BARGAINING AND NEGOTIATION IN DEVELOPMENT CONTROL: AN EVALUATION OF PRACTICE IN THE UNITED STATES

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July 1983
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INTRODUCTION

In the United Kingdom there has been growing interest over the last few years in the issue of bargaining in development control and in the nature and extent of the use of agreements between local planning authorities and developers to achieve 'planning gains'. Research by Jowell demonstrated the widespread use of formal agreements and informal negotiation by local authorities seeking to use the traditionally negative control system to obtain positive benefits and to recapture part of the windfall gains occasioned by the grant of planning permission.\(^1\) The issue has since become one of the more controversial in the field of planning law, spawning a series of articles and commentary evaluating the dangers and merits of the process,\(^2\) culminating in a government sponsored report which attempted to define the boundary between acceptable and nonacceptable gains.\(^3\) The Jowell research involved some limited examination of the negotiation process and on the basis of the findings raised a number of questions about the accountability of the practice.\(^4\) Other

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research has looked at the bargaining process in action in relation to specific development projects, raising similar accountability issues and demonstrating how planning gains may be offset by losses where the local authority's side of the bargain involves the setting aside of agreed policies or criteria governing development.\(^5\)

The benefits and disbenefits of the practice of bargaining in development control in the United Kingdom remain open to debate; similarly, the central government has yet to resolve the legal questions or formulate a statement of policy on the permissable use and scope of agreements. However the research does demonstrate that the development control system, traditionally conceived as a legal-rational process based on clear rules and standards, operates in practice as a more political process open to negotiation and bargaining.

There are certainly great differences between the United Kingdom and the United States in the legal foundations of control over land development and in the techniques of control that operate, but recent work suggests that similar trends to negotiation and bargaining are occurring.\(^6\)

The reasons for the changes in practice and the specific techniques used will be discussed in more detail below, but increasingly controls are being adopted which make the approval of development conditional on the developer entering an agreement to provide capital infrastructure needed

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to accommodate the development or public amenities in connection with the development. Frequently bargaining over public improvements is project specific and involves some 'trade-off' in the form of permission to develop at higher density or to vary design standards for development. However, there has not been a great deal of research in the United States on such agreements or on the bargaining process involved. Much of the comment in the journals derives from legal reviews, and while this gives some idea of the kinds of agreements which local governments are seeking, their main focus is the constitutionality of agreements and the principles which have been established to determine their legality.  

A second stream of work has been concerned with the financial implications of shifting the burden of public improvement costs on to the private sector. A national survey carried out by the development industry and case studies in various local governments show that the practice of requiring developers to contribute to public services is widespread, but also shows the extreme variation in the costs involved in different areas. The development industry is uniformly hostile to the practice, making the case that development costs are driven up and either net profits are decreased or consumers pay more. The research carried out by local governments and professional associations is more equivocal on the question of the influence of developer contributions on costs, claiming


that they form only a small part of the total costs and that factors such
as land availability, and land and construction costs are far more important
determinants. However, the attention devoted to the question demonstrates
that different kinds of issues are given emphasis in the American context;
the potential threat to property (applicant and developer) rights which
increased negotiation and bargaining presents. Very little attention has
been given to questions of accountability, the advantages and disadvantages
of negotiation and the benefits that developers might gain in the
bargaining process.

The intention of this research has been to raise these issues and
examine them in the context of the bargaining process and its outcomes in
three case study local governments. The aims of the research were:

i to document which powers and techniques the local governments
were using to obtain agreements from private developers to
provide capital infrastructure, other public amenities or
other planning gains, such as the provision of specific uses.

ii to examine the circumstances in which negotiation and
bargaining over land development occurs, referring to the type
of area, level of development pressure, local political
context, planning problems and physical development conditions.

iii to examine the nature of any 'trade-offs' made, i.e. where
agreements on the part of developers to provide public
facilities or specific uses are accompanied by departures
from existing local government policies or design standards.

iv to examine the negotiation process to explore participation
in bargaining and decision making and opportunities for
public representation in decision making procedures.

The results of existing research in the United States and the United Kingdom were used to formulate initial hypotheses. For example, research in both countries tends to support the notion that the ability of local governments to negotiate and achieve gains is greater when an area is under development pressure. The British research suggests that the process of negotiation and bargaining normally takes place in relative secrecy; professional and technical staff and the developers or their representatives are involved, but rarely do local politicians or the public participate in the discussions. Guidelines of acceptable 'gains' rarely exist as the process is to a large extent opportunistic. Research by Kirlin in the United States and that carried out by Jowell in the United Kingdom found that both developers, despite their public hostility to bargaining, and local governments can benefit from negotiated solutions rather than decisions based on fixed criteria, particularly where a development is large and complex.

The three case study authorities selected to examine these issues were Baltimore County, Maryland, Arlington County, Virginia and the midtown area of Manhattan in New York City. Baltimore County is a suburban county surrounding Baltimore City on three sides. The pattern of development is typically suburban with residential land uses and economic activity located along the main transport routes from the central city. Development pressure, particularly for residential and retail development, has been

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10 J. Jowell, 1977, ibid.
strong due to the considerable movement of population out of the city over the past twenty years. Arlington County, Virginia is a somewhat more urbanised county forming part of the metropolitan area of Washington, D.C. Great impetus was given to office and residential development by the area's location and access to central Washington; federal government activities have created a strong market for office development in particular.

Midtown Manhattan is an area of high density office, retail and hotel development. Development pressure for office buildings is very strong, though also highly cyclical, and new construction takes place under physical constraints due to the already densely built up character of the area.

In each area planning documents and application files were reviewed and local officials were interviewed to obtain information on: the character of the area and level and type of development pressure; land use policies and development control regulations, including the scope for requiring private development to contribute to public infrastructure or services, the extent of discretion in determining the content of agreements and ability to vary use regulations or development standards; and the decision process, including who was involved in negotiations and final decision making.

In each area one development scheme was examined to illustrate the nature of the bargains struck between the local governments and the developers. Selected interviews were also carried out with interests outside government for example, developers, lawyers representing the development industry and community organizations. The development schemes examined in detail were all rather large and complex commercial (office and retail) developments
as these best demonstrate the issues being explored. The case studies are appended to this report.

The rest of this report discusses, first, the development control system in the United States and draws some comparisons between it and the British system. The major difference is that legislation governing development control in the United States is locally adopted and there is, in comparison to the United Kingdom, great variation between local governments in the techniques used and the procedures applied. However, recent trends towards the adoption of more discretionary controls and mechanisms for obtaining 'planning gains' provide the basis for some comparison with the British experience. Secondly, some of the legal issues posed by increased bargaining are examined and the general attitude of the courts towards the practice are discussed. Thirdly, the results of the case study work are discussed: the techniques used for bargaining in the three areas; the types of bargains struck between the local governments and developers; the negotiation and decision making process; and the factors which seemed to encourage the adoption of negotiable techniques and which influenced the outcome of the practices. One conclusion is that individual development, site and market conditions may encourage all parties to seek a negotiated solution. Also, the importance of new commercial construction to the local tax base and constraints on local expenditure add a political dimension to negotiations in development control. Hence, the local political context needs to be taken into account when evaluating the results of negotiation. Finally, the benefits and drawbacks of bargaining in the three authorities are discussed and some comparison is made with research findings in the United Kingdom.
Government control of land use and development in the United States has been characterized as one of the weakest systems of all western industrialized countries. The most fundamental difference between the American and British systems concerns the 'ownership' of development rights. In Britain the 1947 Town and Country Planning Act essentially nationalised land development rights and set up a control system which gave the local authorities charged with operating it considerable discretion over the use and development of land in their areas and the grounds on which decisions could be made. In the United States, on the other hand, the system is based on the notion that development rights remain with the property owner and a set of controls and permits exist which are dependent on uniform standards and the avoidance of discretionary power in the hands of planning authorities. Property owners have a constitutional right to some reasonable use of their land, usually taken to mean a use giving some reasonable economic return, and equity or evenhanded justice in the treatment of all applicants is an important principle.

The legal basis for land use controls is the general residual 'police power' of state legislatures to make regulations in the interests of "public health, safety and welfare." The courts have interpreted the concept of

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12 The great potential for discretion in the system and the constraints which operate in practice to constrain that discretion are discussed by J. Underwood 'Development Control: A Case Study of Discretion in Action' in S. Barrett and C. Fudge, eds. Policy and Action, Methuen, 1981.
public welfare very broadly to include physical, aesthetic, economic and spiritual values, there are, however, judicial variations at the state level in what is considered to form the proper scope of land use regulations.

In most areas development control legislation is based on one of a number of standard enabling acts drawn up in the nineteen twenties and thirties. The basic techniques are zoning regulations, controlling permitted uses and density, and subdivision regulations, controlling the layout of development and the coordination of infrastructure and site services. The authority to draw up zoning ordinances and subdivision regulations and the administration of the relevant permits has usually been delegated to local governments. Unlike the British system there is no administrative review of decisions by higher levels of government or federal or state policies or standards that must be taken into account. As conventionally applied the zoning regulations meant that any development falling within the terms of the rules could proceed 'as of right', though 'special exception uses' defined in the zoning ordinance in any individual or all zones required a special application to be made. Subdivision regulations have traditionally been applied to residential development of greenfield sites, where large areas of land were being divided for lease or sale. Development not involving such division would therefore be excluded from regulation. However, practice is

14 Taken from a Supreme Court decision reported in Natural Resources Defense Council, Land Use Controls in the United States, Dial Press, 1977.

15 For example, the U.S. Department of Commerce Standard City Planning Enabling Act 1928, the Municipal Planning Enabling Act drafted by Bassett and Williams 1935 and the Municipal Subdivision Regulation Act drafted by Bettman 1935.
changing so that development in many areas is rarely 'as of right' and most proposals of any substances are subject to review and approval by local governments.

The traditional reasons for regulation have been the control of externalities (e.g., noise, pollution and non conforming uses), consumer protection (e.g. building codes) and the preservation of the character and amenities of specific neighbourhoods and localities. The technical or 'value neutral' character of zoning regulations has been seriously challenged by research which examines the social impact of zoning controls directed towards the 'preservation of amenity' objective, and the political nature of zoning is reinforced by the strong dependence on local property taxes as a source of government revenue and the localised nature of land use decision making. Local governments, with a view to increasing the local tax base, have been willing to adapt zoning controls to take advantage of the market for different uses and to accommodate growth, particularly where a net contributor to taxes. Such fiscal zoning can, in practice, also operate to exclude certain socio economic groups, i.e. zoning which is directed at maximising property values and reducing municipal expenditures works simultaneously to exclude groups such as low income families and the elderly. These issues place zoning and land use controls very much in a political arena and explicitly attribute to the


system a number of objectives that in the United Kingdom would be considered outside 'the proper role of planning'. For example, a recent court decision ruled that all municipalities in the State of New Jersey should, through their land use regulations, provide for low and moderate income housing. The courts opinion advocated affirmative measures including incentives, such as the relaxation of various restrictions, in exchange for the construction of low and moderate income housing, and requiring private developers to set aside a portion of their developments for lower income housing. The court stated that "the contention that generally these devices are beyond the municipal power because they are 'socio economic' is particularly inappropriate."18

As techniques and objectives are subject to local discretion, so are procedures for making decisions (though there are constitutional 'due process' requirements). Depending on the structure of local government in different areas decisions may be made administratively, politically or by lay, appointed planning commissions. The rights of the public and means of representation or participation also vary across local governments; in some jurisdictions the public can appear and speak at public hearings, in others local community groups may be more directly consulted to make recommendations to decision makers along with professional staff. The degree of local discretion over the procedures adopted leads to public suspicion that the system is either biased or overtly corrupt,19 particularly


19 A task force on land use and urban growth sponsored by the Rockefeller Foundation concluded "neither the procedures for determining land use nor the individuals making decisions have the public confidence...citizens suspect that the people making regulatory decisions are thinking more about themselves and their cronies than the public welfare. These suspicions are sometimes inaccurate, far too often though, they are well grounded." W. Reilly ed., The Use of Land, 1973, pp. 213-214.
as development interests are often heavily represented in local government and on planning commissions and zoning boards.

**Innovations and Changing Approaches in Land Use Controls**

Innovations in the development control system during the nineteen sixties and seventies have led to the adoption of controls that are more complex and restrictive and which give local governments far more flexibility in guiding new development. In many areas 'as of right' development is becoming rare and discretionary controls are being adopted where development is on a 'de facto' permit basis. Developers are thus, in practice, required to make a specific proposal to the planning authority, which then has the freedom to approve or deny the development in the community's interest. 20

Such developments bring the system into closer line with the British, though the 'taking' of development rights by public authorities is by no means a legally endorsed principle.

Zoning and subdivision controls are increasingly associated with exactions, fees and agreements between local governments and developers for the provision of various public improvements and services. Subdivision regulations have traditionally been used to require residential developers to install basic improvements, such as access roads, sidewalks, utilities etc. But more recently, developers have been required to provide for the full range of public services necessitated by new development or are required to

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pay a fee in lieu of actual provision. Suburban counties in the State of
Maryland have adopted 'adequate facilities' clauses in their subdivision
regulations which assess the impact of any new development on roads,
sewers, water supply, parks and open space, schools, police and fire
services. If any of these services are found to be inadequate then the
developer is required to make good the provision, for example, through the
dedication of land for schools and open space, or is required to pay an
in lieu fee to the local authority. Similar legislation applies in other
parts of the country as evidenced in a survey of fees and exactions
carried out by the development industry and in journal articles commenting
on the practice. The requirements associated with subdivision can be
placed on a continuum ranging from a point where the benefit is solely for
the new development to a point where it is shared by the whole community.
There is variation in the position of locally stipulated requirements
along this continuum and in the attitude of state courts to where the
cut off should reasonably be drawn.

Similarly zoning controls are being refined to allow requirements
or conditions to be attached to approvals. Where proposed development is
not compatible with existing zoning, changes may be made conditional on
the developer taking measures to mitigate any negative impact, and these
can include restrictions on the use of rezoned property or contributions
towards public facilities. Variances to design criteria may be granted
if the developer can show unnecessary hardship or that there are special

development difficulties; variances can also be made conditional. The requirement to seek a special permit may be made for specific kinds of development or in designated locations, and the grant of the permit offers an opportunity for imposing conditions. Some local governments zone land to a lower density than they would be prepared to allow and require a special permit for higher density development. The imposition of conditions or requirements that the developer provide public improvements and facilities then becomes part of an explicit trade off.

In effect, local governments are beginning to engage in negotiations and bargaining over development approval in a similar way to that observed in Britain. The techniques for obtaining 'planning gains' tend to fall into two categories: those that are specific, with detailed requirements stated in advance (many of the subdivision techniques are of this kind); and those that are more open ended and discretionary. The distinction, however, can be somewhat false in practice, as even where requirements are stated in advance there may still be negotiation over the precise form of agreements. Similarly, a single local government may be operating both sets of techniques: some regulations which mandate specific public improvements and others which allow conditions and requirements to be applied in a discretionary manner. Also, where some incentive is provided for developers to agree to conditions or requirements in the form of permission to develop at higher densities, the 'bonuses' may be stipulated in advance or may be subject to discretionary adjustment.

This research finds that trade offs, implicit in the British practice of bargaining over planning permission, are more explicit in the American
context. As property owners have the right to some development of their land, it is, in most cases, difficult for local governments to withhold approval for any development and, as a result, to use this as a bargaining counter in the same way that British local authorities can refuse planning permission. Hence, there are frequently regulations allowing some basic 'as of right' development, with developers having the option to submit to conditions and requirements in return for the permission to develop at higher densities or to obtain variances to the regulations. Other research indicates that bargaining may not always be associated with such incentives and that the necessary development approval may be sufficient 'consideration'.

The reasons for the move to bargaining over development control in the United States are primarily economic. The introduction in some areas of legislation which limits the local government's ability to raise finance through property taxes and bond issues, akin to Proposition 13 in California, makes public provision of additional capital infrastructure for new growth almost impossible. As a result a greater burden must be shifted to the private sector. Existing research suggests that the extent of bargaining is greatest in California for this reason, but the general climate of fiscal stress is also leading governments in other states to find alternative means for funding infrastructure costs.

In areas where large scale suburban expansion took place in the nineteen fifties and sixties local governments and their populations have reacted by introducing stringent growth management policies. Fees and

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infrastructure requirements are frequently made part of growth control measures, either as a way of discouraging development or to ensure that development which does take place does not impose additional tax burdens on the local government.

A further justification for bargaining is that conditions and requirements can serve to recapture for the community part of the windfall gains realized by developers when they receive development approval. Fees and exactions have been interpreted as an informal substitute for a development land tax by some observers, though questions are raised about the equity of the practice.²³ In circumstances where the market for specific uses is very strong it is, however, seen as legitimate for the community to take a share of the development gains.²⁴

Finally, there has been some dissatisfaction amongst professionals with the narrow and negative operation of zoning and subdivision controls. More flexible and discretionary techniques allow the controls to be used to achieve positive benefits and social and economic goals. The New Jersey court decision referred to above is an indication that affirmative techniques have been legally accepted when they can be justified in relation to the 'general welfare'. In that particular case equal housing opportunities for low income groups was considered part of the 'general welfare'.

²⁴New York City planning policy for office development in Midtown Manhattan includes the partial recapture of development gains as a justification for requiring contributions to public facilities. New York City Department of Planning, Zoning Handbook, 1981, p. 81.
In the light of the recent changes and innovations in practice it is possible to draw some conclusions about the scope and purposes of the development control system. First, there is evidence that a traditionally negative regulatory system, relying on standard rules and criteria is becoming more positive and interventionist with local government exercising discretion over the approval of applications for development. Secondly, the procedures for making decisions are becoming less 'judicial' in character and more political, open to negotiation and bargaining between development interests and local government officials and politicians. Thirdly, the narrow, physical/land use scope of the system is being broadened to include social and economic objectives such as the provision of low income housing and other public amenities, the minimisation of new local expenditures and the redistribution of development gains.

These conclusions, however, relate to an examination of practice and similar conclusions might be drawn about the British system from an examination of the research on negotiation and bargaining in development control. A concern for broad social goals and plan implementation which cannot be achieved by public investment alone and, hence, requires the cooperation of the private sector encourages negotiation. The conclusions would however diverge from the prevailing legal conception of the process of development control as 'quasi judicial' and from judicial attitudes regarding the scope and purpose of planning law. Jowell doubts the legality of some of the practices evident in his research in the light of court attitudes. For example, conditions enforcing a specific use, such as public housing, had been informally negotiated with developers but had been held unlawful when made formal conditions. Other research
analysing the determinations of the British courts in development control presents a somewhat confused and ambiguous picture. While conditions relating to physical matters such as amenity and environment have been consistently upheld, more inconsistent treatment is given to social and economic matters, such as the relevance of social need in planning decisions. However, a conception of planning that emphasizes the public interest or social need over private property rights does not appear to be dominant in judicial attitudes.

In the United States the absence of federal government guidelines on development control or review of decisions places emphasis also on the courts to delimit the scope and purposes of the control system. The following section reviews court decisions and discusses some of the legal issues that revolve around the questions of conditions, development agreements and bargaining as mode of operation.

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24 J. Jowell, 1974, ibid., p. 430.
LEGAL ISSUES IN PLANNING BY AGREEMENT AND BARGAINING

With an absence of review of local land use decisions by higher levels of government, judicial review is a far more important feature of the American system than it is in Britain. Appeal can be made to the courts on the refusal of local government to authorize development or on conditions imposed on the grant of permits on the grounds that the decision is unconstitutional. The tests in determining constitutionality are of two kinds: that the regulation or condition must "have a public purpose within the constitutionally acceptable objectives of the police power and must be reasonable." Whether or not a regulation is within the scope of the police power is rarely a serious barrier; as the Supreme Court definition of the general welfare quoted above demonstrates, the police power has, potentially, a very wide scope. Also, courts in the great majority of cases will defer to local legislatures on matters of policy and the objectives of regulation, particularly where some justification for the regulation or condition is included in adopted general land use plans or local legislation. The 'reasonableness' criterion is a more important basis for striking down decisions.

Judicial determination of the 'reasonableness' of conditions and requirements is made under the rubric of arbitrariness, confiscation, discrimination or taking. It is the state rather than the federal courts

which are of importance and judicial attitudes between states vary in terms of what they consider to be 'reasonable' conditions or requirements. Also, inconsistency within states makes the assessment of judicial attitudes a difficult task. However, recently reported cases are said to demonstrate a broader validation of conditions and agreements between developers and local governments.29

Where statutory authority in the form of state or local legislation exists to make zoning or subdivision approval conditional on the applicant meeting certain conditions or requirements, the courts have unanimously upheld requirements for internal infrastructure necessary for the development. A landmark California case upheld the constitutionality of the dedication and construction of improvements, even those with some wider public benefit.30 The case involved the dedication of land for adjacent and internal roads and the court determined that the conditions were 'reasonably related to increased traffic and other needs of the proposed subdivision.' An even broader standard was established by the New York courts, requiring only an incidental relationship between the conditions and the new development.31 In California and New York conditions or exactions involving off site improvements and the dedication of land for schools and parks have been upheld, even where they serve the

community generally, so long as they also benefit the new development. In other states, however, more restrictive principles have been established. For example, the Illinois courts developed the "significantly and uniquely attributable" standard, admitting basic infrastructure exclusively for the benefit of the land being developed, but not public facilities to serve a wider community.

The attitudes of the courts in different states may provide a contextual influence on local government practice, but the importance of judicial determinations must also be considered in relation to the economic realities of land development. Judicial review may not always be sought by developers because of the direct costs of litigation and the indirect costs through delay which it imposes. In many cases developers are willing to negotiate informally with local governments to reach agreement, particularly as the negotiation often involves some trading of concessions on both sides. The California research on bargaining in development controls indicates that some of the agreements reached through negotiations can "stretch the bounds of legality," but where development is profitable applicants may find it in their interest to proceed in an informal way.

A second legal issue involved in the practice of planning by agreement is whether the arrangement violates uniformity provisions by not treating all similarly zoned property in the same way or whether agreements constitute a 'contracting away' of the police power. Again, on these issues, case law does not provide clear or unambiguous answers. A New York court of appeals case in 1981 rejected the argument that conditional rezoning constituted an illegal bargaining away of local

government power and ruled that the restrictions were generally intended to benefit the general public and were, therefore, in furtherance of public policy. Again, bargains or agreements are given more legal support if the agreement has some basis in local government plans or laws making clear the relationship between the agreements and the implementation, not abnegation, of general policy. Explicit attempts to 'legitimize' bargaining in this way to avoid fears that the practice allows developers to 'buy zoning' without regard to local planning criteria are given support by a number of commentators. 34

Although there is not clear judicial validation of the practice of bargaining in development control and substantive limits on the content of agreements appear to be as much a matter of informal negotiation as of legal determination, there does appear to be support for the inclusion of guidelines in locally adopted plans and legalization. Legal support of basing agreements on local plans and ordinances also stems from a concern with accountability. While it is acknowledged that formal public hearings may not be appropriate until the terms of a proposed agreement are developed, it is recommended that the limits of acceptable bargains and some constraint on the preliminary stages of negotiation be exercised through pre regulation or policy guidance, minimising the chance of legal challenge.

THE CASE STUDIES

Each of the three authorities selected to examine the extent and purpose of bargaining in development control differed somewhat in the techniques applied to achieve 'gains', in the types of bargains they negotiated and in the procedures following in the negotiation process. There were also differing reasons and justifications for negotiation relating to a complex and changing pattern of constraints on land development: market conditions; public policy and public investment; local politics; land availability and construction costs; individual site characteristics. Thus, when examining bargaining in each of the three areas and in evaluating its outcome reference back to these contextual factors is necessary.

The study does not purport to provide a full compilation of techniques for bargaining or types of 'gains'. However, it does give some evidence on the range of public facilities and improvements required by local governments and the different basis from which bargains are struck. The research was confined to bargaining in the context of approval for office and commercial developments, though it was evident that agreements with developers would also be sought for residential development for the provision of open space and, possibly, for some 'set aside' low income housing. However the scope for achieving gains is greater in the case of profitable office and retail developments and these were thought to demonstrate better the range of requirements that might be made.
Two of the authorities examined, Arlington County and New York City, negotiated extensively with developers for private provision of public facilities. Both also operated on the basis of 'incentive bonussing' where an explicit trade-off of conditions and requirements for extra density or variances to design regulations occurred. Baltimore County's zoning and development regulations were more rigid and conventional; only limited negotiation took place with developers over the detail of pre established requirements and the division of financial responsibilities between the county and the developer.

Development pressure in all three areas has been strong and the difference in practices can only be explained partially by this factor. Also of importance are local factors such as political attitudes, the type and location of new development and individual site characteristics.

The remainder of this section discusses the arenas for bargaining, i.e. the permit approvals and techniques which provided an opportunity for public/private bargaining, the types of bargains struck, including the conditions and requirements placed on developers and the trade offs made by the public sector, and the process of negotiation and participation in decision making. Finally, the reasons why bargaining and negotiation occur are discussed and the outcomes are evaluated.

**Arenas for Bargaining**

Techniques for controlling development and redevelopment in the United States are, in comparison to the British permit system, highly complex and diverse as a result of local discretion over legislation and regulations. There are a variety of permit approvals that can be used.
as an opportunity to seek agreement with developers over infrastructure or service provision or to require specific uses.

1 Subdivision Regulations

The development regulations, essentially subdivision regulations, in Baltimore County are the main context in which conditions and requirements are placed on private developers. However the regulations differ from conventional subdivision as they apply to all development, apart from very minor applications, and subject any proposals of substance to a process of review. The change requiring all proposals to be submitted in this way was adopted as part of the county's growth management policy which seeks to coordinate new construction and infrastructure availability and provision. The review process is essentially a design and engineering review including an assessment of site services and infrastructure. The development regulations provide for a public works agreement to be drawn up between the county and the developer for the provision or improvement of public infrastructure to county standards. Bargaining over the content of the agreements is very limited as the development regulations specify in some detail the precise nature of requirements and the design standards to which they must be provided. However, individual site and application characteristics can vary to the extent that interpretation of the requirements may become an issue, particularly when the improvements are off site and of wider benefit to the local community. Then the issue becomes one of agreeing on the division of responsibilities between the county and the developer.
Zoning Regulations

Where new development is in accordance with the existing zoning there may, nevertheless, be regulations requiring the developer to set aside land for open space, or where large scale residential development is proposed, schools. The Baltimore County Zoning Codes require land dedication for these purposes; again, the requirements are not negotiable, but based on size and density formulae. Where the requirement is small an 'in lieu' fee based on the cost of the required land is levied.

Building Regulation Variances

Building height and bulk regulations are frequently very detailed as in the case of New York City. However, variances may be granted where developers can demonstrate special site development problems or can show that compliance would preclude obtaining a reasonable economic return from the development. The grant of a variance can be made conditional on the developer providing public amenities or agreeing to design or use restrictions. The scope for using variances as a technique for achieving gains varies, but in the New York case the very specific nature of the regulations and land availability and site development conditions made requests for variances frequent. Variances, in their turn, could enable developers to obtain substantial benefits as building floor area can be increased substantially above that which would be allowed 'as of right'.

Zoning Map Changes

Changes to the zoning of parcels (use, density or boundary changes) are discretionary and provide an opportunity to impose conditions. In New York City restrictive declarations can be attached to zoning changes to
restrict future uses, control building design or to require public amenities, particularly when rezoning provides a considerable windfall benefit to the affected property. In Arlington County rezonings were associated with informal negotiation to achieve public policy aims, for example, increasing allowable density as a way of encouraging the provision of residential units in office buildings. Rezoning provided limited scope for conditioning in Baltimore County; individual site reclassification is discouraged by a State legal requirement known as the 'change or mistake doctrine.' Applicants for rezoning must show either a mistake in the original classification or a substantial change in the character of the area, hence most reclassification of property takes place during a four yearly review of zoning maps when approval cannot be conditioned.

v. Special 'districts'

Special district designation is the most widely used affirmative zoning technique in New York City and Arlington County, though each authority applies the technique somewhat differently. In New York City special districts have been designated for particular geographic areas with the aim of preserving special characteristics or promoting specific types of development. All development in special districts is subject to review and special permits can be granted for variances to the building regulations or density bonuses in return for the developer undertaking to provide public amenities, to restrict uses or provide particular uses. For each special district detailed legislative guidelines exist outlining requirements and the range of incentives, however the grant of special permits is discretionary. Special districts have also been created
on an ad hoc basis for individual sites, particularly where large and complex projects are proposed in key central locations. The special permit procedure then allows the city government to negotiate and award density bonuses in return for a range of public amenities depending on location and site characteristics.

In Arlington County special zoning districts are designated in areas where significant redevelopment and change is expected to take place. In the special districts a site plan review process operates that allows developers to obtain density bonuses in return for accepting conditions and requirements set by the local government. Submission to the review process is optional with the underlying zoning allowing some 'as of right' development. However, the underlying zoning tends to be very low density and in a situation where market demand for office space is strong the benefits derived from submitting to the process are considerable. Legislative guidance on the types of conditions that can be designated and the sorts of bonuses that can be awarded is available, but this is general and the elected politicians retain for themselves significant discretion over the sorts of bargains that can be made. In contrast, the New York special permit provisions are very detailed and appear to considerably constrain discretion, but in practice they have proved to be quite flexible, with special text amendments being incorporated to take account of project specific agreements.

vi Incentive Zoning

Incentive zoning is the specific technique used as a basis for bargaining in the special districts described above. However, in New York
it is applied more generally to all commercial development in Manhattan. 'As of right' bonuses are available for the provision by developers of public plazas according to a pre determined scale, without the need to apply for a special permit. Incentives in this case, and in the special districts described above, are based on manipulation of the floor area ratio (FAR), a density measure expressed as the ratio between the floor area of a building and the area of its site. The New York plaza bonus awarded an additional ten square feet of building space in return for one square foot of plaza space, up to a maximum of three additional FAR. New zoning regulations adopted in 1981 reduced the maximum to one FAR. However, the 'as of right' incentives have in practice been far less significant than the discretionary bonuses and conditions as most new developments in midtown Manhattan have been approved under the special district and special permit provisions of the zoning.

vii Transfer of Development Rights

Transfer of development rights is a mechanism for preserving threatened historic buildings and vulnerable public resources, such as parks. The technique allows a land owner to purchase excess development rights from such sites and transfer them to his or her own parcel, thereby increasing the allowable density. In most cases transfer is permitted to adjacent sites, but in the case of New York the concept has been broadened to allow unused development rights to 'float' more freely within a designated area. The transfer process is subject to local government approval and is usually subject to conditions concerning the preservation and maintenance of the historic building or other resource. For example, Arlington County approved the transfer of development rights from a parking area for an
an adjacent office and commercial development on the basis that the site remain in use as a car park. In New York unused development rights from theatres are allowed to 'float' within the designated theatre district, with transfer dependent on a proposal to rehabilitate the theatre.

**Types of Agreements**

The types of agreements that have been negotiated with developers by the three authorities range from the provision of infrastructure directly needed by the new development and urban amenities and open spaces designed to mitigate the high density of development to major off site improvements of wider community benefit and the provision of specific uses for a variety of public policy purposes.

1. **Rights of way on developers' land**

   All three of the authorities required or negotiated right of way or public access easements on developers' land. Commonly the easements were required for roads, both internal to the development and for access, and for pedestrian circulation requirements. In more limited cases easements were negotiated for subway station facilities and access and for open space and parks. The dedication of land to the public sector only occurred in one authority where land was dedicated for open space. More usually land remained in private ownership with the right to use the land for a specific public purpose being given to the local government. The right of way requirements could be substantial, for example in Arlington County, where agreements with private developers were made for an area being substantially redeveloped for high density office use, new highway
requirements and, hence, right of way requirements were up to forty percent of the site area for individual developments.

11 Provision of Infrastructure

Basic infrastructure has traditionally been required through the subdivision process covering items such as roads, sidewalks and paving, sewer and water supply, utilities and stormwater drainage. There were instances in the case studies of developers being required to contribute to major and offsite improvements, for example, a pedestrian bridge system linking office developments in the Arlington County redevelopment scheme was fifty percent funded by the developers. Major roads adjacent to developers' sites were also partially funded by the developers and the precise division of costs became an issue for negotiation. In New York City, where basic infrastructure provision was not a necessity, agreements were made covering pedestrian circulation requirements such as sidewalk widening, the building of through-block passageways and the relocation of subway station access to developers' land from the sidewalks. Two of the case study authorities, New York City and Arlington County, also obtained agreements from developers to construct or improve subway station facilities, and, in the New York case, transferred responsibility for maintenance of the stations. Infrastructure, in a sense the physical necessities of development, was probably the most successfully negotiated item in the case study authorities, though there were sometimes difficulties in relation to the phasing of infrastructure provision with the new development.
Urban Public Amenities

Public amenities of various kinds were the major items bargained for in New York City. The facilities included plazas, covered pedestrian space in the ground floor of office buildings, small parks and retail arcades. The design of the amenities varies from very basic open spaces to elaborately landscaped interior spaces with seating and restaurants. Parks and plazas were also required in Arlington County; here the amenities were often obtained on fragmented development sites where the consolidation of development rights was made conditional on the peripheral land being laid out as a public park.

Improvements to Offsite Buildings and Parks

Agreements in this category covered the rehabilitation of historic buildings and theatres, the provision and maintenance of small offsite parks and contributions to a central park improvement fund. In most cases the agreements were in connection with the transfer of unused development rights from the building or open area improved. Park fund contributions were also required in cases where the provision of on site public amenities was inappropriate, for example in Fifth Avenue in New York, plazas and open areas, normally bonused elsewhere, were discouraged as a way of maintaining retail continuity and contributions to the park fund were levied instead.

The Specification of Use

A wide range of uses were encouraged through incentive bonusing provisions and agreements were made for the provision of retail space in office buildings, hotel and residential space, new theatre construction,
restaurants, sports facilities and museum space. In Arlington County attempts to require that 10% of residential units provided be set aside as low income housing were made but dropped after a short period as potentially open to legal challenge in Virginia courts. Restrictions on use were also placed, for example, restricting retail uses to those thought appropriate in particular locations in New York. Encouraging mixed use was seen primarily as a way of reducing congestion, but it was probably the least successful public policy pursued through bargaining. In New York and Arlington County it was not politically possible to increase densities to a level where residential use gave returns commensurate with office use because land values were based on the expectation that high density office development would take place. Attempts to encourage retail and hotel space have been more successful, but in both Arlington and New York some retail space initially provided has failed commercially with the governments being pressured to approve conversion to office space. In Arlington this has affected retail space provided along the pedestrian bridge system which is not well utilised, and in New York retail space in the ground floor public areas of office buildings has remained empty when access to and design of the spaces does not make their 'public' character obvious.

In some cases the agreements were made subject to the approval of the necessary permission to develop, in others, they were traded against adjustments in zoning regulations. Only in Baltimore County were the agreements solely part of the standard requirements for permission to develop. In the other two authorities some requirements were imposed subject to specific permit approval, for example the rehabilitation of theatres in connection with development right transfers, some were
explicitly bonussed, such as the plaza bonus in New York, others were subject to discretionary adjustments in building design and density regulations. In the specific developments examined in New York and Arlington a package of benefits was offered and a variety of permit approvals were given and concessions were made. The main concessions or incentives offered have been floor area bonuses through variation of density controls or building height and bulk regulations.

In New York the standard density limit for the midtown area during the sixties and seventies was FAR 15 with developers being able to build to FAR 21.6 subject to certain requirements. Changes in the building bulk regulations have in effect meant variances of a 40% tower coverage regulation (i.e. that any office tower should be built to cover only 40% of its site area). Variances of this regulation have probably conferred the greatest economic benefits on developers, as floor space additions resulting can be very significant. Towards the end of the nineteen seventies, variance of the tower coverage regulation became a necessity as land availability and site constraints made compliance impossible if buildings with marketable floor dimensions were to be built.

In Arlington similar density and height and bulk bonuses were given together with reductions of standard parking requirements. No specific ceiling was set on density bonusses as in New York, but in practice most approvals until the mid nineteen seventies were for twelve storey building at FAR 3.5. In the period since a number of developments were negotiated which were significantly larger and more densely developed, up to 20 stories and FAR 5.8. The larger bonuses were awarded for developments characterized by certain difficulties: the sites were fractured by roads
and required significant efforts to consolidate; right of way requirements were in excess of those previously negotiated; and some joint development with the transit authority was desirable.

In the majority of cases the requirements could be legally defended as bearing some reasonable relationship with the developments approval; either they related to infrastructure directly needed or partially necessitated by the new development or to devices aimed at mitigating the extra density being approved (open spaces and mixed uses). The theatre and historic building rehabilitation and park provision requirements in New York are somewhat different in character with a more tenuous relationship to the new development. However, in practice, the legality of particular requirements has been less important than the balancing of the requirement/bonus financial equation. The concern of developers has been to ensure that the scale of compensation is sufficient to account for the economic implications of the requirements. For example, the New York real estate industry debated recent changes in the zoning requirements to make major and offsite subway station improvements bonusable items not in terms of legalities but according to the financial implications. In theory, there is unlimited legislative discretion over the scale of bonuses that can be approved, though in Arlington citizen and neighbouring jurisdiction views on acceptable height and density set political limits. In New York political considerations were also important, particularly as the city, towards the end of the nineteen seventies, was being criticized for approving development that overloaded existing infrastructure without providing sufficient compensation in the form of public amenities.
The Process of Negotiation

Negotiation over infrastructure provided and participation in decision making in Baltimore County was purely administrative, though officer discretion was extremely limited by the detailed regulations in operation. In Arlington and New York common procedures for reviewing and approving development proposals have been adopted and involve technical review by professional staff, consultation on applications with the planning commission and citizen representatives and final decision making by elected politicians. The procedures, therefore, provided some opportunity for public input; also accountability could be defended on the grounds that decisions were based on published guidelines and regulations. Unlike the British practice of largely opportunistic negotiation unconstrained by guidance on 'acceptable gains', the American system emphasizes detailed rules and standards to constrain discretion and provide developers and citizens with certainty. However, in practice the rules and standards were open to adaptation and manipulation during the review process for individual developments, illustrating the tension that exists between the desire for certainty and the need for flexibility where market conditions are subject to change and unforeseen circumstances arise.

In Arlington professional staff involvement in discussions with developers and their representatives was a very important element of the procedures. The discussions provided a forum for arriving at solutions to the problem of providing the planned infrastructure and open space with compensation for developers in the form of additional office floor space. Solutions arrived at during pre application discussions were referred to
the planning commission and the county board, often with strong recommendations of acceptance based on the opportunity offered to achieve important public policy goals. There was particularly strong professional commitment to implementing transportation policies and fulfilling traffic and pedestrian circulation requirements. Planning commission members objected to the extra building height and density proposed for approval, but the alternative solution suggested of the county assuming a higher proportion of infrastructure costs was unacceptable to county politicians.

Participation in negotiations over development proposals in the New York case varied over time. When the technique of incentive bonusing was first developed its purpose was primarily to promote improved urban design; during this period discussions and negotiations with developers were conducted mainly by professional and technical staff. As the issue of stimulating new office construction became politically more important during the mid nineteen seventies, and bonusing began to be used as a way of providing incentives for development, so political involvement in the negotiations grew. Consultation with community boards and public hearings provided an opportunity for public representation, though the highly technical nature of the negotiations, and the complexity of the zoning regulations on which they were based, did not encourage wide participation. However, in at least one case the size of the bonus floor area agreed with the developer in return for the provision of an interior public space was reduced by the elected politicians after strong local opposition.

Evaluation of the role of local politicians is made difficult by an absence of direct evidence on their involvement. Documentation of particular
developments tended to refer to discussions and negotiations between developers and professional staff. The British research findings on bargaining suggest that the involvement of elected members is minimal. However, interviews suggested that local politicians played a more important role than their British counterparts, both through informal contacts with developers and their formal power to vary zoning and building regulations. The political nature of negotiations over land development and the review and approval process was emphasized by reference to the significance of contributions from the development industry to political campaigns.

In Arlington and New York a consensus on broad policy goals between the local governments and developers characterized the negotiations. In Arlington, for example, the county and developers shared the view that high density office development was appropriate in areas around subway stations and cooperation was engendered by the county's decision to reject urban renewal powers and rely on private redevelopment, allowing developers to realize gains on speculative land acquisitions from an earlier period. In New York, the city government was fundamentally dependent on private redevelopment for new construction and employment to stimulate the city's economy. The floor area bonus provisions enabled the development industry to overcome construction difficulties and build marketable and, no doubt, highly profitable office buildings.

In both Arlington and New York planning staff remarked on the difficulties of entering into negotiations with developers from a position

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uncertainty about the correct facts of construction finance. Developers would typically assert to the local governments that a specific floor area bonus or building regulation variance was fundamental if a project was to proceed and if the requirements were to be met, and even technically qualified staff would be unable to assess with accuracy the validity of this position. Citizens in both areas criticized the local governments for 'giving too much away' in negotiations after projects had been completed and the outcomes were apparent. A possible disadvantage of bargaining is that local governments may lack the expertise needed to negotiate successfully and it may even be possible that the precise economic facts can never be known by government participants.

Why Negotiations Occurred

The context of a strong market for office development was of fundamental importance in Arlington in allowing the county to make requirements and offer compensatory density bonuses or permission to vary building regulations. In New York, however, a negotiable stance to the interpretation of zoning regulations was a feature of periods of both boom and recession in office construction. Certainly, the changing context of market conditions, public investment possibilities and site development conditions, in both authorities, encouraged the parties (public and private) to negotiate and adapt regulations and conditions to fit varying circumstances. For example, the site plan review process in Arlington allowed considerable flexibility in floor area densities and building height and in the sorts of conditions or requirements that became part of the agreement between
between developers and the county government. The system allowed redevelopment to take place and infrastructure to be provided at a very low cost to the county. As conditions changed over time the sorts of agreements made varied: larger floor area bonuses were approved to compensate developers for special development difficulties and expensive infrastructure requirements. In New York, an upturn in the market for office space coupled with increasing land and construction costs and problems of land availability motivated developers to seek bonuses and variances to the building regulations in order to be able to construct the maximum possible floor area on each site. At the same time the city government was reluctant to discourage new development, so was prepared to negotiate to meet these demands while requiring transport improvements and amenities to mitigate the effects of the extra density being approved. While a detailed set of rules and guidelines formed the basis of the negotiations, discretionary adjustments and formal amendments were made to adjust bonuses and requirements to fit the needs of individual developments.

In Baltimore County, on the other hand, the local government made few efforts to negotiate with developers, despite the existence of development pressure. The burden of infrastructure costs has increasingly been shifted onto private developers as a way of minimizing additional public expenditure but the requirements are detailed in the county's development regulations which are applied uniformly. Also, requirements were restricted to items of physical infrastructure necessary to the new developments and no attempts were made to obtain other 'planning gains'. A political
desire to provide the development industry with certainty about requirements and to minimize administrative discretion influenced development control practice in the county. Also, the predominant type of new development in the county consisted of large single use developments in fringe locations, such as shopping malls and office and industrial parks, where efforts to encourage mixed use or a broader range of public facilities would be inappropriate. In more established commercial centres where such requirements would be of benefit development pressure was significantly less strong.

In terms of the outcomes of negotiation the local governments experienced variable success. In Arlington the agreements with developers were certainly financially beneficial, providing substantial contributions to roads, pedestrian bridges and subway station facilities. The site plan review process enabled the county to substantially implement its transportation policies at very low cost to the public purse. However, there was less success in implementing a policy to achieve a mix of residential and office uses in the Rosslyn area. In New York many new public spaces and amenities have been provided in conjunction with new office buildings, but subsequent evaluations by the press, by citizen groups and the city government itself have been critical of the public benefit provided by the new amenities compared to the bonuses awarded to developers.

Arlington's success in obtaining contributions to physical infrastructure can be attributed to a number of factors. Firstly, the considerable flexibility in the development regulations allowed them to adjust bonuses and requirements to meet individual circumstances. There was not, however,
sufficient flexibility to allow them to adjust density bonuses to provide for compensation for replacing office with residential space in new buildings when the difference in profitability between the two uses was very great. Secondly, Arlington designed its incentive bonus system to meet specific needs; in the case of the Rosslyn area, to provide transport infrastructure using primarily private funds. In New York, on the other hand, the detailed development regulations fixing the level of bonuses and requirements made adjusting to changed circumstances very difficult. The structure of incentives written into the legislation in the mid seventies proved to be very generous as the market for office construction recovered in the late seventies providing developers with a great incentive to develop and take full advantage of the bonuses available. Also, in New York, the development regulations had a variety of objectives: to encourage improved urban design; to provide open space and public amenities; to stimulate new office development; and to partially recapture windfall gains for the community. Negotiations, as a result, were not clearly directed towards achieving a single goal; the objectives of incentive zoning varied over time and the stance of the city government in the negotiations varied to the same extent.
EVALUATION: OUTCOMES AND ACCOUNTABILITY

This final section of the report is concerned with summing up the results of the research more generally and, in particular, directing attention to the issues of outcomes and accountability identified in the introduction as areas of contention in the British context. Previous research and commentary on bargaining over land use regulation in the United States has tended to neglect these questions.

First, this research reinforces the findings of other work that local governments in the United States are increasingly using their legislative powers to control and regulate land use and development as a means of pursuing goals wider than the traditional objectives of regulation, i.e. the separation of non-conforming uses and maintenance of the amenity of particular locations. The incorporation of social and economic goals into the land use regulation arena has been legitimated in at least one state (see New Jersey court opinion quoted above, p. 11). The objectives pursued by the local governments examined in this research included: minimizing local government expenditures by shifting responsibility for infrastructure costs, traditionally borne by the public sector, onto private developers; provision of facilities and amenities that might not be provided by the normal operation of market forces in land development, for example, public open spaces, theatres and retail space; and control of architectural design, normally considered to be outside the purview of local planning controls. Essentially, the local governments were using what powers and resources they did have to meet their objectives in a context of financial pressure and political limits on more positive intervention.
However, there were constraints to what could be achieved through bargaining over development permits and these were less legal, though court determinations and known attitudes may be an implicit constraint on what authorities will seek, and were more to do with the economic and political context for land development in a particular area and on a particular site. The local governments were demonstrably more successful in achieving 'gains' related to design features and amenities, which might be expected to improve the marketing of developments as well as providing some wider community benefit. Also, there was success in requiring items of physical infrastructure directly related to the functioning of an area and a building. Less successful were attempts to inject social need criteria into the negotiations with developers, for example, the failures to achieve a mix of commercial and residential development. Economic viability, not surprisingly, was the overriding constraint on the scope of agreements.

The basis of agreement was normally that developers be fully compensated in the form of additional building floor space for any requirements made and there were, in turn, political constraints on the degree to which local governments could make the necessary concessions. On the other hand, developers were eager to offer public amenities where they could obtain variances to regulations and overcome particular site development problems. In the one case study area where agreements were made in the absence of compensatory variances the specific nature of conditions and requirements was made clear in published regulations and it is assumed that the cost of such requirements would be built into initial financial analyses. The impact of such costs might be expected to result in lower land costs rather than reduced profits for developers. This conclusion is supported by other work.
examining the incidence effects of development agreements. 36

Given these findings questions can be raised about the validity of the development industry's assertions that the practice of imposing conditions and requirements represents a threat to their interests. In two of the case studies the outcome of public/private negotiation gave developers substantial benefits in the form of permission to develop at higher densities and negotiation was actively sought where site development conditions made compliance with the regulations problematic. While no hard financial evaluations of the distribution of costs and benefits are available, the flow of benefits was hardly one way. There is also the issue of the costs borne by the community resulting from the concessions made by the local governments. In two of the areas the government received public criticism for 'giving too much away' in its negotiations with developers. In one area the criticism related to the impact of the larger buildings being approved on basic infrastructure such as roads, sidewalks and public transport and on congestion in the city. In the other area the environmental and visual impact of the larger and higher buildings was criticised.

The local governments' ability to use their power, regulatory control of development, was certainly enhanced in circumstances of development pressure, though the motivation to negotiate for government and private participants was related in a more complex way to a whole set of factors having to do with the market for office space, land availability and cost, public

investment possibilities and individual site characteristics. The detailed outcome of the negotiations in terms of the agreements made was dependent on changes in these factors over time. Given this dynamic context attempts to pre regulate the terms of permissable agreements proved difficult and legislative flexibility was found to be an advantage. Such flexibility conflicts however with desires by both developers and local communities for certainty.

Criticism of the practice of bargaining is frequently based on the charge that it allows local government to unfairly exploit their monopoly power over land supply. However, this attitude neglects the fact that the powers available are largely negative, while most areas will be concerned with policy implementation in a positive sense. Also, in the American context, there is the importance of new construction to the local tax base which encourages many authorities into a permissive stance towards development. Private developers are in the relatively advantageous position of being the key agents in land development and the participants upon whom many of a local government's policy objectives depend for implementation. A further important resource controlled by the development industry is information and skill. In the two areas where the governments did negotiate extensively with developers to obtain 'gains' professional staff involved found themselves disadvantaged by a lack of reliable knowledge about the finances of a particular building project. In most cases there was no alternative to accepting the developers' version of the kind of concessions required if a project was to go ahead in the form desired by the local government.

Given this balance of resources between public and private participants one
would not anticipate outcomes against the interests of developers.

The potential threats to public accountability identified in the British literature arise because of the tendency for negotiations to be conducted in secrecy without involvement of elected politicians or opportunities for public consultation. However, in all three of the areas examined formal mechanisms existed for public representation (public hearings, involvement of lay planning commissions or community groups) and there were opportunities to review the terms of agreements before final approval. Also guidelines were available in some form as a background for negotiations. However, pre-application meetings between local government professionals and developers or their representatives crucially influenced the sorts of agreements reached and strong support from professionals was important in at least one area in ensuring political approval of projects. The highly technical nature of the discussions and the complexity of the zoning and development regulations on which they were based also discouraged wider participation. This complexity also tended to give some advantage to those development interests with the resources to obtain the services of professional experts with experience of maneuvering through and around the regulations.

The involvement of locally elected politicians was, however, important and occurred in one or more of three ways: through actual involvement in negotiations; through approval of final project applications; and by adoption of policy or legislation guiding agreements. The more overtly political nature of land development regulation and approval in the United States derives from the significance of local property taxes for local finance and provides the basis for a set of shared interests between developers obtaining
profit from land development and politicians obtaining tax dollars for the local community. These shared interests are reinforced by more informal links between politicians and the development industry. Certainly negotiations over land development were marked by a consensus between government participants and developers, where the government cooperated out of a desire to promote office construction for economic and employment reasons. The local governments were in the contradictory position of being dependent on private developers to meet their planning and financial objectives and of having to regulate and control their activity in the 'public interest', which itself might comprise contradictory objectives. However, this contradiction exists not only in relation to bargaining and negotiation over development control but is a broader structural feature of a planning system operating in the context of a land development process responding to market forces.

This work will not make value judgements regarding the ethics or appropriateness of planning by agreement. Indeed, one of the implications of both this work and related work in the United Kingdom is that for local authorities to influence land development in their areas they will need to bargain and negotiate with the powers and resources they have, which are largely regulatory powers. Despite some of the issues regarding the distribution of costs and benefits and the outcomes of bargaining raised by the examination of the three local governments in this study it would be difficult to argue that the practice is inappropriate, though they also reinforce the importance of procedural safeguards and possibly argue for a simplification of development regulations to make the process more accessible. Also local governments had to be aware of their limited powers and possibly take steps to enhance their resource positions through expanding their
technical capacity in the field of development finance. However negotiation and bargaining is a mode of operation that serves a range of (public and private) interests and reflects the constraints on local governments to intervene more directly in land development. The practice of negotiation (and compromise) is likely to persist and possibly increase in a situation of reduced financial resources making public infrastructure and service provision more difficult. This conclusion is shared by the authors of similar work carried out in California.

Although a negotiative mode of operation is a characteristic of the land use control system in at least some local governments in the United States and the United Kingdom, there are some specific differences in practice. The differences relate to:

1. The more explicit nature of trade offs or concessions made by the local government in the American cases examined.
2. The more common American practice of establishing policies and regulations to guide negotiations, which can be very detailed.
3. The variety and complexity of permits and approvals which can form a context for bargaining.
4. The more important role of local politicians in the negotiation process is a context where land development issues have high political visibility due to their significance for local government finance.

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While bargaining in the United Kingdom is in a sense legitimated by the Section 52 provisions of the Town and Country Planning Act, bargaining in the United States is not fully legitimated and legal attitudes may vary in different parts of the country.

The more explicit nature of trade-offs relates to the legal basis of control where land development rights remain with the landowner, thus local governments were found to bargain on the basis of a discretionary ability to increase allowable densities and vary use regulations rather than an ability to withhold development approval. Also, the United States has an historical legacy of detailed and standardized development and zoning regulations as opposed to the more flexible controls operating in the United Kingdom with applications being considered 'on their merits.' While government compromises are explicit in the American context, they are implicit and perhaps more difficult to ascertain in Britain. However, one British study suggested that a local authority's ability to secure a package of benefits from a developer influenced their decision to approve a scheme for office development on land allocated for residential use. Similar issues are raised by other commentators who see changes in the possibility that local authorities will be swayed by the opportunity to obtain financial benefits and will not confine themselves to making decisions on the basis of 'proper planning considerations'. However, this tension may exist in the normal operation of land use controls, particularly in the American context where new development bears significantly on local finances.


The American practice of establishing legislative guidelines to form the context for negotiations is something that coincides with the recommendations of legal commentators in Britain, on the grounds that it safeguards public accountability and provides protection against charges that the local authority is bartering planning permission without consideration of planning objectives. However, in the case studies where detailed guidelines were available they, in practice, proved negotiable and were amended and adjusted for individual applications. Also, the degree of detail proved problematic as concessions made in one set of development and market conditions established precedents for a generous level of bonuses when market conditions changed. The more flexible guidelines operating in Arlington were unconstraining enough to allow the local government to respond to changing circumstances but also allowed great variations in developer contributions and land government concessions, though negotiations were carried out with a view to achieving clear planning objectives.

The variety and complexity of the permit approvals which formed an arena for bargaining in the case studies differs from the British practice of achieving planning gain in the context of a single permit approval (though the now repealed Community Land Act temporarily broadened the arena for negotiation and compulsory purchase provisions also provide local authorities with an opportunity for bargaining). The main point to be made is that the administrative complexity of the system inhibits understanding for lay participants and observers. The complexity also reinforces the advantage of developers with access to the services of experienced professional advisors.
The fourth difference listed, the more important role of local politicians, is a rather tentative conclusion based on officer interviews rather than direct evidence. In the British context political involvement is again advocated on grounds of accountability and democratic representation. It is seen as a counter measure to the tendency for 'corporatist' policy making engendered by a system of public and private sector professionals 'working together.' However, the extent to which local politicians in the United States provide an independent check is questionable given the local political/development industry links and shared interests that are said to exist. However, from a legal point of view political involvement is fundamental and there was at least one case in which local politicians responded to public views and adjusted the terms of agreement to reduce the bonus awarded to a developer.

Finally the 'legitimacy' of planning by agreement might be assumed to be more established in the United Kingdom, however the controversy during the last five years over the ethics and legalities of the practice suggests that the positions in the two countries are not too dissimilar. While Section 52 and a number of other legal provisions (Section 40 of the Highways Act 1959, Section 111 of the Local Government Act 1972, Section 126 of the Housing Act 1974 and various local acts) provide scope for local authorities to enter into agreements 'regulating or restricting' the development on use of land or for securing the provision of infrastructure the Jowell research also

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41E. J. Reade, 'Section 52 and Corporatism in Planning' JPEL September 1982 pp. 8-16.
found planning gain resulting from informally negotiated agreements. There is extensive debate about the legality of agreements and a number of commentators have advanced the opinion that many agreements negotiated in practice would be found 'ultra vires' if legally tested. There have also been attempts to determine the boundary between acceptable and unacceptable gains, though the results have attracted criticism for taking an overly narrow view of acceptable gains and expressing disapproval of consideration by local authorities of items which are regarded as important planning matters, and in so doing betraying a general ignorance of the planning process. Much of the debate refers to the long standing issue of ambiguity in British town planning over 'the proper scope of planning.' In the case of the United States it seems that the potential and legally admissible scope of the 'general welfare' is very wide and includes social need criteria as well as environmental considerations. However the 'reasonableness' issue corresponds more closely to the issues raised in Britain and similar uncertainty appears to exist with variations in attitudes between courts in different states.


43 Current Topics, 'Planning Gain' JPEL, Jan 1982, p. 3.
APPENDIX I

ARLINGTON COUNTY CASE STUDY

Introduction

Arlington County, Virginia forms part of the metropolitan area of Washington, D.C., lying across the Potomac River from downtown Washington. There is good accessibility from the county to the central city by road and, since the mid 1970's, subway train. Since the early 1960's the county has experienced considerable office and commercial development. The rapid growth of federal government functions throughout the 1960's, coupled with regulations controlling the maximum height of buildings in Washington itself, and the anticipated development of the subway system have contributed to an increasing demand for office space in Arlington County. The county currently has about 14% of the total office space in the D.C. metropolitan area. Between 1960 and 1981 just over 14.5 million square feet of office and commercial space was constructed, the vast majority along two transport corridors formed by the subway.1 Two areas in particular have attracted new office development: the Rosslyn area, adjacent to the Potomac River and very close to downtown Washington; and Crystal City, an area near to the existing government center at the Pentagon.

By 1981 more than thirty buildings containing 5.3 million square feet of office and commercial space had been built in Rosslyn with projects tending to increase in size over time. Most of the projects have been individual developments and the great majority contain office space. In Crystal City the pattern of development has been somewhat different. At

1All data on office/commercial construction and approvals is taken from 'Trends. Office and Commercial Development' Arlington, Virginia, July 1982.
the beginning of the period most of the available land (disused railway land) was in a single ownership and until the mid 1970's almost all new construction was completed by one development company. The projects have been on average larger than those in Rosslyn and of mixed office, commercial, hotel and residential use. The level of development pressure in the county has been sustained, despite the current recession. Currently sixteen projects containing 3.2 million square feet of office and commercial space have received approval and are due for completion after 1982. Redevelopment of the Rosslyn area will then be substantially complete.

The county government's policy has been to actively promote new office development to take advantage of the subway transit links, but chose to implement this policy relying mainly on private development initiatives. Federally assisted urban renewal powers allowing condemnation and land cost write-down, which would have involved significant public intervention, were rejected by local voters in 1958, the issue having become associated in the public mind with public housing development. A second important policy goal has been to minimize government expenditures on site servicing and infrastructure necessary for redevelopment. Hence, the aim has been to direct and coordinate redevelopment relying on the zoning and development control powers. The means of achieving this has been the institution of a site plan review and approval procedure giving the county considerable discretion to make requirements and impose conditions on developers for public infrastructure provision in return for permission to develop at significantly
higher densities than allowed 'as of right' by the zoning ordinance. The technique is somewhat analogous to the special exception technique which operates more widely. Other legal precedents include developer contributions made through land sub-division regulations, planned unit developments and conditional rezoning. However, rather than conditions being imposed on a change of use, the site plan review process makes development of a greater scale and higher density subject to conditions.

Throughout the county the zoning ordinance operates in a conventional way allowing certain as of right development in specific use classes and to specific densities. Accompanying this zoning ordinance a set of special zoning districts have been designated, varying in detail depending on the development objectives being pursued in different areas. In the special zoning districts developers can opt for the site plan review procedure and the imposition of conditions, and in return they can develop to levels exceeding the as of right standards. For large redevelopment schemes a master plan is prepared by the county, providing policy guidance on land use, transportation and density to form a context for site plan review and the basis for conditions, but sufficient flexibility is retained to allow discretion in relation to individual development projects. A more opportunistic approach to negotiations with developers in the early 1960's, unconstrained by master plan guidelines, was abandoned because of the unsatisfactory level of uncertainty left to both local citizens, landowners and developers.
Arenas for Bargaining

The site plan review process is the major arena for negotiations between the county and developers. The underlying zoning allows some development of land without entering into the process, but in the context of a strong market for office space the benefits to be derived from submitting to the process can be considerable. The local zoning ordinance provides some legislative guidance, but the County Board, the elected politicians of the area, retain for themselves significant discretion. The board can vary both the uses permitted and the use regulations,

"taking into consideration: provisions made for open space and other environmental amenities; the intensity of traffic; the relationship to existing and permitted uses of adjacent sites; particular site characteristics; and particular construction problems and techniques."

Similarly, in approving a site plan the county board

"may designate conditions which include, but are not limited to: provisions for the protection of adjacent property; off street parking and loading; space for community facilities, e.g. recreation and open space, libraries, fire and utilities."\[1\]

The scope of conditions is specifically open ended.

The individual special zoning districts established for redevelopment areas further refine the guidelines on the scope of bonuses available and the kinds of conditions to be sought. These vary according to the development objectives being pursued in different areas. The Rosslyn 'CO' Zoning District established height and density bonuses and allowed the reduction of parking requirements as incentives for private contributions to the traffic and pedestrian movement systems planned for the area.

Further specific bonuses were given to encourage retail use, the provision

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1"Zoning Ordinance of Arlington, Virginia. Section 32H, paragraphs 4 and 5."
of low and moderate income housing and the provision of community facilities. Initially established height, density and parking reduction bonuses were however increased during the implementation of the project to meet the need to compensate for special requirements and development difficulties. Hence, the county board has in practice exercised its discretion to amend these more detailed development guidelines during the period of their operation. In two other areas, Crystal City and Central Ballston, the county has sought to encourage mixed uses by setting ceilings for office development but allowing development above this density for residential or hotel space. In the Central Ballston area a sliding scale of density bonuses has also been established, increasing with the size of site, to encourage site consolidation and to promote mixed use.

In theory there is no upper limit to the bonuses that can be awarded, though in reality the County Board must take into account the views of local citizens and neighbouring jurisdictions, and there are, of course, physical limitations on the capacity of local roads and infrastructure. Similarly, no precise limits are set on requirements or conditions that can be sought, though there are legal considerations, such as the need to treat applicants equitably. The limitations are chiefly practical; those requirements that developers will agree to during the negotiation process when the constraints are chiefly economic. For instance, it proved very difficult to obtain agreement from developers to provide residential use as part of office developments in the Rosslyn area, as the increased densities that the county were willing to concede could not make the return on residential uses commensurate with that on office space.
The Process of Negotiation

The procedure for site plan review and approval is set out in county administrative regulations and takes the following form:

i. the developer meets with planning staff for an initial briefing on the issues of site development, including the sort of requirements that will be made and the bonuses that would be available.

ii. a detailed development plan is submitted for review by a range of relevant county departments. On the basis of this review further discussions may be held with the developer to obtain modifications to the plan.

iii. a parallel review is carried out by the Site Plan Review Committee (SPRC), an off-shoot of the planning commission. The SPRC also contains local citizen representation from the area concerned.

iv. with recommendations from the staff and the SPRC before it, the planning commission holds a public hearing to consider the development plan and they, in turn, make a recommendation to the County Board.

v. the County Board hold a second public hearing and can accept, conditionally accept, or reject the site plan submitted. There is sometimes open negotiation at this public meeting over proposed modifications to the site plan.

vi. the site plan, as approved, becomes the legal zoning document governing development of the site. In most cases no formal agreement or contracts are made and enforcement of conditions is through subsequent discretionary power to withhold building or occupancy permits.

The professional staff of the county have a key role in the negotiating process through their early involvement with developers and their role
in defining what may be required or bonused. Unlike many other areas the planning department in Arlington County work through the County Manager and are a direct advisory agency to the County Board. This gives the professional staff considerably more power than if they served at the discretion of the Planning Commission. The planning staff are also involved in setting initial policy guidelines in the form of a Master Plan which forms the basis of conditions and requirements and have the technical expertise, particularly in the area of roads and engineering, necessary to conduct negotiations. However, it is the County Board who hold ultimate legislative authority to approve discretionary incentives and conditions.

Types of Bargains

The county's side of bargains struck with developers has been to vary density, height and set back regulations, to reduce parking requirements, to permit the transfer of development rights from fragmented parcels of land into single parcels and to make direct contributions to necessary public infrastructure themselves, though the financial incentives have been far less important than the non-financial bonuses. In return developers have been required to make a range of contributions to public infrastructure and have been encouraged to provide specific amenities or uses in their projects. The following list encompasses most of the requirements that have been made.

1. Public rights of way on developers' land. Easements (i.e. the right to use land for a specific public purpose) have been required for roads, ranging from 20% to 40% of site area. Similarly, easements have been
required for other public facilities such as open space and parks, pedestrian circulation space and access to transit facilities.

1i Construction of public facilities. Developers have been required to construct or contribute to the construction of roads, plazas and parks, sidewalks, pedestrian bridges, and public transport facilities.

1ii Basic infrastructure provision. Basic needs such as sewer, water and utilities have been required, both on site and off site. Also landscaping and the provision of street lights to certain specifications have been required.

1iv Provision of specific uses. The county has attempted to encourage developers to provide retail and restaurant space in office buildings, hotel or residential use, low and moderate income housing and sports facilities. Additional density, over and above the bonused maximum, has been approved for these other uses, e.g. in the Rosslyn area an additional 5% floorspace could be built for retail use. An attempt was made during the 1970's to require 10% of any residential building as low or moderate income housing. However efforts to encourage or restrict uses in this way have probably been the least successful and the low income housing requirement has now been abandoned as it was potentially open to legal challenge.

1v Joint development with public agencies. An informally negotiated agreement for a Rosslyn project required the developer to undertake joint development with the transit authority and to provide certain Metro Station facilities.

The substantive content of the bargains negotiated by the county is described below in relation to specific developments in the Rosslyn area.
The Rosslyn Redevelopment Project

Redevelopment of the Rosslyn area started in 1961. At that time the area consisted of low rise, marginal industrial and commercial uses, but, with the planned development of the subway and existing accessibility to Washington, had great potential as an area for high rise intensive office use. By 1983 redevelopment is almost complete with most available sites taken up and the major items of public infrastructure, the road system, a grade separated pedestrian circulation system, metro station, parks and open space, in place.

The redevelopment of the Rosslyn area was foreseen and programmed in a fairly systematic and comprehensive manner, although the means of implementation did not involve single or public ownership. The Master Plan prepared to guide redevelopment of the area contained proposals for land uses, density and transportation. The issue of traffic and pedestrian circulation was paid particular attention, and detailed proposals were made for a loop road to serve the area and a grade separated pedestrian movement system. The Master Plan also called for mixed redevelopment, in the ratio two-thirds office and commercial space to one-third residential space, as a way of reducing traffic congestion. However, the project as implemented consists mainly of office buildings as the speculative rise in land prices during the 1960's made developers reluctant to forego profitable office development.

Redevelopment in the Rosslyn area was an issue around which a number of interests were able to coalesce. There was a general consensus that the area was appropriate for high density office development. The area's location on the edge of the county and separate from the residential
sections of Arlington minimized citizen opposition and redevelopment would result in property tax dollars for the county and would serve to clear the existing blight. Cooperation between the private sector and the county was also reinforced by the decision not to use urban renewal powers. Private redevelopment meant that developers who had been consolidating land in the area, anticipating the building of the Metro line, would still be given the opportunity to realize development gains.

Between 1961 and the mid-1970's the county used the site plan review process to guide redevelopment and coordinate infrastructure provision. Incentives given and requirements made were fairly standard: 12 storey buildings at 3.5 floor area ratio (FAR) were approved in return for right of way easements averaging 20% of the site, street lights, utilities, sidewalks and contributions to the pedestrian bridge systems. However, by the mid-1970's those sites remaining to be developed were subject to certain difficulties: they required substantial efforts to consolidate; they were often fractured by roads; right of way requirements were substantial; and some joint development with the transit authority was necessary. Hence, the County Board used its discretion to approve a number of developments which were at variance with the previous standards; they were significantly larger and more densely developed and provided substantial contributions to public infrastructure. Two of these later building projects will be examined in more detail.

Rosslyn Centre

Negotiations for the building of Rosslyn Centre began in 1968 and final approval of the plan was obtained in 1975. The project is a 20 storey
mixed office and retail building (floor area 420,000 sq. feet) adjacent to and connected with Rosslyn Metro Station, and at the centre of the pedestrian bridge system. Other features of the building are covered pedestrian passageways from the building to the station and bus stops, retail and restaurant space at lower levels with escalator connections to the station, a small park and a public plaza.

The Rosslyn Centre site comprised two land parcels separated by a road and the developer initially proposed an office building at 3.5 FAR (the existing standard for the area) but with all of the allowable density transferred onto the larger of the two sites. The developer was also proposing additional retail space and was requesting reduction of the full parking requirements. At a meeting between the developer and the county staff in 1973 the staff stressed the strategic nature of the site in connection with the Metro Station and at the centre of the pedestrian movement system, and pointed out that certain difficulties existed with public funding of this system. They urged the developer to approach the Washington Metropolitan Area Transit Authority (WMATA), owner of the adjacent Metro site, to discuss the transfer of unused Metro Station site density to the Rosslyn centre site, thereby increasing the density of the development sufficiently to allow the developer to fund the pedestrian bridge system.

Discussions with WMATA at that time were unsuccessful and the planning staff suggested that the county itself award an extra density bonus in return for the developer constructing the bridge system. A new plan, submitted in 1973, requested five extra floors, a density bonus of 1.8, together with further excess retail space and reduction of required
parking. The smaller parcel of land was to be reserved as a public park. The planning staff supported this new application because of the importance of the pedestrian bridge system and the Site Plan Review Committee, while concerned at the proposed density, were in reluctant agreement. Questions were particularly raised about the excess retail space, which, although a public amenity, would also be profitable given access to the Metro Station. In view of the concern over the increased height and density some planning commission members requested that the county themselves assume a bigger share of public improvement costs, but this proved unacceptable to the County Board.

Continuing negotiations between the developer and WMATA eventually arrived at a solution where the developer would purchase the Metro Station site, leasing it back to Metro and transferring unused density from this site to his building. During a further round of negotiations with the county the developer set out the additional costs that would arise from including the metro property in his development (escalators, pedestrian links to his building and station canopy) wishing to establish a case for a significantly higher density of FAR 6.2. However, planning staff resisted such high density as politically unacceptable and a precedent for future development in the area.

The final plan submitted and approved proposed 350,300 square feet of office space, and 53,918 sq. feet of retail and restaurant space. This represents an approved office floor area of 140,900 square feet in excess of the pre-existing standard FAR of 3.5. On the other hand, public benefits had been negotiated estimated as costing $1,175,500, comprising pedestrian bridges, escalators, a public park and plazas and other infrastructure requirements.

A comparison of the initial site plan submission and the approved
shows how the project was modified during the five years of negotiation.

<table>
<thead>
<tr>
<th></th>
<th>Initial Plan</th>
<th>Approved Plan</th>
</tr>
</thead>
<tbody>
<tr>
<td>Office floor area</td>
<td>129,500 sq. ft.</td>
<td>350,363 sq. ft.</td>
</tr>
<tr>
<td>FAR</td>
<td>3.5</td>
<td>5.82</td>
</tr>
<tr>
<td>Commercial floor area</td>
<td>47,933</td>
<td>53,918</td>
</tr>
<tr>
<td>Height</td>
<td>12 floors</td>
<td>20 floors</td>
</tr>
<tr>
<td>Parking as a % of required</td>
<td>68%</td>
<td>64.7%</td>
</tr>
</tbody>
</table>

The developer received approval for a building of eight additional stories and with 140,900 additional square feet of office space, plus excess retail space which could also be expected to be profitable. The county, in return, obtained a central element of the pedestrian circulation system, a number of contributions to the Metro Station and some valuable open space. The staff assessment of the outcome of negotiations was positive: the pedestrian bridge system had been an important planning goal from the outset; previous development had included very little open space and this lack was becoming an issue of public criticism; and direct access would be provided from the Rosslyn Centre shops and offices to the Metro Station.

**Arland Towers**

Arland Towers is a second large development project given approval in 1978. The project comprises two 28 storey office towers connected by a smaller retail structure (total floor area 1,033,700 square feet). On an adjacent smaller site there is parking, hotel space and recreational facilities. The two sites are separated by a section of the Rosslyn loop road, constructed by the developer, and are connected by a covered
pedestrian bridge. The development represents the consolidation of four separate land parcels, with total office density transferred to the largest site and total hotel space on the smaller site. The remaining two parcels remain in their former use of parking for a nearby residential development, with the exception of a portion of one, developed as a park.

Initial discussions with the developer concerned the transfer of office density onto the larger site to overcome the problems of the fragmented land holding. Also the importance of the road dividing the site as a link in the Rosslyn area loop road was emphasized. An initial application was considered by the planning staff and Site Plan Review Committee in January 1978. The initial application covered only the larger of the two main land parcels with a proposal for two 28 storey office towers connected by retail use at ground level, hotel space and an enclosed glass atrium. A tentative plan was suggested for the smaller site consisting of an eight storey parking structure topped by further hotel development using development rights transferred from the two peripheral land parcels, allowing these to continue to provide needed residential parking space. A zoning amendment was requested to allow development to a higher density on the smaller site.

A number of problems were identified with the proposal including the need for a zoning amendment and the height of development on both sites. Nevertheless, the planning staff strongly recommended approval given that the site was important, straddling a key portion of the loop road, and that the developer was undertaking to construct that portion of the road together with a contribution to an access ramp. The value of this improve-
ment alone was thought to be between $600,000 and $2 million. Also the project provided a dramatic architectural design and public amenities in the form of the atrium and street level retail space. The proposed rezoning of the peripheral land allowing a higher density to be transferred to the smaller site was supported on the grounds that it might be possible to require some low and moderate income housing. An important aspect of the developer's case for requesting the excess height and density was a change in the office market in the Rosslyn area. There was less demand for government office space and increasing demand from the private sector who typically required higher standards of accommodation. In order to make 'luxury' provision feasible the developer was arguing for special treatment in terms of the size of bonus awarded.

Despite strong support from the planning staff the planning commission recommended refusal on the grounds that the office tower height and density (FAR 5.33) was a significant departure from the pre-existing standard and not justified by the public improvements the development would provide. Further meetings between the developer and planning staff resulted in the addition of a covered pedestrian bridge linking the two sites and construction of a park on one of the peripheral sites. With support for the proposal from planning staff the County Board accepted the development plan with a condition that a detailed plan be submitted for the smaller site prior to issuance of a building permit for the office development. The developer refused to accept a condition that he enter into a formal agreement to construct the public facilities and this condition was removed.
During the subsequent four months the proposal was further modified by the developer and an amended application was submitted in July 1978 covering both the large and small sites. Office development remained on the larger site, though the hotel space and glass atrium were omitted and the retail space was reduced. Hotel and parking space were to be built on the smaller site, together with some recreational facilities, though no low income housing was included. The number of public facilities provided was therefore reduced, though the cost of the road link to be provided proved to be considerably higher than previously estimated. This application was approved by the County Board with regret expressed particularly at the reduction in retail space. A condition was attached that the developer consider the conversion of some parking space to retail use within one year of project completion.

The proposal was modified in the following way during negotiations.

<table>
<thead>
<tr>
<th></th>
<th>Initial</th>
<th>Approved</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Large Site</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>office</td>
<td>895,900 square feet</td>
<td>895,900 square feet</td>
</tr>
<tr>
<td>retail</td>
<td>137,800 square feet</td>
<td>124,700 square feet</td>
</tr>
<tr>
<td>FAR</td>
<td>5.33</td>
<td>5.16</td>
</tr>
<tr>
<td>public areas</td>
<td>35,500</td>
<td>39,800 (including peripheral park)</td>
</tr>
<tr>
<td>hotel</td>
<td>114 units</td>
<td></td>
</tr>
<tr>
<td><strong>Small Site</strong></td>
<td></td>
<td></td>
</tr>
<tr>
<td>hotel</td>
<td>245 units</td>
<td>350 units</td>
</tr>
</tbody>
</table>

parking as % of required 91% 95.8%
Hence, as a result of negotiation the developer obtained 895,900 square feet of office space, an FAR in excess of 3.5 of 310,710 square feet. In return the county obtained public benefits valued at over $3 million consisting of the public park, the pedestrian bridge and a portion of the loop road. This latter item by itself was estimated to cost $2.5 million.

As a footnote to the description of these development projects, the county was taken to court by the federal government Department of the Interior in 1979. The height of the approved office buildings, visible from Washington, across the river, was considered excessive and it was argued that the zoning code which allowed additional height in return for public improvements was intended to allow small bonuses of one to three stories, not 14 stories as in the case of Arland Towers. However, the case was lost, with the court finding that the procedures established for site plan review were sufficiently open to comply with due process requirements and, whilst the zoning ordinance allowed an unusual degree of discretion and flexibility, this was not a constitutional issue in which the court should intervene.

**Evaluation**

Many benefits have been derived in Arlington County from the application of bonus zoning with site plan review procedures. Given the local citizens' rejection of more direct public intervention and the need to keep expenditures to a minimum, the technique allowed the county to require the coordination and provision of infrastructure and public amenities. In financial terms the success is demonstrated by a financial evaluation carried out for the
county by consultants in 1974. This study estimated $13 million of private investment in public expenditures for project implementation and capital facilities even before the substantial benefits derived from the Rosslyn Centre and Arland Towers projects.

A more qualitative analysis indicates greater success at requiring infrastructure directly related to the physical functioning of the area (utilities, roads, pedestrian circulation space, public transport facilities) and less success in obtaining environmental amenities and other community facilities or in promoting greater diversity of use. The opportunity to consolidate the development rights of fragmented land parcels in the cases of Arland Towers and Rosslyn Centre provided valuable open space and proved fortuitous. Retail space provided a public benefit in conjunction with many projects but some of the space has proved unprofitable and has been reconverted to office space, particularly that provided along the pedestrian bridge system, which is not well utilized. The county has been least successful in encouraging more mixed development and the provision of low income housing. The Rosslyn area contains only 196 apartment units in a single office development. However the county hopes that they will be more successful in other areas with larger land holdings more appropriate for mixed development and where different structures of incentives will be operated.

The consensus between professional staff, the County Board and the

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development industry over the general form of redevelopment was important in promoting a cooperative spirit and success in negotiations. Also, the county was aided during negotiations by having a clear and consistent idea of certain planning goals. Transportation proposals were initially the most detailed, were strongly bargained for and, ultimately, best achieved. It was also possible to reach agreements with developers to provide the roads and pedestrian bridges without reducing the overall profitability of development through density bonuses awarded. However, requirements which involved some sacrifice of profitable office space which could not be fully compensated for in additional density were substantially unsuccessful. The basis of agreement between the county and the developers was that of not interfering with specific property rights, such as the right to equal treatment and the right to a full economic return on land development.

Professional staff played a key role in negotiations over both developments. In instances where there was an opportunity to achieve a planning goal they could initiate possible trade-offs, for example, promoting discussions between the developer and the transit authority to allow transfer of development rights in return for construction of the pedestrian bridges. Professional staff recommendations were substantially supported by the County Board, while those of the lay planning committee were given less weight. During the review process for both buildings the planning commission questioned the increased height and density of the proposed developments but their objections were not particularly strong and they could not counter the arguments made by the professional staff in
support of the developments, motivated in large part by commitment to the transportation policies. The staff were also persuaded by the opportunity presented by both developments to provide public open space, which in view of the existing deficiency and public criticism, was of both real and symbolic value.

The site plan review process as initially set up provided a very flexible framework for reviewing development proposals on a project by project basis. Unlike some other areas which apply incentive zoning techniques Arlington did not attempt to prescribe bonuses and conditions in great detail, and hence, were able to vary the sorts of trade-offs they made as circumstances changed. The context of a strong market for office space was fundamental in that it allowed the practice to be followed at all. Changes in the market over time were also an influence on the pressure being exerted on the local government to approve additional height and density for office buildings, with demand shifting from space for federal government departments to the private business and service sectors. Office development consequently became more speculative and oriented toward the 'luxury' section of the market, and developers argued that existing standards for height and density bonuses needed to be increased to accommodate such changes.

The substance of the bargains struck and the increasingly flexible interpretation of the regulations were also influenced by individual site characteristics making construction more difficult and more costly. When, by the mid 1970's, a number of difficult sites remained to be developed and large and costly public improvements were required, the county was
willing to vary existing standards and practices to achieve their planning goals. Professional staff were by and large supportive of development projects and of the requests by the Rosslyn Centre and Arland Towers developers to make concessions over and above the existing standards where it was possible to implement other planning policies as a result. The transportation policies of the master plan were successfully implemented by this strategy. However, staff also commented on the difficulty of conducting negotiations with developers and in knowing what might be a 'fair bargain' in an individual case without access to details of project costs and finance, particularly when such factors are subject to change over time. There was broad community acceptance of the Rosslyn redevelopment given the area's distance from the established and more powerful residential districts and by the previous blighted image of the area, though there were some accusations that the county was 'giving too much away' in the negotiations. County staff have themselves also raised this issue in the light of subsequent experience. For example, the lack of success of the pedestrian bridge systems and large surplus road capacity begs a question about whether the higher and bigger buildings were too high a price to pay.
APPENDIX II

NEW YORK CITY CASE STUDY

Introduction

This case study is concerned with the operation of incentive zoning in the mid-town area of Manhattan, New York. The mid-town core is largely an area of high density office, retail and hotel use where land values are extremely high, particularly on the high status east side of the mid-town core on Park and Madison Avenues. The area has an obvious importance to the economy of the city in terms of the employment it represents and the property taxes which it provides.

The mid-town area has had a sustained office building boom in the post war period with the shift in employment from industry and manufacturing to commercial and service sectors. Office construction peaked in the early seventies; in 1972 alone over 12.2 million square feet of office space was completed in 12 buildings.¹ However, this was followed by a period of significant decline in office construction during the mid nineteen seventies; in the period 1975 to 1979 only 5.6 million square feet were built in total, considerably less than the annual average for the preceding ten years. The recession in office construction coincided with the well publicised economic difficulties of the city as a whole, but also represented a reaction to an enormous over supply at the beginning of the decade. Office space has, in fact, been absorbed at a relatively high level throughout the nineteen seventies and by the end of 1979 the vacancy rate was down to 2.05 percent.

¹Data is taken from Midtown Development, Department of City Planning, NYC June 1981. The midtown area is defined as the area from 34th to 60th Streets and Third to Eighth Avenue.
The last three years have seen a significant increase again in office construction, 9 million square feet was completed in 1981/82 and it is estimated that over 10 million square feet will become available in 1983/84.

The majority of this latest wave of construction activity is located in a small area on the east side of mid-town, an approximately half square mile from 40th to 60th Streets and Third Avenue to Sixth Avenue. Rents are high in the area, currently up to $700 per square foot, and the profitability of new construction is assured as a result. The west side of mid-town has proved less attractive, despite lower land costs and less congestion, because of caution on the part of development interests who had taken losses on buildings in these more 'marginal' areas when the office market collapsed in the early nineteen seventies.

Zoning regulations were first introduced in New York City in 1916 with the purpose of protecting property values and ensuring light and air to the streets. The first set of regulations controlled non conforming uses and the height and bulk of buildings. The controls were motivated partly by powerful Fifth Avenue commercial interests concerned at the encroachment of manufacturing uses into the retail area and partly by the impact of the Equitable Building in lower Manhattan, completed some years previously, whose neighbours responded by applying for reductions in their property taxes to compensate the loss of light and air caused by the new building. By the late nineteen fifties the regulations were proving inadequate in dealing with the degree of development pressure being experienced by the city and the regulations were revised. The 1961 Zoning Code introduced stricter controls on height and bulk and established the principle of
allowing higher density development in mid-town in exchange for the provision by developers of plazas as a way of providing public open space. To achieve more open space the zoning regulations were written to encourage high density redevelopment of large sites only, so that a building of economic size could be constructed and a portion of land reserved for an open plaza.

During the period since 1961 the zoning code has undergone significant amendment and modification, linked with the city government's efforts to stimulate office building from 1974 onward. Financial incentives in the form of tax abatements were designed and the zoning incentives were broadened to allow larger buildings and more densely developed site. At the same time changes in the market for office space and in conditions of construction were leading developers to increase requests for variances and modifications to the zoning regulations. A recovery in the office market was being anticipated by the development industry and development pressure was beginning to build. Construction generally was becoming more difficult and more costly: there were few prime sites left on the east side and available land was in smaller holdings or on the margins of the commercial area. The marginal sites often required a considerable effort to consolidate as office developers encountered established residential uses. So, land costs were rising rapidly and development was increasingly taking place on the smaller sites that the zoning regulations were not intended to cover. In order to take full advantage of the demand for office space and to offset the increasing costs developers were seeking to maximize development on each site. It was also becoming very difficult to construct a building with floor area dimensions large enough to meet the requirements of the
market without overriding the existing controls on building bulk and site coverage. Hence, the policy aims of the city government and the interests of the development industry were both served by a more negotiable approach to zoning and building controls; for the city, seeking to stimulate development and provide public open space and for the development industry, seeking to maximize development on each site.

A further complicating factor was the political context, which while essentially pro-development was also having to take account of citizen demands. As a result of the public participation movement in the nineteen sixties community boards were set up throughout New York in 1974 to channel public comment on development proposals. The boards were growing in experience and sophistication and were also initially pressing for commercial developments to provide some public benefits. Community attitudes have changed more recently and the city government has been charged with giving too much away in its negotiations with developers. There has been a wide perception, especially among community and civic amenity groups, that the new development was taxing the city's infrastructure, imposing significant social costs and providing public amenities that were not sufficient compensation for the extra building size being approved.

A commission was set up in 1980 to re-examine policy for midtown and to revise the zoning regulations. Midtown Development, published in 1981, recommended a strategy to shift new development west and south to take pressure off the congested east side through a restructuring of zoning and financial incentives. Some public amenities that were previously negotiable have been mandated and other, bonussable, public amenities have been added.
A new zoning code for midtown was adopted in May 1982 and there is, as yet, limited experience of its operation. This case study focuses primarily on the period 1961 to 1981 when the previous zoning regulations were in operation.

**Arenas for Bargaining**

The 1961 zoning resolution first established the principle of incentive bonuses as a way of encouraging the provision of public open space in the form of plazas associated with office buildings. Since adoption of the 1961 resolution the planning commission has expanded the means for encouraging certain design features and uses. The most widely used affirmative zoning technique is special district zoning. Under this technique zoning incentives and public amenity requirements are outlined, with the aim of addressing specific objectives in specific areas. It is an explicit way of using private capital to carry out public policy.

The special theatre district, on the west side of midtown, authorized a floor area bonus in return for the inclusion of theatre development in office buildings. The special fifth avenue district was created to maintain the street's character as a major retail area. Breaks in the street wall are discouraged, so bonuses for plazas and arcades applicable elsewhere are not given, but covered pedestrian spaces and mid block pedestrian connections are bonussed. Incentives are also given for hotel and residential uses above commercial uses. Small special districts have also been created on an ad hoc basis for individual building projects with amendments to the zoning regulations being made to broaden the range of bonussable amenities.
Generally these changes have been initiated by developers seeking to overcome particular development problems. For instance, the developer of the Park Avenue Plaza, on 53rd Street was seeking approval for an oversized (in the terms of the existing zoning) building on a midblock site. Certain design features were offered, including an indoor landscaped pedestrian space, and the planning commission amended the regulations to make it bonussable.

In addition to the special district technique, developers have also been able to increase the size of buildings above the basic level set by zoning through development rights transfer techniques. This has created a zoning mechanism to transfer development rights from threatened historic buildings and other vulnerable resources, such as parks, to nearby parcels. In most cases transfer is permitted to adjacent land parcels, but the concept has been broadened in some areas to allow unused development rights to float more freely within a designated area. The concept of 'floating' development rights was introduced to preserve the Grand Central Station building and has been applied in the theatre district. As part of the transfer the developer must prepare a proposal to preserve and maintain the landmark or other resource; for example, in the theatre district a condition of transfer is a proposal to rehabilitate the existing theatre.

A further technique has been the use of restrictive declarations in connection with zoning changes (boundary or use changes). Conditions may be imposed on the future use of land, uses may be restricted, building design may be controlled or certain public amenities may be required as part of development. As a matter of policy restrictive declarations may be used when rezoning provides a considerable windfall benefit to the affected property. The applicant may then be required to convenant a major public
amenity, such as a park or the dedication of land for a subway access.

The application of all these techniques uses a special permit procedure. Special permits also apply to requests from developers for variances of the height and bulk regulations because of special site development problems or because compliance would preclude obtaining a reasonable economic return. The 1961 zoning regulations mandated that office towers cover 40% of their site, allowing the remaining land to be used as a plaza. However, this requirement has become inappropriate with redevelopment increasingly taking place on small sites. Hence, requests for variances of this regulation have been frequent during the nineteen seventies.

Other techniques embodying a high degree of discretion have been developed and included in legislation, but are more applicable to other areas of the city: planned unit development, housing quality points systems and performance standards give scope to the city government to make development approval conditional or to require certain design features or public amenities.

The New York zoning regulations and building bulk controls are extremely complex, and are further complicated by the modifications and amendments that are introduced in their application. They are also very detailed, with precise standards and requirements varying according to the type of development and the area of application. It is a system that appears to try to cover all eventualities with a set of preset regulations aimed at a diverse and wide set of public goals. Paradoxically, however, the high degree of detail in the regulations has necessitated a flexible and negotiable stance in their practical application to take account of the changing context for land development: changes in public policy; the variability of the property
market; changing costs and conditions of land availability. For instance, the detailed height and building bulk regulations designed to protect light and air to the streets invited frequent requests for variances where site conditions were such that the regulations became unworkable, and would have precluded any development taking place. The plaza incentive designated a specific floor area bonus in square feet, up to a maximum of FAR 3, that would be awarded for each square foot of plaza space. While the bonus/requirement financial equation could be made to balance at any one time and for any one building, as soon as market conditions changed or different site conditions were encountered, the regulations would require amendment.

In practice, very little was built in midtown Manhattan in the nineteen seventies that did not require changes in the regulations and the application of the special permit procedure. The general legal requirement that all applicants be treated equitably meant that departures from existing practice were incorporated as legislative amendments so that it did not appear that project by project review and negotiation was taking place. But, in effect, this is what was happening.

Procedures

All special permits are subject to a uniform land use review process. A detailed site application is submitted to the planning department which coordinates an inter-departmental review and make recommendations to the Planning Commission. The community board of the affected area also reviews the application and submits a recommendation to the Planning Commission. A public hearing is held by the Planning Commission and if the application
is approved at this stage the city Board of Estimates holds a further public meeting and makes the final decision. The Board of Estimates comprises the Mayor and City Council President and each of the borough presidents.

Participation in the process of negotiation has varied during the period since the adoption of the 1961 zoning code. During the earlier period the incentive bonussing system was perceived as a tool for encouraging certain urban design features and public amenities; in part the open space required was an amelioration for the extra density being built, rather than a method for stimulating office construction. An urban design team was established in the planning department in 1967 to develop incentives for the design features being sought. The process of review and negotiation at that time tended to emphasize technical and professional involvement. The changing political context altered this pattern of participation during the nineteen seventies. A new city charter in 1974 established community boards and gave board members the opportunity to enter negotiations and introduce their own demands into the process. The membership of the community boards in midtown Manhattan reflects the kinds of land uses present; it is dominated by the business, legal, architectural and cultural interests which operate in the midtown area. Members are often professionally involved in land use and development issues and less representative of local residential interests than community boards in other areas. However, there was divergence in the views of the community boards and city government towards the end of the nineteen seventies with the boards reacting against the upward trend in office construction and the perceived 'overdevelopment' of the east side. From the mid nineteen seventies onward political involve-
ment in the review process has grown more important. The stimulation of office development became a political priority after the fiscal crisis of 1974 and the collapse of new office construction. There are well-established links between the development industry and city politicians and negotiations have increasingly been removed from a technical arena into a political arena. Also, throughout the period since 1961 the legal and architectural professions, who service the development industry, have become more experienced in the intricacies of the zoning negotiations and were able to initiate proposals that met their clients' demands of maximizing building floor area. There has also been growing use of a technique known as zoning lot merger; a private transaction whereby a developer buys or leases contiguous sites containing small buildings, merging the excess development rights with his site.

The complexity of the zoning legislation, and the highly technical nature of the negotiations encourages only limited participation, and this in turn has resulted in some public suspicion of the process, manifest in a number of press articles commenting on midtown development. The suspicion is reinforced by what is perceived as an unsatisfactory outcome of negotiated zoning. Public interest groups including the community boards, citizens housing and planning commission and civic amenity societies began to press for clearer development rules and less negotiation. This attitude also came to be shared by the development industry, who reacted to the protracted nature of the negotiations, causing expensive delays, and the uncertainty of the outcome. For example, in 1980 a proposed office building on Third Avenue had been planned on the basis of an agreement to provide a glass atrium and retail space in return for a floor area bonus of five.
additional office stories. However the local community board objected strongly to the Board of Estimates about what they saw as the limited public benefits of the scheme versus the public disadvantages of the building's increased size. The Board of Estimates reduced the building's height by two stories at a late stage in the approval process, throwing financial arrangements into disarray. Therefore both public and development interests have been pressing the city to modify zoning regulations to encourage more 'as of right' development.

However, while arguing for a less interventionist stance by city government on the one hand, developers have also been campaigning for the extension of financial incentives and for city government aid in site assembly. Such techniques are of more relevance in the areas to the south and west where development is having to shift because of land shortage on the east side of midtown. In the peripheral areas the market for office space is more uncertain and there is, therefore, less incentive for developers to maximize development on sites, but there could be difficulties of size assembly because of existing established residential and retail uses in fragmented ownership. The new policy for midtown development includes proposals to extend tax incentives for designated growth areas and for the establishment of an Economic Development Corporation for help in site assembly and to expedite the development process.

Types of Bargains

The range of requirements and conditions that have been negotiated with developers over the years has been very wide. They fall into the following categories.
Design features which provide public amenities. Urban plazas have been given 'as of right' bonuses since 1961. During the 1970's various discretionary 'bonussable amenities' were introduced, including covered pedestrian space on the ground floor of buildings, sometimes with landscaping and seating, retail arcades and small outdoor parks.

Features to improve pedestrian circulation. These have included sidewalk widening and entrance way recesses, through block passageways and direct stair and escalator connections from buildings to subway stations.

Improvements to public transport facilities. Easements have been required on developers land for subway station access. In some cases the development has included the construction of access and subsequent maintenance of station facilities.

Improvements to offsite facilities or buildings. This has generally occurred in connection with development rights transfer from historic buildings or parks. In general requirements for preservation and maintenance of buildings or open areas apply to adjacent sites, however the new zoning regulations award bonuses for new development in the theatre district in return for the rehabilitation of non-adjacent theatres. Also in this category are contributions to a central park improvement fund in lieu of the provision of plazas or arcades in locations thought inappropriate. The Fifth Avenue special district, for example, encourages retail continuity on the street and instead allows park improvement contributions.
Conditions which restrict or control use. Ground floor retail space and hotel and retail space in office buildings have been bonussed on Fifth Avenue. New theatre construction is similarly bonussed in the theatre district. There have also been conditions restricting retail uses to those considered appropriate for different areas.

Requirements for low and moderate income housing apply in the city, but not in the midtown area.

The reverse side of the bargains, the concessions made by the city government, have broadly been of three types: the necessary approval alone in the case of development rights transfer and zoning changes; floor area bonuses through variation of density restrictions; changes in the building bulk regulations, which in practice often means variance of the tower coverage provisions. The midtown commercial area was zoned FAR 15 under the 1961 zoning legislation, though it was anticipated that lower density buildings would be built on the narrow east/west streets because of height and bulk restrictions. Generally it has been possible for developers to obtain floor area bonuses of up to FAR 3 for public amenities such as plazas and arcades and a further 20% additional density as a result of development rights transfer. FAR 21.6 has been the practical limit of building density, though individual buildings have been constructed which exceed this limit, calculating density on the basis of the building lot which they occupy. For example, two buildings on Fifth Avenue have an effective FAR of 31, however their overall density, calculated on the basis of a merged zoning lot containing a small building, falls within the 21.6 limit.
Variances of the 40% tower coverage regulation have, however, probably conferred greater economic benefits. Floor space increases as a result of varying tower coverage can be very significant. With more small sites being developed in recent years it has become usual for building coverage of the site to approach 100%, for example the AT&T building, currently under construction, rises from the lot line on three sides with a small rear set back. Variances to the height and bulk regulations have resulted in midblock buildings of equivalent scale to avenue buildings.

The limits on conditions and requirements appear to have been practical as much as legal. They span a range from basic infrastructure to public amenities to use restrictions, both on site and off site. In practice the limit has been what developers have offered or agreed to provide and, on the other side of the equation, the physical and political limits on floor space concessions. In the long debates over the kinds of amenities to be included in the 1982 zoning revision, the legality of major and offsite requirements such as subway station improvements was not questioned. The development industry's response, coordinated by the Real Estate Board, focussed, rather, on the economic implications of such requirements and the scale of compensations that would be required. However, in all cases the requirements have a purpose linked to reducing the impact of the extra density being built through providing open space, improving pedestrian circulation or retaining mixed uses and spreading use throughout the day.

Enforcement of conditions has generally been through restrictive covenants that run with the land; the ultimate sanction for non compliance has been the city government's ability to withhold building or occupancy permits. In a number of cases the sanctions were threatened, rather than
invoked, and court action was taken to force compliance with agreements. The sanction is a severe one which can result in major financial difficulties for developers and has not been appropriate in cases where minor infringements of agreements have taken place.

For instance, escalator connections to subways have been promised and staircases actually provided, plazas have been built to specifications other than as agreed, covered pedestrian spaces and through block passageways intended to be amenities for the general public have been designed in such a way as to discourage public access and promised retail space in ground floor arcades has remained empty because, in practice, not sufficiently accessible. In such cases the city government has tried to enforce compliance through informal discussion.

**Case Study Project**

There are numerous examples of office buildings constructed during the nineteen seventies which could be selected to illustrate the practical implications of the New York zoning regulations and the nature of the bargains struck between city government and the developer. Many projects have been controversial either because the conditions imposed were not fully met or because the benefits provided by the developer were not perceived to provide adequate compensation for the bonuses awarded. The Citicorp Center, which will be examined in more detail, is an example of a building which has been successful in terms of the professional and public response to the amenities it provides. It is also an example of a project which, because of initial site constraints, could not be constructed to satisfy the existing terms of the zoning legislation and so required a number of text amendments. Finally, the project pioneered a number of bonusable
amenities which have subsequently been used in other buildings in the midtown area.

The Citicorp Center

The project is a mixed use development comprising a 59 storey tower containing over 1 million square feet of office space, a church, three floors of retail space, a covered pedestrian space and an open air plaza with connection to a subway station. Site acquisition for the project took from 1969 to 1972 and the building was completed in 1977. The project was one of the few to be started in this period and its review and approval coincides with the time when city government was broadening the scope of bonussable amenities and seeking to encourage new office development.

Before redevelopment the site comprised low rise retail and office buildings and a church. The church agreed to sell its land to the developer subject to certain conditions: first, that the developer would rebuild the church as part of the office development and sell back the building; second, that the developer would provide space for community facilities; and third, that an effort be made to retain the existing mixed character of land use. So, the terms of the agreement were an early constraint on the kind of redevelopment that took place. Also, in the early seventies the city had commissioned a series of studies on urban design issues in midtown Manhattan and the concept of improving pedestrian circulation by removing subway entrances from sidewalks and incorporating them in new buildings was developed. Subway station entrances could also be upgraded using private rather than public funds. As the Citicorp Building adjoined a key subway station the project presented an opportunity for the city to promote the idea.
Discussions commenced between the developer and city government in 1971. It had not proved possible for the developer to acquire all of the land within the block and in order to provide the bonussable open space the building was designed to be elevated on pillars over the open spaces and the new church building. The design also necessitated variances to the regulations for set back of buildings from the street and tower encroachment, though light and air requirements were met by the elevation of the base of the building. In 1973 the application for the project was submitted and four special permits were requested, one for the setback waiver and three for floor area bonuses on covered pedestrian space, a through block arcade and a plaza with access to the subway station. The plaza and subway access were first offered by the developer of the Citicorp Building and required amendment to the zoning legislation. The covered pedestrian space that was offered was also to be connected to the subway and would provide retail and restaurant space and additional floor area bonuses were requested for these facilities. An initial proposal to build apartments as part of the development was dropped when it proved politically unacceptable to provide further floor area bonuses for residential space.

The four special permits were approved by the planning commission and the Board of Estimates in December 1973. A total of 19,500 square feet was to be available for public use (26% of the site area) and in return 222,000 square feet of excess office space was approved. The community board for the area did not raise questions about the principle of providing bonuses for the amenities required and restricted their comments to matters concerned with design detail and access arrangements. When approval was given for the special permits conditions were attached requiring sidewalk
widening and the elimination of the existing subway entrances, landscaping and public seating and measures to ensure public access.

In 1975, when the project was under construction, a second application was made modifying the project after the developer had acquired more land adjacent to the site. The dimensions of the public spaces were changed, though the overall size of the public spaces and the floor area bonus remained broadly similar. The increased site area, however, allowed an enlargement of the building and an accompanying reduction of the previously approved FAR of 18.

There were certain constraints that influenced the form and size of the building: the terms of the agreement with the church; the inability to acquire all of the necessary land initially; the desire of city government to achieve certain public improvements; and the cost of land and construction. The building represents an investment of $125,000,000, with the land alone costing approximately $40,000,000. Hence the cost of land relative to the cost of construction was approximately one to two. This ratio demonstrates the significance of the floor area bonuses that were awarded, although the developers from the outset stressed their desire to create a building that met public needs.

The review and approval of the project involved consensus amongst the key participants. The developer was granted all of the floor area bonuses requested and the public amenities offered were considered 'spectacular' by the city architects and planners reviewing the application. No objections to the proposal were made at the public hearings held and the community board's concerns were with relatively minor design details. The project as approved was almost identical to the initial application made in 1973.
So, negotiations regarding public amenities and floor area bonuses presumably preceded submission of the application. It was stressed by city government staff that the developer's intention to meet the spirit as well as the letter of the law relating to the public amenities encouraged cooperation and there is satisfaction with the outcome.

**Evaluation**

There was a considerable increase in the extent of negotiations and bargaining over development approval for office buildings during the period 1961 to 1980. Office construction activity during that period has been highly cyclical and negotiation has been a feature of both boom and recession market conditions. During the recession in office construction the city government's policy objective to stimulate development encouraged flexibility and the incorporation of floor area bonuses. To ameliorate the extra density being approved public open spaces of various kinds were required in return. With the recovery of the office market in the late nineteen seventies, in a context of rising costs and limited land availability, developers were attempting to maximize the development of sites and were prepared to incur expenditures for public amenities to achieve this aim. Individual site and building characteristics have also made the uniform application of development regulations difficult in practice and have encouraged negotiation on both sides.

There are alternative perspectives on the purpose of incentive zoning and, hence, different evaluations of its outcome. The urban design professionals in city government saw the open space and other public amenities as means
of mitigating the negative impact of the high density construction that was taking place in midtown. While a 'carrot and stick' technique was used there was no necessary economic relationship between the value of the amenity and the value of the bonus. City government policy documents conceive of incentive bonussing alternatively as 'good urban design,' as a way of using private funds to achieve public policies, as a means of stimulating office development and as a device for partially recapturing windfall gains. Development interests (lawyers and economists), on the other hand, stress the financial nature of the trade-off involved in incentive zoning.

There has been no systematic evaluation of the range of public amenities provided and the bonuses awarded, but a New York Times analysis published in 1982 estimated that between 1963 and 1975 the plaza bonus had resulted in an additional 8 million square feet of office space and the arcade bonus provided a further 0.5 million square feet. Together with a number of civic amenity groups, the newspaper has been highly critical of the practice of incentive zoning since 1979. A report in 1982 commented "builders have been winning the right to make enormous profits in perpetuity in exchange for the one time cost of an amenity, and in hindsight it has turned out that many of the amenities were not so desirable."¹ The perception that the results of the practice have been unsatisfactory is also, now, shared by the city government. The Midtown Development Study published in 1981 acknowledged the unintended and unsatisfactory consequences of incentive bonussing and made proposals for reducing the number of amenities for which

bonuses would be awarded. Developers' non compliance with agreements has posed some problems, but more common have been amenities in technical compliance with the laws but, in practice, providing little public benefit. The city has also been criticised for being over-generous with bonuses, resulting in public costs in the form of increased noise, pollution and congestion on sidewalks, roads and subways.

The unfavourable response of public interest groups to the outcome of negotiated zoning has provoked questions about the ethics of the practice and the accountability of the procedures. Participation in the negotiations has varied over time, moving from a technical/professional arena into a more political arena as the issue of stimulating office construction grew in political importance for the city. However, the highly complex and somewhat arcane world of the city's zoning legislation and the technical nature of development planning and finance almost by necessity restricted participation to those with professional skills and day to day involvement in the process.

Those developers with the ability to acquire legal and architectural support familiar with the system and skilled at maneuvering through its complexities were able to derive the largest benefit. Without suggesting underhand dealing, it has been questioned whether the negotiating skills of city government professionals and politicians have been sufficient for the task. However, the city government has been in a contradictory position; having to rely, on the one hand, on private development to build up the city's economy and at the same time having to also control and regulate that activity. The contradiction has manifested itself as what is judged to be overdevelopment and unacceptable congestion in areas of
midtown Manhattan. The scale of incentives developed in the early seventies, when the goal was to promote office development, proved to be temptingly generous as market conditions changed, further fuelling the office boom.

The very detailed form of the regulations, governing bonuses that could be awarded and amenities that could be required in return, itself caused difficulties. Precedents were set and the city could not respond to changing market conditions by reducing bonuses. The justification for detailed regulations is partly legal, to treat all applicants equitably, and partly to provide developers with some certainty in advance of making investment commitments. However, the negotiability of the regulations in practice led to individual projects being given varied treatment. A further reason for the high degree of detail may have been a political desire to limit administrative discretion and maintain control in a very large organization. The need to prevent the possibility of corrupt or illegal practices was also mentioned by more than one participant as a justification for detailed rules governing bargaining.
APPENDIX III

BALTIMORE COUNTY CASE STUDY

Introduction

Baltimore County, comprising the fringe and suburban areas of Baltimore City, has experienced significant growth during the post war period. Population has tripled in the last 30 years, with considerable decentralization from the city, and currently stands at 600,000. Growth has been concentrated along the major transportation corridors extending northward from the city and much of the non-residential development has been oriented to car users in the form of shopping malls and office and industrial parks. Development pressure has thus been strong; residential building permit approvals were in the region of 5000 per annum during the late 1960's and the 1970's, though have now fallen to around 2000 per annum with the current recession in the construction industry. Non-residential development, however, has remained at a high level with the county receiving 36% of the metropolitan regions total non-residential growth in 1979-1980. Office, commercial and industrial development valued at $332.7 million was completed during 1979-81, a large portion of which ($142.2 million) being contributed by two large retail malls.

During the 1970's growth management policies were adopted with the aim of restricting growth in rural and agricultural areas and directing new development to existing built up areas or designated growth areas where capital infrastructure was already available or planned. Uncoordinated growth in the past has led to particular problems in servicing new development with sewers and water supply. Implementation of growth management is through
the master plan, adopted in 1979. Master plan policies provide incentives for development in two designated growth areas and in existing town centres in the county. Also major public capital investment is planned in the growth areas, including roads, a subway line from the central city and utilities. Incentives for development are mainly financial, e.g. low interest loans and support and advice given by the county.

Zoning and development regulations are the major tools for controlling new development. Both sets of controls operate in a conventional and quite rigid way, though the development regulations permit the review of all development proposals with the exception of very minor applications. The operation of development control is primarily an administrative matter; local politicians are involved at the level of broad policy in adopting the master plan, but rarely have involvement in individual proposals. However the general policy stance is politically influenced in being broadly pro-development, with clear regulatory rules and little direct public intervention. Urban renewal powers, proposed in the master plan for older town centres in the county, for example, have not been adopted and development regulations have been recently revised with a view to streamlining the process of development review and minimizing the time taken.

Arenas for Bargaining

The development control powers available in the county provide only limited scope for negotiation with developers over the nature of developments. As stated above zoning controls are conventional and fairly rigid in operation; flexibility is introduced through a four year review of master plan policies and zoning provisions when sites can be reclassified, but
interim reclassification on a site by site basis is strongly discouraged. In part, this relates to a legal requirement in the State of Maryland that applicants for rezoning must prove either a significant change in the character of an area since the initial zoning or a mistake in the initial zoning. The procedure for reclassification thus ensures certainty for all interests in the subsequent four year period. The zoning code does designate special exception uses which are subject to a public hearing and can be approved conditionally, but in practice conditions are limited to design details with the aim of minimizing the impact of the new development on neighbouring properties. The zoning regulations also mandate open space and parking, though requirements are documented in detail and are not subject to bargaining. They may however be waived in special circumstances.

The main context in which limited negotiation takes place is the subdivision review process, governed by a set of detailed development regulations. The review process is a design and engineering review including an assessment of the adequacy of site services and infrastructure (highways and access arrangements, sewer, water and utilities, storm water management and flood plain control). The development regulations provide for a Public Works Agreement to be drawn up, a contractual agreement between the county and the developer for the provision or improvement of public infrastructure to county standards.

The subdivision review process comprises the following steps:

1. a pre-development conference between county staff and the developer provides information on the policy background, development requirements and potential problems of development
ii a county review group comprising representatives from relevant county departments meets to review the submitted development plan. Meetings are open to members of the public who have the opportunity to make comments. If major modifications are necessary a second meeting may be required, otherwise approval can be given at this stage.

iii if the development plan receives approval an application is submitted for plat approval (a legal record of the boundaries of the proposed development). The public works agreement is drawn up at this final stage.

Very few applications submitted are refused; developers will normally not apply if there are major policy conflicts between their proposal and existing master plan and zoning provisions or if they are unwilling to meet requirements. In most cases the review is purely administrative, though an application may be submitted to the Planning Commission in special circumstances such as a potential conflict with the master plan or a dispute over the line of a proposed road.

Bargaining over the content of agreements is strictly limited as regulations are drawn up to provide certainty to developers about what will be required and there is little room for maneuvering outside of these. Similarly there is no mechanism for varying use regulations in return for public facilities provided. However individual site and application characteristics vary sufficiently for there to be limited negotiation over the interpretation of regulations. For instance, the interpretation of requirements may be an issue when improvements are of wider benefit and responsibilities are divided between the developer and the county. Road improvements are particularly affected by such problems.
The general trend has been for the county to shift a greater burden of infrastructure costs onto private developers over the years. Revisions of the development regulations have required more items to be privately provided, for a higher proportion of costs to be met where contributions are required and for improvements to be constructed to higher standards. For instance responsibility for storm water management has been shifted over the years from the county to developers. The motivation for this shift has been largely financial and was spurred by the adoption of growth management in the 1970's which sought to limit the impact of new development on the county's expenditures.

Types of Requirements

The county's regulations detail all requirements and the standards to which they must be provided. The following items are covered:

i Rights of way on developers land. Easements are required for all roads and for planned highways, including offsite rights of way where necessary for access.

ii Construction of capital infrastructure. Infrastructure must either be shown to be adequate or be made part of a public works agreement. This covers all roads interior to a development or for access, sidewalks, paving, sewer and water, utilities and storm water drains. Where the improvements are major, and of wider benefit than the individual project, costs are split between the county and the developer.
Open Space. Dedication of land for open space is a requirement under the zoning regulations. The amount of open space required is based on a formula dependent on the density of residential development or on the size of commercial and office developments. If the requirement is so small that the recreation and parks department do not wish to adopt it, then a fee based on the average cost of the required land is levied. Although the open space requirements are under separate legislation the recreation and parks department comment on the requirements in the public works agreement which serves as a method of enforcement.

There are no attempts to negotiate facilities outside of those required by regulation; similarly restriction of uses or the encouragement of certain uses is not attempted by condition or by informal negotiation. There are occasionally attempts to influence the design and layout of new development, but compliance with public suggestions is dependent on the goodwill of developers and an application could not be refused on such design grounds.

The very limited degree of negotiability in the application of development regulations makes the description of a detailed building project case study unnecessary as all applicants are subject to broadly uniform requirements. However one project can be described to demonstrate the negotiation that does take place and the items it covers.

The Rouse Company has submitted a development plan for a 1 million square foot shopping centre in Owings Mills, Baltimore County. The county review group approved the initial plan in October 1982 subject to the assumption of certain costs and responsibilities by the developer. The developers, who have undertaken other projects in the jurisdiction accept their
responsibility for providing all on site infrastructure and sewage and water provision, however have entered negotiations with the county over the provision of a road bordering their development which they believe is of wider public benefit. The Owings Mills Centre has been planned since the late 1960's to be coordinated with the public construction of the Northwest Expressway road and the metro transit line. The road in question is one necessary to link the centre with these major transport facilities and to distribute traffic to the center's several entrances.

The Rouse Company is in agreement with the need for the road, but questions the allocation of costs and responsibilities. Standard county policy requires the developer to dedicate the 80 foot right of way necessary and to construct a 30 foot paved section with the county providing the remaining costs for the full 55 foot road. The final allocation of costs will be determined by the public works agreement. The county was intending to conform to its usual policy and was resisting negotiation with the developer at the time of research.

Evaluation

The county's land use controls operate with a minimum of discretion over conditions or requirements that may be attached to either zoning or subdivision applications. Both sets of controls are subject to detailed policies and standards that are fairly uniform in their application. The county's policy is to provide the development industry with certainty in advance of making any commitment to development and with treating all developers equitably. While developers may feel that some of the requirements are unnecessary for their particular development, there is only limited
scope for requiring less. The industry also has a voice in designing the regulations; monthly meetings are held with the National Home Builders Association to discuss development regulations and the recent review of development regulations included consultation with development interests and was primarily motivated by a wish to streamline the process and reduce delays.

The decision process is almost purely administrative with the planning commission, a lay appointed body representing citizen interests, involved in only limited circumstances. However, the public can attend and make comments at the first county review group meeting to review proposals. Non technical involvement in the process is made less important by the highly constrained scope for discretion that exists.

The goals pursued through this process are the more traditional ones of physical design and infrastructure coordination. A reduction of public expenditure to service new development has also been important in shifting an increasing burden of costs onto private developers over the years. The pattern of development in the county may be an important influence on the absence of bargaining and negotiation. Major new commercial and retail developments have been located in fringe areas, dependent on car users, i.e. office parks and shopping malls. These are essentially single use facilities, away from established residential and commercial areas; there are certain physical necessities for development but less justification for requiring a broader range of public amenities. In the older commercial areas, where the county policy is to encourage community facilities, development pressure is not strong. The county has been providing financial incentives and design guidance and support, but density or building size bonuses in return for the
provision of public amenities would not be effective or appropriate.

A further important influence on the county's policy stance is the political context: pro-development; concerned with providing certainty to the development industry; discouraging the exercise of either administrative or political discretion. The recent political history of the area has been one involving political corruption and the present policy removes any scope for unethical or unprofessional practices.