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Structuring Real Estate Development Agreements With Municipalities

Leveraging Agreements for Long-Term Development Projects
and Addressing Land Use and Infrastructure Issues

THURSDAY, APRIL 30, 2015

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Structuring Real Estate Development Agreements With Municipalities

Presented by

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What is a development agreement?

- A development agreement is any contractual agreement between a municipality (city, town, village) or a county and the owner or developer of real property relating to the development of the property.
- Development agreements are a response to the *Avco Community Developers, Inc. v. South Coast Regional Commission* (553 P. 2d 546 (Cal. 1976)) decision that development rights do not vest until the issuance of a building permit even though developers may incur substantial costs prior to the issuance of the permit.

What does a Development Agreement govern?

- Depending on the statute, a development agreement may govern:
 - the future entitlement process (see e.g., *Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Sups*, 100 Cal.Rptr. 2d 740,748 (Cal. Ct. App. 2000));
 - the development of the real property;
 - the use of the property;
 - actual building construction; or
 - a single-purpose improvement (e.g., a toll road).

Purpose of a Development Agreement



- **“The purpose of a development agreement is to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations”** (*City of West Hollywood v. Beverly Towers*, 805 P.2d 329, 334 n. 6 (Cal. 1991)).

Development agreements address:

- **the lack of certainty in the entitlement process;**
- **Provide assurances to the applicant for a development project that upon approval of that project, the applicant may proceed with that project without the rules changing;**
- **Strengthen the public planning process and encourage private participation in comprehensive planning;**
- **Assure the provision of adequate public facilities and services without burdening the existing community.**

Land Owner/Developer Benefits

- **Vested Rights**
- **Money/Subsidy/Reimbursements**
- **Land**
- **Public Infrastructure**
- **Regulatory Considerations**

Benefits for Municipalities/Public Agencies

- **Promote economic development**
- **Provide certainty that public facilities and services will be provided while minimizing costs to existing residents.**
- **Obtain additional community benefits that are not bound by Constitutional nexus limitations.**
- **Assure consistency throughout long-term multi-phased projects in order to maintain efficient use of staff resources.**
- **Increased tax base**

Legal challenges originate from the unique framework of a private contract subject to governmental law principles:

- **Bargaining Away the Police Power**
- **Contracts Clause and Reserved Powers**
- **Protection of the General Welfare**
- **Constitutional Nexus Limitations**
- **Illegal Spot Zoning**

Development agreements are challenged by the nature of the contract as a private contract subject to principles of public and municipal law.

Consider whether it is legislative (Ca. Gov't Code 65867.5) or administrative (Haw. Rev. Stat. 46-131 (1993)).

Bargaining Away Police Power



- **Zoning Principle**: Municipality cannot contract away the police power (see e.g., *Carlino v. Whitpain Investors*, 453 A.2d 1385m 1388 (Pa 1982): “Individuals cannot, by contract, abridge police powers which protect the general welfare and public interest”).
- **Issue**: Did the local government bargain away its police power by entering into a contract in which it promises not change the land use regulations applicable to the property during the term of the contract?
- **Rule**: California court of appeals held that the statutory source of a city’s authority to discharge its annexation and sewage functions have the effect by necessary implication authorizing a city to contract for either purpose finding.
 - [A] city has authority to enter into contracts which enable it to carry out its necessary functions, and this applies to powers expressly conferred upon a municipality [and to] powers implied by necessity.” *Morrison Homes Corp. v. City of Pleasanton* 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (quoting *Carruth v. City of Madera*, 43 Cal. Rptr. 855, 860 (Cal. Ct. App. 1965)). See also, *Giger v. City of Omaha* (442 N.W.2d 182 (1989)).

- **Statutes generally authorize development agreements as a mechanism for avoiding Contracts Clause and Reserved Powers problems.**
- **Contracts Clause:**
 - **“No State shall...pass any...Law impairing the Obligation of Contracts” (U.S. CONST. art. I, 10, cl. 1.**
 - **Contracts Clause limitation cannot operate to eliminate “essential attributes of sovereign power” . . . Necessarily reserved by the States to safeguard the welfare of their citizens” (*United States Trust Co. v. New Jersey*, 431 U.S. 1, 17, n. 14 (1977)).**
 - **This requires a balancing of the exercise of the police power against the impairment resulting from the exercise of such police power (*United States Trust Co.*, as refined in *Allied Structural Steel Co. v. Spannus* (438 U.S., 234 (1978)).**

- **Many Development Agreement statutes (e.g., CA, HI, FLA, etc.) include (very similar) strong public purpose-serving language.**
 - **Development Agreement therefore must include trade-off's**
 - **Vested rights in exchange for infrastructure funding**
 - **Vested rights in exchange for minimum design standards**
 - **Fee lock-in for extra community benefits**

- **Development agreements are “voluntary” and can be a vehicle to impose other requirements which exceed Constitutional Nexus Limitations.**
 - **Consider potential ramifications of Supreme Court decision in *Koontz v. St. Johns River Water Management District* (133 S. Ct. 2586 (2013)).**
 - **Consider implications of imposing exactions through an agreement (see e.g., *Sterling v. City of Palo Alto* (2013) 57 Cal.4th 1193).**

Some states have authorized municipalities to enter into development agreements as a matter of statutory authority in order to legislatively solve concern regarding illegal contract zoning:

- **Texas - Municipalities have the authority to enter into development agreements as part of their authority to operate and perform municipal functions.**
- **California – Development Agreement Statute authorizes cities and counties to enter into development agreements with developers.**

Development Agreement Statutes provide for the freezing of applicable development regulations during the term of the agreement:

- **Many development agreement statutes provide that the rules, regulations and official policies governing permitted uses, density, design, improvement and construction are those in effect when the agreement is executed (see e.g., Cal. Gov't Code 65866).**
- **Courts have upheld agreements which froze zoning during the term of the contract (see e.g., *Meegan v. Village of Tinley Park*, 288 N.E.2d 423 (Ill. 1972).)**

A Development Agreement vests the right to develop a project based on the rules, regulations and policies in effect at the time of the effective date of the contract. But what if different rules apply to the surrounding area?

- Land use plans, policies and regulations can change in the meantime and not apply to the property covered by the development agreement.**
- This can result in the property being subject to different rules from those applied to the surrounding property.**

Brookside Meadows Novato General Plan case example.

- Property subject to a 1990 Development Agreement allowed for development of 70-unit hillside residential project.**
- Development Agreement had a 20-year term.**
- During the term, the City decided to change its general plan policies to allow only open space use of the property.**
- The developer required the City to process the remaining approvals for the 70-unit hillside project before the Development Agreement expired, even though the City’s policies changed.**

- **Other Legal Issues related to the private/public contract framework:**
 - **Infrastructure financing tools**
 - **Public bidding**
 - **Prevailing wage**

Real Estate Development Agreements with Municipalities

Statutory Scheme, Protections
Against Challenges, Community
Benefits Agreements

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Introduction

- State Law Authority For Development Agreements;
- Challenges;
- Negotiation of Development Agreements;
- Drafting Points;
- Community Benefits Agreements;
- Community Benefits Policy;
- Attributes of the Community Benefits Model;

State Law Authority for Development Agreements

General Statutes

State enabling statutes provide the authority for municipalities to enter into development agreements (statute may authorize the municipality or the governing body). Generally, the enabling statutes will also provide for the due process procedures which will include any notice, hearing or meeting requirements.

Also, The procedural rules must conform to any general notice and meeting requirements such as a sunshine statute.

State Law Authority for Development Agreements

Statutes may permit a “taking” of private property
for a redevelopment project

- Must provide clear notice and hearing requirements
- All procedural rules must conform to constitutional requirements (both US Constitution and State Constitution)
- Absolute compliance with all procedural rules specific to the redevelopment statute
- Absolute compliance with all general procedural rules

Challenges

Since development agreements represent a contract between a municipality and private developer it faces unique challenge opportunities:

- Subject to challenges associated to general jurisdictional contract law between the parties;
- If procedural rules are at issue (due process violation), standing is very broad;
- Any deviation from procedural rules can be challenged by any person with standing;
- Subject to challenges associated with many common restrictions on public agency contracts:
 - Restrictions on granting funds or lending credit;
 - Creation of unfunded debts
 - Retention of Police Power.

Protections against Challenges

- Ensure absolute compliance with all statutory requirements of redevelopment statute;
 - Approval requirements
 - Notice requirements
 - Hearing requirements
 - Meeting requirements

Protections against Challenges

- Ensure compliance with all general procedural requirements:
 - Absolute compliance with open public meetings statutes (sunshine laws)
 - Absolute compliance with statutes required for adopting ordinances in general

Protections against Challenges

- Adopt sound redevelopment plan that clearly addresses site specific concerns and establishes public benefit and municipal goals to be achieved (establishes road map for development agreement);
- Establish an outreach plan in order to garner community support for the proposed project;
- Negotiate Agreement based on goals and objectives of redevelopment plan;
- Draft agreement that conforms to public agency contract restrictions

Protections against Challenges

- Ensure that the development agreement does not violate legal restrictions commonly imposed upon public agencies (e.g. municipality retains police power, no violations on public funding restrictions)
- Develop a checklist that includes all aspects associated with the redevelopment project and the development agreement.

Community Benefits Agreement

A community benefits agreement is an agreement (CBA) between a developer and a community coalition that outlines specific details regarding the benefits from the development project to the community in exchange for the community support for the project.

The terms detailing the community benefits provided in the CBA may be incorporated into a development agreement between the developer and the municipality.

The CBA provides for communication between the developer and the community in the early stages of the project which decreases the developer's risk and maximizes the positive impact of the project on the community.

Community Benefits Agreement

- CBA has two primary advantages over the normal land use approval process since:
 1. Provides for constructive dialogue on how the project will meet the needs of the community; and
 2. The CBA is a private agreement that permits the community coalition and the developer to negotiate free from the rigid constraints involved in a land use hearing.

Community Benefits Policy

- CBA Policy is any policy adopted by municipality that requires community benefits on projects undertaken
- Examples include living wage requirements, affordable housing, and local hiring requirements.
- The CBA Policy may include application to multi-parcel development (particularly with government owned land)
- CBA Policy should have clear standards particularly if the project includes subsidies

Advantages of the Community Benefits Model

- Maximizes returns on municipality investment in development;
- Carefully constructed CBA policy can transform local economies;
- CBAs helps to generate public support for projects
- CBAs enhances accountability of developers
- Provides for public input which enhances local support of the project;
- CBA projects often enjoy faster and smoother project approval process.

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