Utopian Visions: Cooperation without Conflicts in Public/Private Ventures

Judith Welch Wegner

Follow this and additional works at: http://digitalcommons.law.scu.edu/lawreview

Part of the Law Commons

Recommended Citation

This Article is brought to you for free and open access by the Journals at Santa Clara Law Digital Commons. It has been accepted for inclusion in Santa Clara Law Review by an authorized administrator of Santa Clara Law Digital Commons. For more information, please contact sculawlibrarian@gmail.com.
UTOPIAN VISIONS: COOPERATION WITHOUT CONFLICTS IN PUBLIC/PRIVATE VENTURES

Judith Welch Wegner*

I. INTRODUCTION

The proliferation of cooperative ventures involving local governments and private businesses is a fascinating and promising development. For planners, ventures such as San Diego's Horton Plaza or St. Paul's Town Square may provide Utopian solutions to intransigent problems of urban deterioration. For economists, these ventures provide proof that non-regulatory solutions to pressing urban problems are possible, and vindic-
cate recent federal budgetary decisions to leave states and localities more and more on their own to explore creative financing methods designed to meet localized needs. For political scientists and historians, such public-private partnerships present a fascinating image of corporate lions lying down with municipal lambs (or vice versa, depending on one's point of view). For lawyers, this development poses many questions that are left unanswered—first, is there or should there be a fundamental distinction between public and private entities, and second, how are they to be treated under the law? There exists a grave possibility that pragmatic solutions may only confound the puzzlement of theoreticians.\(^2\)

Richard Babcock's provocative essay entitled "The City as Entrepreneur: Fiscal Wisdom or Regulatory Folly?"\(^3\) acknowledges the splendor of such visions, but injects a healthy dose of reality into the picture. He poses a central question and presents a critical challenge to proponents of "municipal entrepreneurship:" do cooperative ventures of the sort presently emerging create a fundamental conflict of interest for government participants either because of tensions between their interests and those of their private partners, or because of incompatibility between their own dual roles of entrepreneur and regulator? This essay accepts that challenge and seeks to carry the discussion a step or two further both by probing the precise extent to which conflicts of interest may threaten the Utopian vision, and by exploring the ways in which the development of appropriate legal principles and institutional mechanisms may put fears of potential conflicts of interest to rest.

An important initial step in addressing the existence of potential conflicts of interest involves understanding precisely what is meant by that term. "Conflict of interest" is sometimes used as an epithet to condemn immoral or improper conduct. Matthew's Biblical caution embodies the depth of this concern: "No man can serve two masters: for either he will hate the one, and love the other; or else he will hold to the one, and


despise the other. Ye cannot serve God and mammon."\(^4\)

This essay reflects a fundamentally more hopeful or at least less pessimistic view concerning problems of potential conflicts of interest for local government participants in cooperative ventures. It assumes that "conflict of interest" means nothing more than the existence of competing interests or concerns between parties or within a single party. It suggests that in the face of such competing concerns, a range of responses is possible—avoiding situations that give rise to a problematic tension is one possibility, but alternative approaches also exist. Such approaches include the development of appropriate mechanisms and principles for determining which of the competing concerns should prevail or how both might be accommodated. Finally, it recognizes that a cooperative venture or other relationship has a number of specific facets which give rise to distinctive sets of competing interests and appropriate responses.

This paper therefore proceeds by identifying a number of key facets of cooperative ventures which serve as focal points for discussion. These key features include (1) a local government's capacity to enter such an agreement, (2) the parties in interest, (3) the process by which agreement is reached, (4) the purposes underlying the agreement, (5) the "coinage" a government may use in the transaction, and (6) problems of noncompliance.

The essay proceeds systematically to examine each of these facets of public-private agreements, by identifying and describing the relevant competing interests, discussing and evaluating established legal doctrine that provides guidance regarding possible responses to the tensions that exist, and suggesting additional or alternative legal and institutional mechanisms that can be brought into play to achieve desired results in the face of competing concerns. In this way, it attempts to place specters of conflicting interests to rest, so that Utopian visions may flourish undisturbed.

II. GOVERNMENTAL CAPACITY

Several competing interests may influence judgments concerning a government's capacity to enter into cooperative ven-

---

tures. The question of government capacity is not a new one, or one limited to this particular context. The debate in recent years has been openly framed in terms of interests in city power or powerlessness. Professor Gerald Frug has urged that cities need additional power in order to deal with local problems and to facilitate decentralized democracy. He has also argued, however, that the current legal system denies cities expansive powers because of the liberal tradition’s concentration of power at the state level in order to protect the rights of individual citizens. Professor Robert Ellickson has maintained that cities, in fact, have too much power, and that such power may adversely affect the functioning of the marketplace and individual freedom. Professor Joan Williams has observed that the current legal regime limiting city power may have been intended, in particular, to foster the concerns of private property owners to maintain their economic interests. Finally, Professor Hendrick Hartog has documented patterns of state intervention in order to limit city power, and public sentiment relegating New York City to the governmental role rather than the proprietary role. In essence, then, these commentators have described and documented key competing interests which bear on cities’ capacity to undertake novel roles: the interest in allowing local initiative to solve pressing problems perceived by local constituents, and the countervailing pressure to maximize individual and market autonomy and maintain private property rights free from government intervention.

Additional concerns are evident with regard to cooperative ventures. Cities typically enter such ventures in order to achieve particularized goals including the achievement of sound planning objectives, the furtherance of urban renewal not otherwise possible, or the procurement of necessary public infrastructure. On the other hand, such ventures carry potential risks of financial overextension or failure, as well as market

6. Id. at 1074-80.
distortion.

The existing legal framework reflects the longstanding tug-of-war between concerns for city power and interests in city powerlessness. The courts in a number of states continue to apply "Dillon's Rule," a nineteenth century formulation that provides that "a local government entity can possess and exercise those powers granted in express words; those powers necessarily or fairly implied in or incident to the powers expressly granted; and those powers essential to the accomplishment of the declared objects and purposes . . . ." Some state courts, legislatures, or constitutions have in recent years adopted a more expansive view of local government powers and a more generous interpretive view. "Home rule" authority has been made available to local governments in many states, but has been vigorously pursued in comparatively few. Local charter amendments are likely to be required before broad home rule powers can be asserted in any event. Particularly stringent approaches are often brought to bear in determining the capacity of local governments to take initiatives involving financial matters.

Although the legal framework just described reflects many years of effort to forge an appropriate balance between com-


12. See Vanlandingham, Municipal Home Rule in the United States, 10 WM. & MARY L. REV. 269, 277, 282 (1968). See also 1 C. Sands & M. Libonati, Local Government Law § 4.02 nn.2-3, § 4.05 (listing constitutional and statutory provisions). Grants of "home rule" power to counties and municipalities are intended to delegate autonomous power to local governments in order to allow them to take initiatives with regard to local affairs and in order to give them some protection from the encroachment of state legislatures. See D. Mandelker, D. Netsch, P. Salsich & J. Wegner, State and Local Government in a Federal System 110-11 (3d ed. 1990); Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 MINN. L. REV. 643 (1964).

13. See, e.g., Carter Carburetor Corp. v. City of St. Louis, 356 Mo. 646, 203 S.W.2d 438 (1947) (city charter did not confer power to levy municipal income tax).
peting concerns about local governments' capacity to undertake creative initiatives, it is unlikely to provide an adequate response to the problem of government capacity in the particular context at hand. It may be difficult for the question of government capacity to reach the courts or to be presented at a time when judicial intervention could do much good. As discussed in part III, citizens at large or even those particularly affected by a cooperative venture may face problems in establishing standing. Government or private partners who might be given standing to assert such a claim are likely to do so only as a way of excusing noncompliance with contractual obligations at a later date.

Absent legislative action to afford explicit authority for certain types of cooperative ventures, courts may confront difficult questions of interpretation before resolving debates about governmental capacity in any event. Even then, the critical question remains unanswered—while local governments in general may be authorized to undertake any type of cooperative venture, is the particular government involved sufficiently sophisticated and otherwise adequately equipped?

The legal scheme, therefore, needs amendment to ensure that questions of government capacity are indeed addressed, in a fact-specific and timely way, by those with appropriate expertise. Explicit legislation is needed, as was recognized by states which recently approved the use of development agreements, in order to permit a careful weighing of general concerns relating to appropriate types of cooperative ventures and their terms. Key features of such legislation are provisions which address the question of government capacity and how it is to be determined prior to commencement of a cooperative venture. Several options are possible. A state-level local government commission could be empowered to review proposed financial arrangements. Provision could be made for the as-


signment of experienced staff to work closely with a local government undertaking a sophisticated venture. Alternatively, a public referendum could be authorized to ensure that the local government and its citizens have carefully weighed competing concerns before commencing a potentially beneficial but also novel and possibly risky undertaking.

III. Parties in Interest

Competing interests also exist regarding the conceptualization of a cooperative venture as a simple contract involving a public and a private party. The simplicity of this approach has many positive aspects from the standpoint of the principal parties—it minimizes time consuming debate with others such as neighbors, competitors, and citizens at large who appear to have more marginal interests, and limits associated costs of the transaction and project implementation. It also preserves the government party’s considerable stake in maintaining its legitimacy by appearing (and acting) to represent the interests of all its citizens—in short, representing not only its institutional interests, but also the interests of “the public.” The public is composed of citizens at large, as well as persons with more particularized interests such as neighbors or entrepreneurs.

At the same time, however, citizens may perceive a potential variance between the government’s institutional interests and the interests of the citizenry as a whole. This may be particularly true where fiscal concerns, a desire to improve municipal infrastructure, or visionary planning goals motivate government participation, while many citizens lack information about or appreciation for such matters, are content with the status quo, and place different values on competing environmental and financial considerations. Certain segments of the public are particularly apt to voice specific concerns—those

---

state-level local government commission charged with reviewing local governments' borrowing proposals). This option of a state-level local government commission to review proposed financial arrangements has been implemented in various states. Cf. also Lawrence, Private Exercise of Governmental Power, 61 IND. L.J. 647, 691 (1986) (suggesting use of state-level agency to provide protection against unfairness that might result if delegation to private parties of certain traditional governmental functions resulted in abuse of power for private interests).

17. See, e.g., CAL. GOV'T CODE § 65867.5 (West 1983 & Supp. 1991) (declaring such development agreement a legislative act subject to referendum).
who live close to the site of the projected development, and those whose business interests may be affected. Neighbors may feel that a cooperative venture involving a local government puts that government in a novel posture. It is not simply reacting to someone else's development proposal as a neutral decisionmaker, but is instead initiating its own development—an action that may arguably trigger enhanced responsibilities to those immediately affected. Competitors may fear that they will not be given a fair chance to compete for government-sponsored opportunities, or that their businesses will suffer from government action affecting the market, perhaps in unfair ways.

The existing legal framework affords citizens, neighbors, and competitors a relatively limited opportunity to ensure that their concerns are recognized. They are given opportunities to assert their interests through procedural mechanisms designed to channel their comments into local government decision-making, as described in part IV below. Absent successful assertion of those concerns in that setting, however, they must turn to the courts and use the threat of litigation as leverage to claim a more significant role in a given cooperative venture.

Success in litigation is likely to turn upon facts and theories in individual cases, but two broad themes deserve mention here. First, a question may exist as to whether citizens, neighbors or competitors have standing—in other words, whether there exists a sufficiently concrete link between their personal claim and the challenged government action to convince a court that the litigant is entitled to judicial review. The law of standing varies in subtle respects from state to state. Courts may afford citizens standing only upon a showing that they have suffered a discernible injury. In some cases, the injury to

18. See, e.g., Hotels of Distinction West, Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988) (competitor hotel lacked standing to challenge city agreement to participate in a cooperative venture for the development of a convention center, on the grounds that the city had violated requirements of an affirmative action ordinance. State law required the complainant to be injured in fact or imminently threatened with economic or other injury but the city's alleged violation did not adversely affect the competitor); Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987) (noting the necessity of proof that plaintiffs had been injuriously affected in their persons, property or constitutional rights, but assuming alleged facts for procedural purposes).
the individual must be distinct from that suffered by the public at large.\textsuperscript{19} Many states, by statute, allow taxpayer suits against local governments. However, they may qualify such a right to sue by requiring the taxpayer to demonstrate that a property or pecuniary interest is affected, that expenditure of local funds has in fact been involved, and that a sound legal theory exists that does more than simply question the wisdom of the government's action.\textsuperscript{20} More stringent rules may further limit standing to challenge land use decisions. Only those who can demonstrate that they have suffered special injury or damage (such as nearby landowners) typically can challenge adverse rezoning or permit decisions.\textsuperscript{21} Adverse effects on the business of a competitor have not sufficed to establish standing for such purposes.\textsuperscript{22}

Second, even if standing is established, it may be difficult to devise a tenable legal theory that would allow challengers the opportunity to prevail. If a rezoning or permit application is involved, procedural requirements must be followed and substantive standards satisfied. Such standards may require that rezoning comport with a comprehensive overall plan for local land use regulation, weigh relevant facts and policy considerations, account for changed circumstances, or follow ordinance provisions regarding the grounds for denial of permits or imposition of conditions.\textsuperscript{23} The decisions in such cases are

\textsuperscript{19} See, e.g., Tabor v. Moore, 81 Wash. 2d 613, 503 P.2d 736 (1972) (denying standing to taxpayers who failed to show direct, special or pecuniary interest in the outcome of an action challenging police procedures). \textit{See also} 6 E. MCQUILLIN, \textsc{MUNICIPAL CORPORATIONS}, § 20.19 (3d rev. ed. 1988) ("a citizen or taxpayer, without pecuniary or property interest that is affected by the enforcement of an ordinance is not a proper party to institute a proceeding to determine the validity of the ordinance or to restrain its enforcement on the ground of its invalidity, at least where the case is not one involving a civic responsibility authorizing, under the law of the particular jurisdiction, a citizen or taxpayer to institute the proceeding"); 18 E. MCQUILLIN, \textsc{MUNICIPAL CORPORATIONS} § 52.14 (3d rev. ed. 1984) (discussing special injury rule in taxpayer suits).

\textsuperscript{20} \textit{See} D. MANDELKER, \textsc{supra} note 12, at 747-61 (discussing case law); 18 E. MCQUILLIN, \textsc{supra} note 19, §§ 52.05-52.06d (describing state statutes); \textit{id.} § 52.13 (discussing pecuniary interest rule); \textit{id.} §§ 52.28-34 (discussing standing in cases involving exceeding debt limits, unlawful expenditures, and improper levy of taxes); \textit{id.} §§ 52.36-38 (discussing standing in cases involving misuse or sale of municipal property); \textit{id.} §§ 52.24-26 (discussing cases involving contracts); \textit{id.} § 52.21 (discussing cases indicating absence of standing to challenge discretionary acts).

\textsuperscript{21} \textit{See} D. MANDELKER, \textsc{LAND USE LAW} §§ 8.02-07 (2d ed. 1988).

\textsuperscript{22} \textit{See} e.g., Copple v. City of Lincoln, 210 Neb. 504, 315 N.W.2d 628 (1982).

\textsuperscript{23} \textit{See} D. MANDELKER, \textsc{supra} note 21, §§ 6.23-34, 6.49-57; Wegner, \textsc{supra}
often unpredictable or deferential to government action granting a permit. On the other hand, efforts by local governments to impose mitigating conditions on rezoning in order to accommodate neighbors’ concerns may be rebuffed. While anticompetitive behavior may at times be challenged under zoning or antitrust laws, the difficulties of proving such behavior may be insurmountable.

When a rezoning or permit application is not required, and the proposed venture instead involves simply a sale of government property, the use of eminent domain powers or government funding, the available theories for challenging government action may be even more sparse and inapposite to the policy concerns driving citizen litigation. For example, in one recent case, neighbors challenged a city’s sale of air rights over municipally-owned land in order to facilitate an urban renewal project including a new parking facility, hotel, and retail shops. Their principal concerns related to traffic congestion and environmental impacts on nearby neighborhoods. Since the existence of local legislation authorizing the project foreclosed a challenge to the city’s capacity or purpose, only weak arguments were stated such as a charge of procedural error, an unpersuasive claim that the project involved “regulation of trade,” and an unsuccessful assertion that it constituted an impermissible joint venture.

The existing legal system thus limits the opportunities for assertion of citizen, neighbor and competitor concerns. If these concerns are to be accorded greater recognition and legitimacy, and if additional safeguards are desirable to minimize risks associated with governments’ performance of multiple roles, then the legal system requires modification. Several solutions warrant consideration.

More appropriate procedural mechanisms can be created to identify and address neighbors’ and the public’s concerns at

---


28. Id. at 550-51, 359 S.E.2d at 793-94.
an early phase of project development. Care can also be taken in the development of appropriate bidding procedures to ensure that opportunities to participate in government funding are allocated on equitable grounds. Finally, adequate standards and appropriate remedies can be formulated to ensure that the overall interest of the public is not compromised. Such standards and remedies are described in parts VI and VII.

IV. Process

Use of appropriate decision-making processes seems to be the very essence of law. It is worth remembering, however, that competing concerns may shape the precise sort of process adopted to govern decision-making in a given context. Traditionally, concerns for openness and orderliness have justified incorporation of detailed procedural requirements as subsequently discussed. Openness and orderliness are in turn assumed to ensure the availability of adequate information and to stimulate fairness instead of favoritism in decision-making. Potentially competing concerns may come into play when business ventures are involved. In that context, there may be a premium on confidentiality in order to forestall increased business costs, and on swift and flexible decision-making in order to capture elusive opportunities.

The legal system recognizes that many types of government action that may give rise to the deprivation of property rights must be accomplished by following certain procedures that afford "due process." The process that is due varies with the circumstances, although some form of notice and hearing at an appropriate time is typically required where administrative action is taken. State statutes specify the situations in which procedural protections are afforded and often go beyond constitutional requirements in establishing rules applicable to legislative action as well.

29. See infra notes 30-42.
31. See U.S. Const. amend. XIV, § 1 ("No state shall . . . deprive any person of life, liberty, or property, without due process of law.").
33. See infra notes 34, 36.
exercise of the police power (such as rezoning or land use permitting decisions) typically are reached after the public and particularly affected landowners receive notice and an opportunity to participate in a hearing before the relevant local government board. Recent statutes in states allowing use of "development agreements" have included similar notice and hearing provisions. Other government powers such as the power to tax or borrow money may trigger notice and hearing requirements under relevant statutes. Not all government contracts may be subject to such provisions, however.

Additional procedural requirements may apply depending upon the particular jurisdiction. Specialized provisions exist in a number of states which require development of environmental impact statements before certain kinds of discretionary action are commenced by government agencies. Local contracts may be restricted by state laws governing bidding procedures. Open meetings laws may influence the extent to which negotiations can take place in private and who may be involved. Certain government actions may also be subject to

35. Development agreements are a means of establishing clear understandings concerning the vested rights of developers to rely on existing land use regulations for a set period of time in return for contributions to community infrastructure and other public goals.
37. See 10 E. McQuillan, Municipal Corporations § 29.18 (3d rev. ed. 1990) (listing conditions precedent to making contract, including vote of electorate in some situations).
39. See 10 E. McQuillan, supra note 37, §§ 29.28-90 (extensive discussion of state laws on competitive bidding).
40. See N.C. Gen. Stat. § 143-318.9 (1990) ("Whereas the public bodies that administer the legislative, policymaking, quasi-judicial, administrative, and advisory functions of North Carolina and its political subdivisions exist solely to conduct the people's business, it is the public policy of North Carolina that the hearings, deliberations, and actions of these bodies be conducted openly."). See also N.C. Gen. Stat. § 143-318.10 (1990) ("[E]ach official meeting of a public body shall be open to the public, and any person is entitled to attend such a meeting."). See generally 4 E. McQuillan, Municipal Corporations § 13.07 (3d rev. ed. 1985) (meetings of council); id. §§ 19.07a-e (public meeting laws and requirements generally).
41. See generally O. Reynolds, Handbook of Local Government Law § 63
public referenda; for example, development agreements in California may be challenged by such means, although those in Hawaii may not.42

The existing legal system has developed fairly straightforward mechanisms for providing public comment prior to finalization of government decisions. Limited refinement most likely is all that is needed in adapting the established notice and hearing practices for use in the context of cooperative ventures. For example, it is advisable, at least as a policy matter, that such procedures be followed whenever a major cooperative venture is undertaken, even if there is no constitutional mandate to that effect. Care must also be exercised in defining the scope and timing of the hearing so that it pertains to the project as a whole at an early point. A hearing must allow for consideration of all relevant information (such as that found in environmental studies), rather than adopting an ill-timed, piecemeal approach to related decisions.43 The application of referendum provisions existing in certain states must be clarified.44

In certain other respects, however, the existing legal scheme needs modification. Clearly, it does not completely treat the process by which public-private deals are developed. Rather, the existing legal system focuses on how these deals are finalized. Much more thought is needed in order to shape the deal-development process so that it addresses concerns regarding the need for information, fairness, confidentiality, and flexibility. The most salient ideas are likely to be provided by those who have been most intimately involved in the formulation of these public-private deals.

Some brief preliminary thoughts may nevertheless be appropriate. First, the process of initial pairing of public and private partners is a clumsy one. Some jurisdictions have used requests for proposals to identify potential private partners either because of governing legal requirements or a concern


43. See e.g., CAL. GOV'T CODE § 65867 (West 1983 & Supp. 1991) (providing for concurrent hearing on development agreement and related permits).

44. See generally Wegner, supra note 14, at 1010-14 (discussing applicability of referenda provisions in land use decision making).
for fairness to all potential bidders.\textsuperscript{45} This mechanism may be problematic, however, if a private party conceives a project and takes the initiative, or if exceptional circumstances dictate a less formal process. Second, the deal-development process fails to afford an appropriate role to neighbors and others who may be adversely affected by a proposed project.\textsuperscript{46} Early identification and consideration of the concerns of those likely to be affected can prove more efficient if it will be necessary to address those concerns in the end. There is a growing body of literature describing ways in which neighbors can be brought into public-private negotiations,\textsuperscript{47} although formal legal mechanisms to assure such involvement are still in the embryonic stage. Finally, the public's interest in ensuring that adequate information is provided need not be effected, at the deal-development stage, by elaborate hearings or open meetings. Instead, that interest may be served by the introduction of expert personnel as part of the local government's negotiating team.\textsuperscript{48} One possible approach to procuring such expertise would be to staff state or regional government agencies with at least one professional who would be able to consult or participate with local governments in negotiations as necessary.

Another novel aspect of the process applicable to cooperative ventures may also be worthy of note. In contrast to land use decisions, which typically involve only initial review by local government agencies, cooperative ventures involve long-term commitments and ongoing relationships. Such projects may extend over several years, may need to weather changes in the

\textsuperscript{45} Some jurisdictions require that governments give notice of their intent to contract for certain services or engage in joint undertakings, in order to allow all interested private parties an opportunity to submit proposals for review and possible selection by the government. See Hotels of Distinction West, Inc. v. City of Albuquerque, 107 N.M. 257, 755 P.2d 595 (1988) (involving development agreement for the addition of a first-class hotel to a convention center); Municipal Art Society v. City of New York, 137 Misc. 2d 832, 522 N.Y.S.2d 800 (1987) (coliseum site offered for sale by public authority pursuant to a request for proposals).

\textsuperscript{46} Costonis, Tinker to Evers to Chance: Community Groups as the Third Player in the Development Game, in CITY DEAL MAKING 155-66 (Urban Land Institute, 1990). This failure to afford an appropriate role to those potentially affected by a proposed project is discussed elsewhere in this article.


\textsuperscript{48} Cf. Lawrence, supra note 16, at 693 (discussing use of specially qualified decision maker).
economy and the political climate, and may involve hard times as well as good times.\textsuperscript{49} It is therefore advisable to anticipate that modifications in the agreement embodying a public-private venture or review of such a project may be required and to provide for a satisfactory process for modification if that becomes necessary. Development agreement statutes take precisely this tack, by specifying that periodic reviews are required, that agreements are to span no more than five years unless agreed to by both parties, and that hearings are to be held in the event of modification.\textsuperscript{50} This sort of arrangement both protects the local government’s prerogative and obligation to gather information on an ongoing basis, and instills public confidence that the government’s capacity to function as an open-minded decisionmaker will be maintained despite the risk that partnership dynamics may result in adoption of a quasi-entrepreneurial viewpoint and an unscrupulous commitment to the project’s completion.

V. PURPOSE

While there is likely to be little debate that government action should be taken only when designed to advance public purposes, competing concerns can influence how “public purposes” should be defined and how that concept should be implemented in particular circumstances. A number of “public purposes” can be cited to support government participation in cooperative ventures. A variety of planning objectives typically provide the basic impetus for government involvement: a desire to promote urban renewal or to stimulate the local economy; a wish to provide needed government infrastructure, public buildings, or amenities; and an interest in using incentives in lieu of regulatory tools. Fiscal concerns are also likely to be

\textsuperscript{49} For example, the Rosemary Square project, described in Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987), was legislatively authorized in 1984, and reached the state supreme court in 1987. During and since that time it was the subject of debate in two municipal elections and required several changes in the project’s design and the financing arrangements of the private partner.

paramount, either in the form of a short term desire to avoid public expenditures by marshaling private contributions, or in the form of long term hopes for an enhanced tax base or profit-sharing. However, each of these aspirations may trigger countervailing concerns. Such concerns include anxiety that government involvement may distort the market's operation to the disadvantage of private participants, worry that government may take questionable financial risks, and apprehension that public health, safety, and welfare objectives may be sacrificed to meet financial goals.

The existing legal framework allows the purpose of government action to be critically examined on a variety of fronts. Statutes authorizing government action often specify the purposes for which the stated authority may be used. Zoning statutes and development agreement statutes are good examples. Challenges to government action are frequently advanced on grounds that the purposes in question fail to comport with those provided by statute—a variation of the *ultra vires* argument discussed in part II. In addition, government action to further various illegal purposes may be forbidden by statute. The existence of a public purpose is also typically required by state constitutional provisions governing taxation, borrowing, spending, and the exercise of the police power consistent with due process and equal protection principles.


52. See, e.g., *Housing Authority v. City of Los Angeles*, 38 Cal. 2d 833, 243 P.2d 515 (1952), *cert. denied*, 344 U.S. 836 (1952) (upholding agreement to vacate streets in order to facilitate development of low rent housing in face of challenge to government authority); *Clark v. Marian Park, Inc.*, 80 Ill. App. 3d 1010, 400 N.E.2d 661 (1980) (authority existed to address tax-exempt status in annexation agreement); *Midtown Properties, Inc. v. Township of Madison*, 68 N.J. Super. 197, 172 A.2d 40 (1961), *aff'd*, 189 A.2d 226 (N.J. 1963) (*per curiam*) (township lacked authority to enter into contingent zoning agreement requiring payment of money for school construction purposes); *City of Knoxville v. Ambrister*, 263 S.W.2d 528 (Tenn. 1953) (contract zoning was invalid when grant of land was involved in exchange for rezoning, because contract made for purpose of affecting official conduct is ultra vires).

53. An example of such a prohibition is provided by federal statutes outlawing actions for anticompetitive ends. See *Westborough Mall, Inc. v. City of Cape Girardeau*, 693 F.2d 783, 745 (8th Cir. 1982), *cert. denied*, 461 U.S. 945 (1983) (discussing claim under section 2 of the Sherman Act which prohibits conspiracies to monopolize or attempt to monopolize).

54. See *O. Reynolds*, *supra* note 41, § 100, at 304-05 (citing cases regarding spending and borrowing for public purposes); 4 *C. Sands & M. Libonati, Local*
Within these specific pockets of legal doctrine, courts have developed several distinctive strategies for dealing with the sort of problem presented by the existence of competing interests such as those aforementioned. First, they have declared certain purposes to be illegitimate. Examples of this approach include judicial decisions declaring "financial zoning" to be illegal, and decisions by courts in a number of states prohibiting annexation for the sole purpose of increasing municipal tax revenues. Courts may or may not explain the reason for these departures from the usual rule that deference is due to legislative judgments based upon legitimate purposes for public action.

Two other strategies for addressing the existence of competing concerns have typically been used. Some courts balance competing concerns and permit government action to proceed if the benefits outweigh the risks. Cases involving restrictions on the lending of public funds provide a ready illustration. Some courts simply state that public concerns to foster a better business climate can be furthered by the lending of public resources, provided private interests are benefited only incidentally and adequate provisions to protect against overreaching or corruption are employed. Others probe more deeply into the possibility that an adequate balance has been struck by promoting the public good without unduly intruding into the private marketplace and allocating public funds for private objectives. These courts ask specifically whether private markets will be affected, and whether there exist any alternatives to reliance upon public funds. Finally, courts may shift the

GOVERNMENT LAW § 23.05 (1982) (discussing public purpose requirement applicable to taxation).

55. See, e.g., National Land & Inv. Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965) (striking down four-acre zoning restriction with comment that zoning "may not be used . . . to avoid the increased responsibilities and economic burdens" that growth inevitably brings).

56. See, e.g., United States v. Bellevue, Nebraska, 474 F.2d 473 (8th Cir. 1973); Chevron U.S.A., Inc. v. City of North Salt Lake, 711 P.2d 228 (Utah 1985); 2 E. McQUILLIN, supra note 10, § 7.23a (3d rev. ed. 1988) (revenue raising may not be sole purpose, but may be considered).

57. See Siemon, Public/Private Partnerships and Fundamental Fairness, in CITY DEAL MAKING, 81-96 (Urban Land Institute, 1990).


59. See, e.g., Stanley v. Department of Conservation and Dev., 284 N.C. 15,
focus of discussion by accepting at face value the public purposes advanced as justification for government action, yet requiring that problematic effects which may result from pursuit of such objectives be avoided. The exclusionary zoning case law developed by the New Jersey Supreme Court exemplifies this approach insofar as it acknowledges local governments' interests in preserving community character, while requiring a remedy for the denial of access to affordable housing that may result.

This basic framework provides a useful model for addressing the specific problems of purpose that arise in connection with cooperative ventures. However, the applicability of the basic framework is in need of clarification. For example, the trial court decision in one of the few reported cases on cooperative ventures, Municipal Art Society v. City of New York, appeared in part to turn upon the question of the city's purpose in undertaking to sell city property near Central Park for the development of a mixed-use project. The court objected to contract provisions which in effect traded density bonuses for cash that would be used to balance the city's budget rather than to make local improvements near the project site. The court's aversion to this strategy was plain enough, but its precise legal theory remained a bit obscure. The opinion hinted at the possibility that the sale of density bonuses for such purposes went beyond the scope of the governing ordinance. In addition, the court suggested that density bonuses may not be proper "coinage" for some sorts of municipal transactions.

199 S.E.2d 641 (1973) (striking down pollution bond program to benefit private industry, prior to adoption of state constitutional amendment).


62. The city proposed that in return for expenditures for subway station improvements, the developer would be allowed to take advantage of an unusually large "floor area ratio" (a 20 percent higher ratio between the square footage allowable in a building and the square footage of the building lot than was otherwise available). This increased development potential is in effect one form of added density provided as a "bonus" for undertaking special development obligations.

63. See infra part VI.
The opinion unfortunately did not explore in careful detail the issues and strategies outlined above—whether raising revenues by the sale of municipal assets is *per se* an invalid purpose, whether that purpose improperly outweighed other legitimate city purposes with regard to the project at hand, or whether the adverse effects of a massive building on a sensitive site were of primary concern.64

A clarification of the applicable legal framework would, therefore, be beneficial. Government action taken purely for profit may well compromise countervailing concerns such as the protection of the public health and safety, and the avoidance of undue financial risks. Nevertheless, declaring fiscal purposes completely off limits would seem to provide a broader remedy than is necessary to address these competing concerns. Instead, a sufficiently strict legal framework might include the following elements: requiring an explicit acknowledgment of government purposes in cooperative ventures, mandating that purposes other than profit-making be legitimate and paramount, and ensuring protection against adverse effects upon public health and safety, the public treasury, and private markets.

**VI. GOVERNMENT COINAGE**

A key element in any cooperative venture is the trading or contribution by the parties of resources in order to further their individual or joint interests. Private parties' resources are generally well known and understood. Governments' resources are a more complex amalgam of tangible assets (such as money and rights with respect to land), and recognized powers (including the powers to tax, borrow, condemn and regulate). For purposes of this discussion, such resources may be described as government "coinage."

Two major types of concerns must be taken into account in determining the coinage allowable to the government in cooperative ventures. First, the government should not improperly expropriate private resources for government use as a result of its desire to garner excessive coinage. The basic tradition of protecting private expectations against government overreaching is exceptionally strong. Second, the government's

---

64. 137 Misc. 2d 832, 522 N.Y.S.2d 800 (1987).
obligation to protect the public welfare should not be compromised, either through external co-option of its powers by private interests, or by its own internal co-option resulting in failure to treat that obligation as preeminent among competing claims. These dual concerns—to avoid government overreaching, and to prevent co-option of critical public interests—significantly limit the government coinage that should be recognized.

The existing legal framework addresses these concerns quite specifically both in rules that control the government's acquisition of resources and in requirements that govern the disposition of such resources. While these rules and requirements vary to some degree depending upon whether financial resources or rights in land are involved, certain basic themes are clear. Acquisition of resources is only allowed where public purposes are served and safeguards against abuse of private interests are established. Disposition of resources is even more carefully controlled by various provisions designed to prevent private abuse of the public interest, as well as by earmarking government coinage in such a way as to limit potential clashes between local governments' fiscal management and welfare-protector roles.

Local governments' acquisition and disposition of funds depends upon their exercise of three major powers—the power to tax, the power to borrow, and the police power. The power to tax, long feared, is strictly regulated. The ability of governments to acquire tax funds is limited by requirements that adequate statutory authority be provided, by statutory and constitutional restrictions on tax rates, and by more recently enacted controls on tax assessment and tax levies. Expenditure of such resources is also carefully constrained. Many states limit local governments' ability to create coinage in the form of tax breaks, that is, decisions to forego taxation. Requirements that tax exemptions be authorized by state legislation ensure

65. See Federation of Tax Administration State Revenue and Spending Limitations Since Proposition 13, at 7-8 (1980); I. M. Gelfand, State & Local Government Debt Financing §§ 5.23-.36 (1985) (describing changes resulting from recent tax revolt); Gelfand, Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, The Taxpayers' Revolt, and Beyond, 63 Minn. L. Rev. 545, 551-55 (1979).
against local decisions to confer favored status on particular individuals, thereby precluding co-option.\textsuperscript{66} Requirements that government spending be statutorily authorized and serve a public purpose provide similar protection.\textsuperscript{67} No additional protection against ill-advised decisions to honor fiscal management interests in derogation of more fundamental concerns for the public health and welfare appears feasible in this context, since budgeting and expenditure decisions concerning finite resources necessarily involve tradeoffs of competing demands.

The power to borrow is also carefully circumscribed. The acquisition of funds by this method must be statutorily authorized.\textsuperscript{68} General obligation bonds, to be repaid through future tax revenues, are typically subject to referendum requirements and statutory or constitutional debt limitations.\textsuperscript{69} Revenue bonds, to be repaid through project receipts, are inherently limited by the absence of a public repayment obligation. When significant burdens nonetheless arise, for example because of the ill-considered imposition of repayment obligations upon utility ratepayers, rules concerning narrow construction of authorizing legislation may be invoked to restrain quasi-governmental abuse.\textsuperscript{70} The disposition of funds derived from government borrowing has long been controlled by state "antidonation" or "lending of credit" provisions designed specifically to preclude co-option of government borrowing powers by private interests. Interpretation of such provisions to ensure that a clear and predominant public purpose exists and that the potential for favoritism of particular private interests is avoided effectively responds to this particular concern.\textsuperscript{71}

\textsuperscript{66} See, 16 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 44.65 (3d rev. ed. 1984) (tax exemptions by municipalities must be authorized).
\textsuperscript{67} See 15 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 39.19 (3d rev. ed. 1985) (must be for a public municipal purpose); id. § 39.21 (illustrations of what are and what are not public purposes).
\textsuperscript{68} See, e.g., O. REYNOLDS, supra note 41, § 102, at 318-19 (collecting cases).
\textsuperscript{69} See id. §§ 100-01 (collecting cases on referendum requirements and debt limitations).
\textsuperscript{70} See, e.g., Chemical Bank v. Washington Public Power Supply System, 99 Wash. 2d 772, 666 P.2d 929 (1983) (invalidating elaborate financial agreements to support construction of two nuclear generating plants, where participants were required to guarantee bond payments irrespective of whether plants were ever completed).
\textsuperscript{71} See supra note 58 and accompanying text.
Potential conflicts between competing governmental roles are also addressed. Borrowing that involves a pledge of future tax revenues must generally be approved through a public referendum process that allows citizens to determine whether potential risks to the public welfare are created by the proposed expenditure of funds. Novel borrowing methods such as tax increment financing allow the government to invest borrowed funds in the hopes of realizing a return from future appreciation in property values. Yet such a leveraging of borrowing power is also carefully restricted: statutory authority is generally needed; eligible projects are carefully defined; and appreciation takes the form of incremental increases in future tax payments which are in the first instance earmarked for repayment of the start-up debt incurred. Stringent controls also limit the adverse effects on the public that might arise from use of revenue bonds. With the growing realization that federal tax breaks and lower interest costs are a significant portion of the value of revenue bonds and affect the resulting operation of the bond market, Congress has imposed restrictions on their use designed to earmark these benefits and control potential government abuse. Recent amendments to the Internal Revenue Code thus restrict the purposes for which revenue bond-related tax breaks will be afforded, and impose arbitrage penalties and state volume caps.

A third governmental power, the police power, has also been used in recent years to accumulate government funds in the form of in lieu and impact fees. The acquisition of such

73. Arbitrage penalties can be imposed in the event governments borrow funds for specific purposes at low interest rates reflecting the special status of municipal borrowings, but retain and invest those funds for the unrelated purpose of accruing additional earnings. Section 148 of the Internal Revenue Code provides that issuers of tax exempt bonds are required to rebate to the U.S. Treasury all arbitrage earnings on investments unrelated to the governmental purpose of borrowing. I.R.C. § 148 (1988).
75. The police power is the government’s power to take steps necessary in the interest of the public health, safety and welfare. The police power is regarded as an inherent power of state governments and is afforded local governments through authorizing legislation or home rule provisions.
76. Impact fees, or development fees, are charges that local governments levy “against new development . . . to generate revenue for capital funding necessitated by the new development.” See Jurgensmeyer & Blake, Impact Fees: An Answer
funds must be statutorily authorized, however, and must rest upon demonstrable needs for public infrastructure and open space that are associated with land development activities proposed by individual property owners. In most jurisdictions, funds collected on that basis must then be spent to benefit the development proposed by the location of facilities relatively nearby, in some states within a specific time period. Failure to comply with these requirements may mean that a levy is deemed a tax.

Government acquisition and disposition of rights with respect to land is also dependent upon the exercise of particular governmental powers. The exercise of those powers is likewise carefully constrained in light of the competing concerns outlined above. Rights to land can be acquired with funds derived through taxation, borrowing, or the police power. Acquisition of land for public purposes is often freely authorized by statute as a necessary incident of a local government's corporate existence. Moreover, few protections against government overreaching are required, since private parties who sell land can protect their own interests through the bargaining process. Additionally, the government's impact as a market participant which is denied opportunities for speculative investment is generally benign. However, the disposition of real estate assets is more closely controlled. Each sale must be au-

---

78. See, e.g., Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200, 204 (1977) (benefit to development must result from exaction); Contractors and Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), cert. denied, 444 U.S. 867 (1979) (earmarking of funds required for impact fees).
79. See, e.g., Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (unless rational nexus text applicable to exactions is satisfied, impact fee may constitute illegal tax arbitrarily imposed on the few for the benefit of the many).
81. See 10 MCQUILLEN, supra note 37, § 28.11 (3d rev. ed. 1981) (discussing purchase of property for municipal purposes, and citing cases holding purchase for speculation or profit was not a public purpose); 12 E. MCQUILLEN, MUNICIPAL CORPORATIONS §§ 36.03-.05 (3d rev. ed. 1981) (collecting cases supporting proposition that municipality may not ordinarily engage in purchase of land for real estate speculation since such activity is not generally deemed to be included in those authorized by statutes).
thorized, and, if property was acquired through dedication or gift, can be constrained by the terms of the initial grant because the government is deemed to act in a fiduciary capacity with regard to such assets. Certain special types of rights in land are further protected by the operation of the public trust doctrine, which allows courts to set aside attempted transfers of rights affecting navigable waters. This doctrine is perhaps due in part to the possible private cooption of government action, or implicitly erroneous government judgments setting the goal of financial gain ahead of the historically important need to preserve avenues for trade.

Rights to land may also be acquired through use of the government's eminent domain power. The acquisition of land by this means is explicitly addressed in both federal and state constitutions. Such provisions typically require that "just compensation" be paid, thereby providing some measure of protection for private expectations. They also refer to the government's taking of property to serve a "public use." Although once viewed narrowly as requiring land taken to be put to use by the government, a broader view now prevails, at least under the federal Constitution, that the eminent domain power can be used for any proper public purpose. Greater flexibility has also been attained with regard to government disposition of property acquired through exercise of the eminent domain power. For example, transfer of land to private parties is permitted where doing so would advance government objectives, as in the promotion of urban renewal.

82. See 10 McQuillen, Supra Note 37, §§ 28.37-40 (3d rev. ed. 1981) (discussing need for legislative authority at least where property is devoted to public use); id. § 28.52a (discussing restrictions on use and sale of parkland acquired by grant).


86. See Hawaii Housing Authority v. Midkiff, 467 U.S. 229 (1984) (upholding Hawaii land reform legislation that created mechanism for condemning land held by large landowners and transferring ownership of condemned fee simple title to existing lessees or others, as consistent with constitutional "public use" provision).

nevertheless exist respecting such government action in the form of statutory provisions elaborately detailing requirements associated with the exercise of eminent domain. Courts have also curbed potential risks and abuses associated with the exercise of this power. In a famous case involving construction of the World Trade Center, *Courtesy Sandwich Shop v. Port of New York Authority*, New York City was found to lack authority to condemn property for use as a source of rental income to be derived from retail tenants unrelated to the World Trade Center concept. Similarly, questions may arise as to the legality of government landbanking based on the exercise of eminent domain power, unless government objectives include more than a mere desire to speculate in hopes of real estate appreciation. Moreover, the anticipated transfer at a future date must serve discernible purposes and occur within a reasonable time.

The police power in recent years has increasingly become a crucial vehicle for the government to acquire new coinage in the form of regulatory rights with respect to land. In effect, the imposition of regulatory requirements which preclude various types of private activity constitute public servitudes not unlike certain types of traditional easements and equitable restraints. Federal and state constitutional provisions that require compliance with due process and equal protection principles and mandate the avoidance of regulatory taking provide some basic safeguards against government overreaching. On the other hand, however, the "reserved rights" doctrine serves to protect the public interest against possible co-option. Under that doctrine, a local government cannot "contract away" its police power, but must retain the right to modify regulatory requirements as needed to respond to important public health and safety concerns. It may not waive that right in return for private concessions, at least where not explicitly authorized by statute, and where private expectations to the contrary are unfounded or ill-defined.

89. *Id.*
90. *See* Stoebuck, *supra* note 84, at 603-05 (collecting sparse case law).
In recent years, governments have begun to experiment with ways in which new coinage might be minted that is consistent with these basic restrictions on the exercise of the government's police power. They have met with some success in at least two situations—where vested rights have been recognized pursuant to development agreement statutes, and where transferable development rights have been created to facilitate achievement of historic preservation and environmental protection objectives.

Development agreement statutes have created new vested rights coinage that affords developers a longer period of protection against regulatory modification of major projects than might be provided by common law rule.\textsuperscript{92} Such added coinage is only created at a developer's request, however, thereby avoiding potential governmental overreaching. Moreover, the public interest is protected through statutory limitations and explicit agreement provisions on the duration and nature of the regulatory freeze that will be put into effect. Finally, earmarked benefits to the public are typically included either in the form of contributions to infrastructure or funds designated to serve a particular community objective. Transferable development rights have also been designed to address concerns regarding governments' overreaching or cooption. Under this approach, development rights in particular parcels of land are

\textsuperscript{92} Common law rules typically blend estoppel and vested rights theories. Estoppel may apply when a property owner, relying in good faith upon some act or omission of the government, has made such a substantial change in position or incurred such extensive obligations and expenses that it would be inequitable and unjust to destroy the rights which he ostensibly has acquired. A vested right to complete construction of a specific development project may be created when a landowner obtains or is the beneficiary of an affirmative governmental act allowing development of a specific project, relies in good faith upon the affirmative governmental act, and makes a substantial change in position or incurs extensive obligations or expenses in the furtherance of the specific project in accordance with the affirmative governmental act. See C. Siemon, W. Larson & D. Porter, \textit{Vested Rights—Balancing Public and Private Development Expectations} (Urban Land Institute 1982); Hanes & Minchew, \textit{On Vested Rights to Land Use and Development}, 46 WASH. & LEE L. REV. 373 (1989); Hecter, \textit{Zoning Estoppel: Application of the Principles of Equitable Estoppel and Vested Rights to Zoning Disputes}, 15 URB. L. ANN. 63 (1971). For a discussion of development agreements, see Wegner, \textit{supra} note 14, at 994-1038; \textit{Managing Development Through Public/Private Negotiations} (R. Levitt & J. Kirkin ed. 1985); D. Porter & L. Marsh, \textit{Development Agreements: Practice, Policy and Prospects} (Urban Land Institute 1989).
bifurcated. A certain level or type of development is allowed to occur on the original parcel, yet additional rights to height or density of development are severed and relocated elsewhere. In effect, the government creates an additional servitude or recaptures certain development rights in connection with a particularly sensitive parcel.

However, the property owner's rights are protected insofar as the Constitution's taking restrictions continue to operate, and insofar as he or she, rather than the government, receives the financial value of the severed rights once they have been acquired by the owner of a designated receiving parcel. The public's interest in protection against cooption of the local government's welfare-protection function is also served. Designation of areas to serve as recipient parcels generally occurs with ample public debate at the same time protected areas are identified. Moreover, the government has no institutional financial stake of its own in the rights created, and instead serves merely as an honest broker which facilitates the operation of a trading system that it has created itself.

In sum, a complex legal framework has already been created that significantly shapes the government coinage available for use in cooperative ventures to protect citizens against government overreaching and to prevent cooption of the government's role as protector of the public health and welfare. This framework should therefore allay fears concerning potential conflicts of interest in settings where the government coinage to be employed is well-established and understood. Novel situations are likely to arise, however, particularly in the context of government efforts to capitalize on its police power. The decision in Municipal Art Society provides a ready example. In that case, the government sought to transfer land previously acquired and to trade density bonuses for additional funds ultimately used for purposes unrelated to the project area. Problems existed both as to the acquisition and disposi-


94. 137 Misc. 2d 832, 522 N.Y.S.2d 800 (1987), discussed supra note 61 and accompanying text.
tion of the density bonuses (a form of police power coinage). Although ordinance provisions allowed for the use of density bonuses in somewhat general terms, some doubt existed as to whether there had been a conscious authorization of their use on a massive scale.\textsuperscript{95} Even more importantly, the trade of the large density bonus for undesignated funds, rather than the earmarking of compensation for use on local improvements, opened the way for cooption of the government's judgment in its role as protector of the public welfare.\textsuperscript{96} Accordingly, the trial court invalidated the arrangement.

The fundamental lessons to be learned concerning available government coinage are therefore short and sweet. Under existing law, governments are unable to create coinage in derogation of established private interests. Nor may such coinage, once acquired, be spent in ways that excessively benefit private interests, compromise the public welfare, or result in excessive financial speculation by local governments. Nonetheless, within these strictures, there exists substantial coinage to allow fruitful cooperation in public-private ventures.

\textbf{VII. NONCOMPLIANCE}

Public and private interests must converge in order to give rise to a cooperative venture agreement. At some later date, however, they may diverge, giving rise to noncompliance by either a public or private party. At that point, competing interests clearly exist on at least two scores. First, the parties disagree on the continued viability of their agreement or its terms. The nonperforming party seeks to avoid old obligations in order to pursue new or more compelling objectives, while the other party continues to adhere to its earlier expectations and desires that contractual obligations be honored. The parties are also likely to be in disagreement over the remedies available in the event of noncompliance. The nonperforming party generally wants to limit its financial exposure and move on, and accordingly prefers a remedy that will cut short any ongoing losses and keep any damage award at a minimum. The injured party, on the other hand, would rather proceed with the deal and desires a more substantial remedy to serve as

\textsuperscript{95} See Lassar, \textit{Zoning for Sale}, \textit{URB. LAND} 34-35 (March 1988).
\textsuperscript{96} 137 Misc. 2d at 835-36, 522 N.Y.S.2d at 803-04.
a disincentive to noncompliance.

The existing legal framework that governs nonperformance of private-sector contracts has been developed to address these sorts of competing interests. For current purposes, it is enough to say that basic contract principles relating to nonperformance and remedies apply to most agreements involving local governments. 97

These basic principles may themselves be insufficient to ease all worries where cooperative ventures are concerned, because they fail to take into account the special character of government action in this context. Governments which enter into cooperative ventures may be more risk averse than their private partners and more risk averse than they would be in other settings. They may face particularly significant financial exposure, and may find it especially problematic to maintain their part of a bargain in the face of competing and relatively inflexible financial burdens. The government may also find it difficult to shore up a floundering partner who seeks infusion of additional resources or concessions with regard to otherwise applicable rules. Moreover, government partners must also weather potential political squalls associated with major projects that rarely command universal support, and must maintain the integrity of their functioning in the welfare-protector role, 98 as well as the role of entrepreneur and partner. These realities may give rise to government noncompliance or influence government action should private noncompliance occur.

97. See 10 McQuillin, supra note 37, at § 29.02 (3d rev. ed. 1981) (rules relating to contracts generally apply to agreements to which a municipal corporation is a party); id. § 29.05 (power to contract depends upon usual rules regarding municipal power). Applicable principles include those which govern other sorts of agreements. See id. § 29.02 ("there must be an offer and acceptance, mutuality, delivery, where that is an essential element of the particular transaction, and in general a conformance with all requirements of the law of contracts"). The agreement also requires consideration, which may consist of mutual, implied, or conditional promises or the release or settlement of a claim. Id. § 29.05 ("Where a city contracts in its proprietary, as distinguished from its governmental, capacity, its measure of liability under the agreement is the same as that of a private individual or corporation under like conditions." The power to contract must exist at the time the contract is made, as any restrictions on the power to contract are designed to protect the public).

98. Local governments must exercise their responsibilities under the police power to make decisions on the applicability of regulatory restrictions designed to protect the public health, safety and welfare, even with regard to projects in which the government is itself involved.
Finally, local governments are subject to special legal obligations concerning impairment of contracts that do not govern the conduct of private partners. Although the federal Constitution's Contracts Clause\(^9\) is not implicated by mere breaches of government contracts in the event that adequate remedies are provided, the Contracts Clause may be triggered by government efforts to modify contractual provisions of public-private contracts. It may be triggered absent adequate justification in the form of changed circumstances, unforeseeable events and public necessity sufficient to dictate a decision to override established expectations pursuant to the police power.\(^10\) Absent such justification and alternative remedies, governments may be called upon to specifically perform contractual obligations.\(^11\)

Several additional steps may be taken by government parties to address special circumstances that make reliance upon traditional contract principles to resolve competing interests more difficult where noncompliance with cooperative venture obligations is concerned. Clear standards for defining obligations and measuring compliance are especially important to provide an adequate benchmark in the event of financial or political downturns.\(^12\) An effort should be made to anticipate future problems or changes in circumstances in order to specify at the outset that both current and future public health

---

99. U.S. CONST. art. I, § 10, cl. 1 ("No State shall . . . pass any . . . Law impairing the Obligation of Contracts.").

100. See United States Trust Co. of New York v. New Jersey, 431 U.S. 1 (1977) (invalidating New Jersey decision to shift bond revenues, which had originally been restricted in order to provide security to bond holders, to use in improving public transportation system; although state had legitimate interest in improving public transit, need for such improvements had been foreseeable and did not outweigh substantial private expectations, and thus violated the Contracts Clause). See generally Wegner, supra note 14, at 968-77.


102. See, e.g., Cheape v. Town of Chapel Hill, 320 N.C. 549, 359 S.E.2d 792 (1987) (setting forth local legislation authorizing Rosemary Square project, including provisions requiring that the cooperative venture contract assure that public facilities meet the needs of the Town and be constructed at a reasonable price). The clear standards provided in the legislation in this case were helpful in resolving litigation brought by disgruntled neighbors of the proposed project. The project itself ultimately foundered due to the changing real estate market and the financial difficulties of the developers, following local elections in which the continuation of the joint undertaking was a hotly-debated issue and in which the composition of the local town council changed in significant respects.
and welfare concerns will be addressed. Finally, ample remedies for noncompliance should be included in the interest of both parties, perhaps including clauses that appropriate performance bonds would be provided by the private partner and liquidated damages provisions would be applicable to the public partner. These remedies would ensure that government judgment remains free and independent in the event of noncompliance and that private expectations are fairly treated in the event of changing political tides.

VIII. CONCLUSION

This essay has attempted to advance the understanding of potential conflicts of interest raised by cooperative ventures. It has argued that competing concerns must be precisely identified and delineated before a determination can be made as to whether insurmountable conflicts exist. It has suggested that such competing concerns are evident with regard to several distinct aspects of cooperative ventures, and that each such aspect must be separately examined and analyzed if appropriate means for mediating or avoiding conflicts are to be developed. Finally, it has explored six specific aspects of cooperative ventures—government capacity, parties, process, purposes, government coinage, and noncompliance problems—to determine how the existing legal framework addresses potentially conflicting interests and how that legal framework can be supplemented or modified to be more effective. However, development of an adequate legal framework is only one part of the picture. The insight, integrity and ingenuity of local government officials, professional staffs, and the development community remain the key ingredients in ensuring that the great promise of cooperation without conflicts in public-private ventures becomes a reality.

103. Performance bonds provide a form of security that ensures that a third-party guarantor will provide necessary funds to complete obligations undertaken by a developer, should default on those obligations occur before the completion of the project.

104. Liquidated damages provisions could be used to ensure that the parties agree on the extent of damages that would be incurred in the event of a breach by the public party.