STANFORD LAW SCHOOL
ENVIRONMENTAL and NATURAL RESOURCES
LAW & POLICY PROGRAM
SLS Case No. 98-029
Revised 3/98

The Redevelopment of the New York Coliseum
A Negotiation Simulation

Teaching Note

I. Goals

There are several major goals of the negotiation. This case is extremely intricate and should reveal for students the complexity of land use decision-making. If students invest themselves in their roles and attempt to negotiate all of the various issues and constraints, they will discover that it can be very difficult to come to an amicable solution, especially in such a public forum. The primary goals are as follows

A. Substantive Legal Issues

The substantive legal issues in the case are raised by the Municipal Arts Society's lawsuit to stop the development. In order to effectively negotiate, each party must analyze the merits of what is a novel case. In the note, the students will begin to learn about contract zoning, conditional zoning and bonus (or incentive) zoning. Because this area of the law is often muddled by the courts, there is no simple answer to the question. Each student will develop his or her own interpretation and will base their negotiating position on that interpretation. This is likely to produce radically different outcomes across the groups. In the debrief, it will be important to explore how each party analyzed the merits of the MAS' legal claims and how that informed their negotiations.

B. Negotiation Skills

Learning how to negotiate with multiple parties is an essential skill of lawyering. For many students, this case will be their first introduction, as a participant, to a negotiation situation. The situation presented here provides an effective vehicle for such a discussion because it revolves primarily around analyzing the merits of a legal case, an activity most students should be comfortable with. The students should get copies of a short note with tips on negotiating in general and questions to ponder in preparation for this exercise in particular. The note introduces them to the concept of the Best Alternative to a Negotiated Agreement (BATNA). They are also encouraged to think broadly about how the interests of each of the parties are aligned and how they are at odds BEFORE the negotiation. Because the participants are unlikely to have much negotiation experience, it is important to have an experienced facilitator for each of the groups. The participants have been instructed about the range of possible facilitation styles from arbitration at one end to a more passive role at the other end. The debrief after the negotiation should focus on deconstructing the negotiation process in detail and the various techniques employed.

C. Teambuilding/ Class participation

By definition, the negotiation format of this case study will require participation by every member of the class. In addition, an effective debrief of the simulation will require each student to analyze the outcomes and processes before the entire class as the experiences within a role are compared across groups. Finally, natural coalitions will form among the negotiating parties, facilitating team-building and cooperative learning among the students.

D. Teach the importance of context to the resolution of legal issues

Another goal of the case is to teach students about the difficulty of analyzing legal issues in a vacuum. In this case, events that take place in the political realm, the arena of public opinion or the economics of the deal are often determinative. A legal analysis that ignores these other important inputs is incomplete.

E. Ethics

As in any negotiation, ethical issues are critical. A negotiation can take a very different course depending on whether there is trust between the parties or whether they are suspicious of each other. Misrepresentations in this case can provide a party with the upper hand. However, students will have to get comfortable with the long-term

reputational effects of such behavior. The case describes a past relationship between Zuckerman and the MAS in which each felt the other was dishonest. During the debrief, the teacher should explore how this history affected the current relationships.

II. Class Procedure

The best way to administer the case is to give the students the background and individual role materials to read one week before class. During that time they should become familiar with their roles and focus on the preparation questions. At the start of class, students will be divided into groups of four or five- one student for each role. In some of the groups, a fifth student will play the role of an observer and will be responsible for summarizing the group's work, which includes noting turning points in the negotiation and helping with the debrief. The night before, the observers should just be given the generic information and not any of the role-specific information. Before the negotiation begins, the parties will have 30 minutes to talk individually with any other party in the group. During that time, they should be encouraged to either start forming coalitions of parties with similar interests to try to take a hard line or to got the opposite way and start the process of compromise. Students should be encouraged to take the path they think will most likely maximize their interests. If all the parties in a group agree, they can go straight to the negotiating session with all parties present. During the debrief, discuss how the informal relationships between the parties during this discussion period affected the course of the formal negotiation.

The negotiating session should last an additional 45 minutes. Reiterate that students should aim to maximize their own interests. If they can do so by coming to an agreement that all four parties find acceptable, they should push for it. There are no restrictions as to the negotiating process or the kinds of additional agreements they can make. They can impose any additional side restrictions or grant and privileges within their power regardless of whether or not such restrictions are contemplated in the materials. In fact, creative problem solving is explicitly encouraged! Remind the students, though, that the results of the different groups will be compared at the end of the exercise. Any concessions made to get a deal done will be revealed and compared against their classmates in other group. Part of the evaluation of their performance in the negotiation should be based on the outcomes so they feel obligated to strike an agreement that truly benefits them instead of just coming to an agreement to end the exercise.

III. Dynamics

There should be an attainable solution, although depending on how hard a

position each group takes, they may be unable to work through all of the issues and reach a compromise. One thing that should be clear to the groups is that the MAS has a significant amount of leverage. Because all of the other parties require MAS to drop the lawsuit in order to reach a settlement, MAS can be the roadblock to a negotiation. The MAS representative should be able to use that power to negotiate the developer, city and state down to their minimal limits. However, the extent to which the MAS is willing to compromise may depend on how inclusive the other parties are in the period before the negotiation. It is made clear to all of the parties that the MAS is upset about not having been made an important part of the process. If the parties attempt to include the MAS from the beginning, it's representative may be more accommodating. It will be interesting to compare the results of the negotiating and to talk through the dynamics of the pre-negotiating period to see if it was determinative.

Issue/Role	**Mayor/ City**	**State**	**Developer (w/o Salomon)**	**MAS**	
Height	Don't Care	Prefer 950 feet	825-875 feet	750-825 SF	
Size (in SF)	Don't Care	Prefer 2.7M SF	2.25M SF	1.7-2.25M F	
Purchase Price	Don't Care	Want $455M; to be reduced if building shrinks	$379-$400M assuming 2.25M SF	Don't care	
Shadow Impact	Care about Appearance of a reduction	Don't care	Don't Care. Willing to Redesign	Must redesign the building	
Lawsuit	Must be dropped	Must be dropped	Must be dropped	Won't drop unless all other criteria are met. Expect to prevail and delay process.	
Salomon	Worth $50M in tax breaks to stay in	Don't Care	Will stay only for $150 M in tax breaks	Would rather they drop out	

The major issues presented in the negotiation are building height, building size (in square feet), the purchase price of the land, shadows produced by the building, settlement of MAS' lawsuit and whether Salomon Brothers stays in the development or not. As contemplated by the stated preferences of the group, negotiated compromises should include a building of about 825 feet in height, 2.25 million square feet, with a payment of $400 million from the developer to the MTA, a redesign of the structure with a new architect, MAS dropping the lawsuit and Salomon dropping out of the project.

IV. Class Discussion

Once the students return to the classroom, it is helpful to have one member of each group summarize their negotiated agreement (or lack thereof) on the board issue by issue. An effective means of discussing the key points is for the teacher to start with the observers of the five party groups since they will have the most unbiased opinions. After they speak, start with the most cooperative group and walk through each of the issues. Ask for comments as to how the group arrived at that settlement and how the power dynamics within the group worked.

A. Questions for the observersof the 5 party groups:

1) ***What was your perception of the group discussion? What went on in your discussion?***

2) ***What aspects of the discussion were helpful in terms of reducing the discord between the parties?***

3) ***What aspects of the discussion were least beneficial in terms of reducing discord?***

4) ***Did the facilitator make a proposal? Did the group accept it? Why or why not?***

5) ***Do the group members think the facilitator helped or not?***

B. Questions for the more cooperative groups:

1) ***How did you come to the solution?***

2) ***What other solutions were discussed?***

3) ***Who put the solutions on the table?***

4) ***Were those solutions even-handed or clearly biased?***

5) ***What aspects of the discussion between parties was particularly helpful?***

6) ***Did you think the solution was fair?***

C. Questions for non-cooperative groups:

1) ***Ask the parties what their opinions were of the other parties? Did they trust each other?***

2) ***There was clearly an area of overlap where an agreement could have been reached. Did they ever get close to it? What prevented them from getting to that area of agreement?***

3) ***What proposals were on the table?***

4) ***After hearing the groups that cooperated, what could or would you have done differently?***

D. To everyone:

1) ***What assumptions did the parties make about the likelihood of success of the lawsuit? How did it affect the negotiation?***

2) ***What were the dynamics during the informal negotiation***

pre-round? How did those dynamics affect the negotiation? What were the differences across groups?

3) ***How did the prior relationship between Zuckerman and the MAS affect the parties' attitudes towards each other?***

4) ***What other ethical issues were raised by the negotiation? Was there any misleading or dishonest behavior? Was that expected?***

5) ***Were there any side deals?***

6) ***Who took control of the meeting?***

V. What Actually Happened

Students will likely be interested in the final outcome of the development. The stock market crash of October, 1987 severely affected New York City's economy as the investment banks cut their payrolls. The real estate market also suffered as businesses cut back and consumers slowed their purchase of homes. Soon after the crash, Salomon dropped out of the development. In December of 1987, a New York State Supreme Court judge struck down the original agreement between Zuckerman, the MTA and the City, adopting the MAS' view of the transaction as a sale of zoning benefits. "Government may not place itself in the position of reaping a cash premium because one of its agencies bestows a zoning benefit on a developer," said the judge. If upheld on appeal, the decision would require the MTA to start the bidding process from the beginning.

Recognizing that he was in jeopardy of losing the site, Zuckerman offered a compromise: the building would be reduced to 2.2 million square feet, the purchase price dropped to $375 million and the height to 850 feet. He also offered to have a new architect, David Childs from Skidmore, Owings & Merrill, design a new structure with more input from the community, Childs was also a member of the Municipal Arts Society's Board of Directors. A month later, in January, 1988 an agreement was reached. The purchase price was reduced to $357 million, a $50 million tax savings was granted to the developer plus a $5 million partial reimbursement for costs incurred to date, no requirement that the Columbus Circle subway station be improved and a height of 850 feet with 2.25 million square feet. The Municipal Art Society dropped its lawsuit. In June, 1988, the new architect unveiled his new design which was acclaimed as having reduced the bulkiness of the building by building three slimmer towers instead of two. The slimmer towers, set further back on the site produced only marginal additional shadows on Central Park. The new compromise was approved again by the City

Planning Commission in March, 1989.

The project continued to be dogged by criticism, lawsuits and a faltering economy. In April, 1989, Zuckerman, the City and the MTA reached a third compromise on a smaller building. The project was reduced by another 100 feet and 170,000 square feet to 750 feet in height and 2.1 million square feet. The land purchase price was also reduced to $337 million, which in the depths of New York's real estate recession still seemed high to industry observers. In addition, the developer promised to provide 4,000 square feet of community meeting space, to pay for one-third of the $12 million subway station repairs, and to provide 120 single-room-occupancy units for the homeless near the project. In September on 1989 a lawsuit was filed by a different community group claiming that the project violated federal clean air standards because an appropriate Environmental Impact Study had never been undertaken. Federal District Court judge ruled in favor of the plaintiffs in July 1991 but was over-ruled by a Second Circuit Appellate Panel in December, 1991. As New York's real estate market continued to deteriorate during the legal challenges, Zuckerman tried to renegotiate the deal with the city and MTA several times. Boston Properties submitted its final proposal in November 1993 for a one million square foot office building of only 600 feet- the size of the adjacent Gulf & Western building. Then, on July 10, 1994, after signing an agreement on most of the major terms, the deal fell apart over some relatively minor technical issues. Some observers speculated that Zuckerman purposefully scuttled the deal because the purchase price had been predicated on a healthy real estate market. By 1994, the New York City real estate market was still in a severe recession.

In July of 1996, with New York's real estate markets on the rebound, the MTA once again solicited bids for the sale of the Coliseum site. To help blunt criticism of the developers and to maximize the sale price, the MTA required in its design guidelines that proposals include a 59 story tower and 2.1 million square feet of floor area, which is the maximum allowed under current zoning limits. In addition, set backs were required on upper floors to reduce the impact of shadows caused by the project. Nine developers submitted proposals in November, 1996. By July, 1997, a plan by Millennium Partners, a New York City developer, for a thousand-room Westin convention hotel, condominiums, substantial retail space, an entertainment center and a major health club had emerged as the front runner. Millennium's proposal was selected because of the large amount of public space included in its proposal, the high price it was reportedly willing to pay ($300 million), and its sole willingness to take on the risk of future litigation, unlike other developers. Having been stung once by litigation, the MTA was eager to receive its money up front, even if that meant accepting a lower purchase price. MTA officials

unofficially informed the press that they were ready to select Millennium's proposal.

New York Mayor Rudolph Guiliani, who was up for reelection that November and formally held veto power over the MTA's selection, publicly lambasted the proposal along familiar lines. He accused the MTA of considering only financial ramifications of the various proposals and ignoring design, use and conformity with the surrounding neighborhood. He threatened to veto the project and created a committee to review the architectural and programmatic elements of the nine bids. In addition, the mayor wanted to somehow leave his mark on the development so that he could claim some political credit for it. Guiliani, an opera buff, declared that Lincoln Center, located 10 blocks north, needed a new large opera house and that the Coliseum development would be the perfect place to house it. The Metropolitan Opera and Lincoln Center expressed no interest in a new opera house, but recognizing that they receive a significant amount of their funding from the city, agreed to take the new theater. Since then, the mayor has dropped his demands for an opera house and replaced them with a requirement for a permanent home for Jazz at Lincoln Center. The current status is that the MTA is loathe to reduce its price to compensate the developers for building the Mayor's jazz center but the Mayor is unlikely to back down from his demands that the building be altered in some significant way so that he can claim political credit. This high profile and important redevelopment effort has stalled once again.

VI. Confidential Individual Roles (Note: The Instructor should be sure to give individual participants the role-specific information for their role only.)

A. City- Mayor Ed Koch

If there is one thing that you are most worried will jeopardize your reelection campaign in 1989 it is the massive budget deficits the city has been running for the last several years. It is important to book the revenue from the sale of the Coliseum as soon as possible to help close the gap between revenues and expenses. Everyone realizes that such a payment is a one-time occurrence, but nonetheless, to say you balanced the budget would have significant political force. In addition, you want the additional annual tax revenues generated by the project (initially estimated at $100 million for the larger project) to commence as soon as possible. You must walk a fine line, though, because while you want to receive as much money as possible, you would much rather get some revenue than have the deal fall apart. You have heard that Salomon Brothers is

considering backing out of the deal because of the recent stock market crash. A pullout by Salomon would be devastating to you personally. You had touted the project as a way to preserve thousands of New York City jobs and to help solidify New York as a major world financial capital. If Salomon pulls out and decides to relocate to New Jersey or Connecticut, the public relations ramifications could be enormous. If Salomon pulls out of the Coliseum, but stays in Manhattan you are less concerned.

Also, remember that from day one you have sanctioned this deal and this development. Whether you now agree with the development or not, the public sees it as one of your projects. If you endorse concessions to help make the deal happen, it will look as if you backed down from your earlier position. You also don't want it to appear as if you didn't consider the shadow impact or effects on the surrounding neighborhood before you backed the project. Finally, you care immensely about your standing with the citizen groups opposing the project. These citizens are among the wealthiest in the city and are extremely active politically. Compromising with them could help you make inroads into this community before the election.

You don't really care about the ultimate size, height or design of the building. A compromise solution may involve changes along any of these dimensions, as long as Salomon stays in and the Municipal Art Society's lawsuit is dropped. You also want it to appear as if the shadow impact of the building has been reduced even if it actually stays roughly the same.

To summarize, it is in your interest to make a deal happen here. You want this property to be developed, especially if it can be done with the cooperation of all parties involved. You don't want the deal to fall through and you don't want it to happen with the Municipal Arts Society still feeling disenfranchised. One powerful weapon you hold that can help force the parties to compromise is the almost unlimited ability to give the developer tax breaks. You are hesitant to use them for fear of being charged with favoritism, but if the situation looks bleak they may be helpful. You can offer up to $50 million in annual real estate tax breaks to the developer to encourage a reduction in the size of the building or a redesign to reduce the shadow impact. Also, you could offer Salomon Brothers a reduction of $50 million in annual income taxes to stay in the project. The sum of all tax breaks provided can not exceed $50 million.

B. MTA

You want as much money as possible right now. However, you can't reveal that goal. You have to pretend that aesthetics, urban design and planning and neighborhood concerns are very important to you. In reality, you only care about design and use to the extent that you want the project to move forward and reducing community resistance will help ease the project's path. For all intents and purposes, though, you want to get your money and continue with your real business which is improving public transportation in the area. You want the building to remain as large as possible in order to maximize the sales proceeds. If the size of the building shrinks, you know that Zuckerman will claim that he can't pay the $455 million bid anymore. This is a legitimate claim, and you are willing to negotiate it with him but under no circumstances are you willing to accept less than $400 million. One major concern is that you have heard rumors that Salomon Brothers may drop out of the proposal due to the recent stock market crash. If Salomon withdraws, Zuckerman will have a difficult time replacing such a major tenant. If he is unable to, the project becomes more risky, harder to finance and less likely to proceed. The most probable outcome is that the building will shrink and, as a result, the purchase price paid for the site will fall. You don't really care if Salomon is a tenant in the building as long as a large a building as possible is built. In addition, you desperately want to win (or settle) the lawsuit that the Municipal Arts Society has filed because a loss there will reduce the ultimate purchase price. It is equally important to win the case in order to defend your practices in the court of public opinion. You want to prove that your actions were not illegal, improper or unethical. Also, if the MAS wins the lawsuit, you will be forced to return to square one and rebid the property, which will cause an additional delay of at least two years. As a part of any compromise, you must demand that the lawsuit be dropped. Finally, the MTA is concerned about the size of the developer's contribution to the refurbishment of the Columbus Circle Station which has been an embarrassment to the Authority for years. Only under exceptional circumstances will you allow Zuckerman to reduce his $25 million pledge to repair the station.

C. Developer

As the developer, you are completely exasperated. By this point, the project should have been fully constructed and operational. Instead, you have missed the biggest bull market in real estate since the 1920's. However, the deal is still worth doing. The risk is much higher but this is the kind of project, in size and prominent location, that

makes a developer's reputation. There will still probably be great profit opportunity as long as the economy holds up.

Salomon Brothers has already approached you and said that because of the delay and changing conditions within the bank brought on by the stock market crash, it is considering pulling out of the development. This didn't surprise you since Salomon seems to have been lukewarm on the project since soon after the deal was signed. With the recent stock market crash and expected job cuts at Salomon, they certainly don't need as much space as they had initially contracted for. Salomon would consider staying in if the project remained substantially unchanged in terms of size and if agreement is reached on the project in the next 30 days. Otherwise, they will likely exercise their right to withdraw, and pay you a $95 million fee for doing so. Your costs on the project to date are only $40 million. If they do pull out, the Mayor will likely be very upset. Salomon was planing on consolidating jobs from locations in Connecticut and New Jersey at the new headquarters. The Mayor had used this new job creation as a major selling point. You know that if Salomon pulls out of the development, they will simply find another home in Manhattan but if the Mayor thinks that that Salomon might move out of New York he will do almost anything to keep them.

At this point, you have three options:

Option 1: You could try to strike a deal quickly that keeps the project alive and keeps Salomon in. This will allow you to proceed immediately and to build a project of the size and scale that will help make a name for yourself as a real estate mogul. In addition, having a major tenant lined up for a significant chunk of the building dramatically reduces the risk of the development and makes the project easier to finance. Convincing Salomon to remain a partner is likely to require a significant economic inducement because of the deteriorating environment on Wall Street. You are not in a position to offer such inducements. If the mayor is willing to give Salomon $150 million in tax breaks, they will stay in, but for any amount lower than that Salomon will withdrawl. If you keep Salomon, however, you will be unable to compromise with the Municipal Arts Society on the building's size. As a result, you will incur the significant risk that you lose the pending lawsuit. If that happens, the MTA will be forced to return to square one and rebid the project from the start. You will walk away with nothing to show for your three years.

Option 2: You could let Salomon go, keep the $95 million which more than covers your costs to date and walk away. It would be frustrating to give up on a project that you have invested so much time and energy into. Also, you would probably be somewhat embarrassed to have to declare defeat to the Municipal Arts Society and other

neighborhood concerns. However, this is the only way to guarantee yourself a handsome profit on the deal. With the stock and real estate markets collapsing around you it is unclear that the project is as much of a financial home run as it was when you first proposed it.

Option 3: You can try to compromise with the City, state and community to keep the project going. If Salomon drops out, you will get its $95 million and be able to reduce the size of the project which should please the community groups. A key element of the compromise will be getting the state to reduce the purchase price of the property to reflect the smaller building. In urban areas, the price of land is usually quoted in terms of dollars per FAR foot- that is the purchase price divided by the number of square feet that can be built under the zoning restrictions. At the same price per FAR, a smaller building will command a smaller purchase price even on the same piece of land. You must make sure that the state thinks you are reducing the size of the building because of community opposition (a de facto restriction on building size akin to a zoning limit) and not because of Salomon dropping out.

You are willing to reduce the project as much as 450,000 square feet to 2.25 million square feet, but the bigger the building the more profitable, even if you are losing a major anchor tenant. You are willing to reduce the purchase price in a amount proportional to the reduction in size. Therefore, for a 2.25 million square foot project, you would pay $379 million, based on the original deal of $455 million for 2.7 million square feet. The MTA may not be willing to go that low, but for a 2.25 million square foot building you would be unwilling to pay more than $400 million. In addition, with a smaller building you will be reluctant to continue to spend $25 million renovating the subway entrance at Columbus Circle. The only reason for doing so initially was to get the zoning bonus. A smaller building would not justify such improvements.

Because the condominiums at the top of your building are the most valuable as a result of the unobstructed views, you are less willing to compromise on height than you are on overall size. Initially, one tower rose 925 feet and the other rose 750 feet. You are willing to reduce the taller of the two to 825 but to economically go below 875 requires extracting some substantial concessions from the opposition. In addition, because the community seems so unhappy with the structure, you are willing to select a new architect or design a new building with input from the community. You are unwilling to reduce the size below 2.25 million square feet, but a new structure could be designed with setbacks at the upper levels to reduce shadows or at least to be more aesthetically pleasing. In return for the concessions, though, you would require that the Municipal Arts Society drop its lawsuit so that work on the building can begin immediately. If the

MAS were to win its lawsuit, the entire contract would be invalidated and the MTA would be forced to rebid the property to the public. In addition to losing all of the costs already incurred, you would be forced to compete again for the property, which would delay the process by at least two years.

1. History with the MAS

Although the MAS is well respected within the community, you are hesitant to strike a deal with them. You have dealt with them once in the past. In the early eighties, during the planning for an office building on the East Side of Manhattan, the Municipal Arts Society protested your plan to link the tower to an adjacent historical structure. They felt that even though the city Office of Historical Preservation had approved your plan, that the incorporation of the facade into the glass tower would somehow degrade the historical significance of the building. After they threatened to launch a massive public protest and to file a lawsuit to block the project, you agreed to negotiate the design with them. Your architects developed a plan that would leave the adjacent historical structure standing and would use the air rights over the building to build a taller tower on your site. As a result, you still incorporated the interior of the historical townhouse, left it as a stand-alone building and got just as many square feet as you wanted by transferring air rights. The Municipal Arts Society agreed to the proposal and dropped their threats to sue and protest. A month later, you received notice of a lawsuit filed by an arm of the MAS to stop your project on the same grounds as they had threatened before. It seems as if there was pressure from some of the Society's more powerful members not to abide by the settlement agreement. Instead of informing you of the change in position or attempting to negotiate further, they simply filed a lawsuit. Even though this occurred 5 years ago and you had negotiated with a different team, the incident has left a bad taste in your mouth and you will be hesitant to trust them again. Any settlement you negotiate here must be written in such a way that it effectively precludes or at least penalizes the MAS if it reneges on the agreement.

D. Community Group

While you are opposed to the development, you recognize that some kind of large building will be built at the site. Your first goal is to ensure that whatever is built is as unintrusive as possible. You are upset that the project passed through the public approval process without any compromise or a rigorous analysis of the building's impact. Your task is made easier by the building's massive size and shadows and its ugliness. One of your co-workers said "they gave us a wonderful building to oppose." Because it is so

unattractive, it has been fairly easy to raise money for the organization and to attract community support. Your second goal is to delay the development as long as you can. You are well financed for a legal fight. You don't want to develop an obstructionist reputation, but as long as there are legitimate legal claims, you will pursue them. On the other hand, you want to be seen as a reasonable voice that developers and the City want to deal with.

1. Options for Compromise

On the Coliseum lawsuit, you feel that you have a novel but potentially winning claim. You are willing to drop the suit but only if the developer is willing to make major compromises on the building. The developer would have to drop the size of the building substantially- at least to the pre-zoning bonus size of 2.25 million square feet but you would prefer a 1.7 million square foot project. With Salomon Brothers rumored to be abandoning the project, Zuckerman has less need for the additional square feet and might even be happy to reduce the size (and risk) of the project. You would prefer that Salomon drop out. A major office tenant such as Salomon would create substantially more traffic than a residential or retail use. In addition, the presence of Salomon would radically change the character of the neighborhood from purely residential to somewhat commercial. Height is a major issue. At the very least you want the height reduced to 825 feet. However, you would like the building to be much shorter- closer to 750 feet, which is only 150 feet taller than the neighboring Gulf and Western Building. Also, Zuckerman would have to develop a new design that reduces the marginal shadow impacts of the new building to almost nothing. Finally, you would want the city and the MTA to agree that the additional payment that the developer makes to the city based on the zoning bonus is used entirely to improve infrastructure within the Columbus Circle area.

2. History with Zuckerman

An additional issue that will likely affect your willingness to settle even if it doesn't actually come up in the negotiation is that the MAS has dealt with Zuckerman in the past and had a bad experience with him. In the early eighties, during the planning for an office building on the East side of Manhattan, the former management team of MAS protested against Zuckerman's plan to link the tower to an adjacent historical structure. Zuckerman's amateur architects had concocted this plan to knock down the historically significant townhouse but leave only the facade. They would surround the beautiful facade with a reflective blue glass tower. The renderings looked nothing short of silly.

The plan had a Disney-esque, false, cartoonish feel about them. The New York Times architect critique slammed the building and everyone was talking about how ugly it was. The city Office of Historical Preservation (OHP), which under new management appointed by Koch had become much more pro-developer had approved the plan with almost no real critical review or required concessions. The MAS, furious about both the plan and its handling by OHP set up a meeting with Zuckerman to voice its complaints. Your predecessors let it slip that that the membership of the MAS was very concerned about the plan and that a public opposition campaign was likely. Also, even a baseless suit filed by the MAS would likely delay Zuckerman by several months. As a result, Zuckerman and his architect agreed to redesign the plan and separate the townhouse from the tower. You signed an agreement and considered the matter settled. Several weeks later you discovered that in the meantime Zuckerman's architects had planned to cantilevered part of the office tower over the townhouse. This was totally unacceptable and clearly violated the spirit of your agreement. Obviously, he was not trustworthy and instead of attempting to renegotiate with him, you simply filed the lawsuit you had originally intended on filing and began your public protests. Even though this occurred 5 years ago, the incident has left a bad taste in the organization's mouth and you will be hesitant to trust him again. Any settlement you negotiate here must be written in such a way that it effectively precludes or at least penalizes Zuckerman for reneging on the agreement.

VII. Note on Zoning Terms and Limitations

A. Introduction

Courts have had a difficult time determining when it is permissible or not permissible for governments to give special zoning treatment to a property or class of properties in return for some kind of restriction. The logic and reasoning in opinions in this area of the law are often murky and difficult to follow. Courts even within the same state can take the same set of facts and come to different conclusions. Below is an attempt to define the various types of zoning bargains. Recognize, however, that the way a court presents the facts is as important if not more important than the facts themselves in any particular case.

B. Conditional Zoning

Conditional zoning is generally considered to be a permissible governmental activity. Generally, conditional zoning arises when a private landowner commits to a governmental authority to limit the use of his property or dedicate a portion of it to the government. The governmental authority makes no promise to provide any zoning benefits or to treat the property in any particular way. The future exercise of the government's police power is not restricted in any way and the government has made no commitments to act.

Often, conditional zoning is upheld on the theory that by making concessions that reduce or eliminate the negative impact from certain uses, a landowner can justify a different land use classification than might otherwise be appropriate. To not allow such variations would be to unreasonable and arbitrary.

On the other hand, in some states even conditional zoning is found to be impermissible as spot zoning. Changing the zoning designation of a particular piece of property, regardless of the conditions placed on its use, treats it differently than surrounding lots. Any conditions must be imposed by the zoning ordinance itself, not by property-by-property bargaining.

C. Contract Zoning

Contract zoning is conditional zoning that has stepped over the legal boundary by restricting the governing agency's ability to use the police power. The agency has "bargained away the police power" by making a commitment to treat a property a certain way in the future. For example, it would be impermissible for a Zoning Board to permanently rezone a property commercial only on the condition that the owner record a covenant that runs with the land restricting the property from being used for anything other than a nursing home. Such an agreement would prevent the Board from later deciding that the property should be zoned residential. As such, the police power has been restricted. The difference between contract and conditional zoning, using this example, is that in permissible conditional zoning, the city makes no commitment to the commercial zoning. Under a legal arrangement, the city could change the zoning designation tomorrow if it desired.

Obviously, the distinction between contract and conditional zoning is tenuous,

especially in urban land use environments where projects often go through multiple review processes. The details of a particular project are negotiated over time with planning staffs, planning commissions and zoning boards. Specific restrictions can arise as imposed conditions of the zoning or as negotiated solutions proposed by the developer. From outside the process, however, it is impossible to distinguish.

C. Bonus or Incentive Zoning

Incentive zoning is a different mechanism for securing public benefits in return for allowing developments that would otherwise be prohibited. There are several differences, however, between incentive zoning and contract or conditional zoning. First, incentive zoning is authorized by a specific legislative act. It is a scheme that applies broadly to a class of properties or a type of property and is generally created well in advance of the proposal of any particular development plan. Second, incentive zoning provides a carrot to the developer, allowing him or her to profit by doing something otherwise prohibited. Conditional and contract zoning both operate by restricting the use of the property in return for approvals.

Often incentive zoning provides the developer with a Floor Area Ratio bonus (allowing the construction of larger buildings) in return for some amenity that improves the community. Such amenities can include the reconstruction of infrastructure around the site, the creation of low income housing in the neighborhood, slum rehabilitation, the creation of public spaces or the rehabilitation of an historic building.

D. The Issue Presented in the Municipal Arts Society Coliseum redevelopment case

In the Municipal Arts Society case, the Zoning resolution which authorized zoning bonuses in return for subway station rehabilitation specifically required that the station be located adjacent to the development. The subway station was adjacent to the Coliseum and Zuckerman had pledged $25 million to rebuild the station. The only remaining obstacle was that the granting of the bonus was at the discretion of the Planning Commission. Up to this point, the transactions are perfectly legal.
The novel wrinkle in this case was that in addition to the $25 million, the purchase contract provided that in the event that the zoning bonus wasn't granted, the purchase

price would be reduced by $57 million. Private buyers and sellers of land often make the purchase price of a piece of land contingent on the size of the building that can ultimately be built on the site. However, in this case, because the City received half of the proceeds of the sale, the payment for the zoning bonus was a $25 million rehabilitation of the adjacent subway station and an additional $28.5 million from the sale of the land. Contrary to the Zoning Resolution, the $28.5 million was not earmarked to go to the improvement of an adjacent subway station. In fact, it had been explicitly agreed by the City and the MTA that the proceeds would go towards improving subway service throughout the city and commuter rail service throughout the region.

The court could chose to look at this contract provision one of three ways: First, the City specifically violated the Zoning Resolution authorizing the granting of subway improvement bonuses by accepting money that was dedicated to the improvement of the entire mass transit system. The intent of the bonus had been to allow larger developments as long as investments were made that would specifically relieve the additional congestion to be caused by the more massive development.

Alternatively, and more nefariously, the City sold the zoning bonus for $28.5 million plus $25 million. The real purpose of this transaction was to maximize the city and state's revenue stream. The governments found a developer who was willing to pay top dollar. In addition, they had the leverage (in the ability to allow a larger development) to extract additional payments out of the developer. Essentially, the government agencies sold a zoning bonus for cash.

Finally, the court could look at the transaction as the developer and the government agencies did. Any time the City or State find themselves in the position of selling land they are placed in the dual position of selling an asset whose value they ultimately can determine. If a zoning bonus is available, it makes no sense for the City or State not to be able to capitalize on the value of that as any private landowner would. As long as a sufficient boundary was maintained between the officials who sold of the property and the officials on the City Planning Commission who determined whether or not the property merited the zoning bonus, there was no reason not to compensate the City for the increased value of its land, as any private landowner would be. If the City attempted to intervene in the granting of the bonuses, it would clearly be improper.

However, to deny the City the potential to profit from the increased value of its land is arbitrary and nonsensical. Also, the State took the lead in negotiating the sale of the land. It is irrelevant that the city stood to benefit from the proceeds of the sale.

There is no directly relevant precedent for the court in this case. As was described above, this is also a murky area of the law. To summarize, the question before the court is whether it is contract zoning when a city in its role as a seller of land receives a greater purchase price when a zoning bonus is granted.