity's benefit increases. In order to make informed judgments about whether to support or oppose the tradeoff between congestion here and low-income housing there, citizens need full disclosure about the nature of the bargain.<sup>162</sup>

Furthermore, incentive zoning, no less than land policy at all levels of government, should strive toward ideals of fairness and equity in its

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162. It is not certain, however, that sunshine and resulting greater participation by the public will inevitably result in better or more equitable decisions. See generally Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1057, 1067-73 (1980) (arguing that smaller responsive units best promote public participation in government decision-making, that such participation is good, but that "the argument for city power rests on what cities have been and what they could become," rather than what they are). Local governments may be captive of majorities or powerful neighborhood groups that refuse incentive zoning's cost of greater development for its benefit of unrelated amenities such as low-income housing. See Fischel, *supra* note 160, at 1582. Not surprisingly, incentive zoning's array of amenities and incentives have generally been clustered in high-income areas containing office buildings and market-rate housing, not in low-income neighborhoods. Furthermore, discussions in the sunshine sometimes encourage political rhetoric masking difficult choices. For example, when discussions of health and safety regulations quantitatively assign life and death rates to specific levels of regulation, elected officials understandably treat the issue as political dynamite. In a similar fashion, one wonders whether closer public scrutiny of the tradeoff between an intermittent shadow over Central Park and the extra public services provided from the additional revenue of a larger building would result in a more equitable or efficient decision.

administration. Incentive zoning's burdens and benefits should be evenly distributed throughout a city in accordance with zoning's bed-rock principle of according equal and uniform treatment to similarly situated landowners.<sup>163</sup> No single area should bear a disproportionate share of bonus floor area, nor enjoy a disproportionate share of amenities. Rough equality would assure what Justice Holmes, in a different context, called the "average reciprocity of advantage," a catch-all concept fundamental to the legality and acceptance of all government restrictions on private property.<sup>164</sup> This concept, however, is not a call for exact equality. Just as commonplace zoning regulations or historic preservation laws routinely saddle one landowner or one area with burdens not shared by everyone else,<sup>165</sup> incentive zoning will similarly burden some more than others.

The technique's administration may profit from government experience garnered in the NIMBY<sup>166</sup> and LULU<sup>167</sup> era, in which local planners strategically disperse throughout a city problematic, yet needed, land uses such as drug treatment centers, homeless shelters, and jails.<sup>168</sup> Similarly, state governments have undertaken to apportion such unpopular uses as hazardous waste treatment plants and prisons among different towns, and even have offered compensating public benefits of additional state aid, which some describe as bribes, in order to encourage local acceptance.<sup>169</sup> The purpose of these efforts is to assure individuals and neighborhoods that they are being treated fairly when government distributes benefits and burdens.

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163. See, e.g., MASS. GEN. L. ch. 40A, § 4 (West 1983).

164. See *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922); see also *Armstrong v. United States*, 364 U.S. 40, 49 (1960) (purpose of just compensation clause is to assure that government is not "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

165. See, e.g., *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 134-35 (1978).

166. NIMBY stands for "not in my back yard."

167. LULU stands for "locally undesirable land uses."

168. See, e.g., M. O'HARE, L. BACOW & D. SANDERSON, *FACILITY SITING AND PUBLIC OPPOSITION passim* (1983).

169. See, e.g., INSTITUTE FOR ENVIRONMENTAL NEGOTIATION, *NOT-IN-MY-BACKYARD: COMMUNITY REACTION TO LOCALLY UNWANTED LAND USE 3* (1984); Mitchell & Carson, *Property Rights, Protest, and the Siting of Hazardous Waste Facilities*, 76 AEA PAPERS AND PROC. 285 (1988).



## V. CONCLUSION

In usual circumstances, incentive zoning and courtrooms are strangers. The two principals, private developer and government, see the technique through spectacles of self-interest. Under utilitarian calculations, the private developer seeks to maximize the amount of development on a fixed quantity of land and enters an incentive zoning deal if the value of additional building rights exceeds the amenity's cost. Confronting decreased federal support and louder cries for social services, local governments view incentive zoning as an off-budget mechanism to meet public needs. As long as the "over-leveraged" city remains largely fictional, both principals will continue to support this exercise of zoning authority. In one respect, the *Municipal Art Society*<sup>170</sup> and *Nollan* cases confirm this reality. The central plaintiff in *Municipal Art Society* was not a private developer but a civic-minded neighbor desiring to protect the public's right to light and air. In *Nollan*, although the plaintiffs were the affected landowners, neither the plaintiff owners nor the defendant government would likely characterize the beach easement as voluntary in any "incentive zoning" sense. Nonetheless, both cases have the potential for chilling the technique's use.

This article has analyzed the facts and reasoning of the two opinions, finding that both expressly or impliedly demand that amenities relate to the impact of incentives. Moreover, the article has highlighted analytical weaknesses leading to this conclusion and urged that neither opinion serve as the basis for invalidating this practice. Although exchanging bonuses for unrelated amenities might offend good planning theory and practice, a constitutional objection is unfounded. Accordingly, ameliorative public policies addressing the pitfalls remain the preferable approach.

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170. Since Justice Lehner's decision in 1987, the Columbus Circle project has changed its scope several times. In 1988, the city and developer agreed to a smaller project with a corresponding reduction in land price from \$455 million to \$357 million. See N.Y. Times, Oct. 24, 1989, B1, col. 4. In 1989, the developer and city downsized further, and the land price further dropped to \$337 million. *Id.* Although the Municipal Art Society agreed to this compromise, other parties have brought additional lawsuits. *Id.* At the time of this article, the project is still in limbo.

