DEVELOPMENT AGREEMENT MANUAL:

Collaboration in Pursuit of Community Interests

INSTITUTE *for* LOCAL
SELF GOVERNMENT

ABOUT THE INSTITUTE FOR LOCAL SELF GOVERNMENT

This publication is a special project of the Institute for Local Self Government, which is the nonprofit research arm of the League of California Cities. The Institute was founded in 1955 as an educational organization to promote and strengthen the processes of local self government. The Institute's mission is to serve as a source of independent research and information that supports and improves the development of public policy on behalf of California's communities and cities.

The Institute's work is concentrated in three areas:

- Land Use
- Fiscal Issues
- Public Confidence in Local Government

For more information about the Institute and its programs, please visit the Institute's website at www.ilsg.org.

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The Institute's work in the land use area is known as the Community Land Use Project. The goal of this effort is to assist local agencies in finding solutions to land and resource issues that appropriately balance private and public interests in community and property. The project focuses primarily on an area of the law known as "regulatory takings," but the project also addresses other issues that pose significant challenges for public agencies.

The Community Land Use Project is developing a number of resources—such as this publication—that are designed to help local officials implement their land use programs. The project is grateful for the generous support of the David and Lucile Packard Foundation and the League of California Cities.

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DEVELOPMENT AGREEMENT MANUAL:
COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS

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THIS PUBLICATION IS NO SUBSTITUTE FOR LEGAL ADVICE

This publication provides an overview of development agreement practices and at times provides summaries of the law. Readers should note that attorneys can, and do, disagree about many of the issues addressed in this *Development Agreement Manual*. Moreover, proposals to change the land use regulatory process are frequently introduced in the state Legislature and new court decisions can alter the practices a public agency should follow. Accordingly:

- **Public officials** should always consult with agency counsel when confronted with specific situations related to land use laws;
- **Agency counsel** using this publication as a resource should always read and update the authorities cited to ensure that their advice reflects a full examination of the current and relevant authorities; and
- **Members of the public and project proponents** reading this publication should consult with an attorney knowledgeable in the fields of land use and real property development law.

CONTENTS

1. INTRODUCTION 9

What are Development Agreements 9

In This Manual 9

2. THE ADVANTAGES AND DISADVANTAGES OF DEVELOPMENT AGREEMENTS 11

Advancing Land Use Policies 11

Potential Advantages: The Ability to Better Implement Planning Policies 12

Potential Disadvantages: May Promote Bad Planning 13

Imposing Conditions 14

Potential Advantages: More Encompassing Developer Requirements May be Enforced 15

Statutory and Constitutional Restrictions 15

Avoiding Constraints and Uncertainties 17

Potential Disadvantages: Unrealistic Expectations May Make Project Infeasible 18

Assuring Project Can Be Built 19

Potential Advantages: Fewer Surprises After Project Approval 20

Potential Disadvantages: Rules of Engagement Are Locked In 20

Summary 23

3. ACHIEVING LAND USE PLANNING OBJECTIVES THROUGH DEVELOPMENT AGREEMENTS 25

The Importance of Comprehensive Planning 25

The Role of Planning Policies in the Negotiation Process 26

Planning Policies as a Mechanism for Defining Project Proponent Expectations . 28

Uses of Development Agreements 28

Summary 28

4. THE NUTS AND BOLTS OF PROCESSING DEVELOPMENT AGREEMENTS 30

Purpose/Findings **31**

Application Process **31**

Public Hearings and Notice **32**

Development Agreements and Public Input **32**

Public Input on Consideration of the Proposed Agreement **34**

Notice Issues **35**

Decisionmaker Input on Development Agreements and Findings **36**

Involving the Planning Commission Early On **36**

Planning Commission Recommendation and Input on Findings **37**

Governing Body Hearing and Decision on the Development Agreement **38**

Action on the Agreement **39**

Recordation and Other Post-Approval Steps **39**

Amending the Development Agreement **40**

Development Agreements and Accountability **40**

Summary **41**

5. THE ART OF NEGOTIATING DEVELOPMENT AGREEMENTS **43**

Who is Going to Negotiate? **43**

Reaching Consensus **44**

Knowing Who is Across the Table **44**

Setting Expectations **44**

The Utility of Ground Rules **45**

Setting Priorities **46**

Have a Strategy **46**

Interest-Based Bargaining Techniques **47**

Summary **48**

6. THE SUBSTANCE OF A DEVELOPMENT AGREEMENT **49**

Who Will do the Drafting? **49**

When Should the Drafting Begin? **50**

Common Provisions In Development Agreements **50**

The Parties to the Agreement **50**

Use of Recitals **51**
Term **51**
Required Contents **52**
Public Benefits **53**
Addressing a Potential Police Power Challenge **53**
Recovery of Costs **55**
Which Regulations Are Frozen? **55**
"Milestone" Requirements **56**
Default, Remedies and Termination **56**
Non-Performance Issues **56**
State or Federal Laws **57**
Annual Review **57**
Enforcement **58**
Recordation **58**
Certificate of Satisfaction **58**
Indemnification and Hold Harmless Provision **58**
Amendment or Cancellation **59**
Assignment **59**
Successors **59**
Validity of Portions of the Agreement Severability **60**
Attorneys Fees **60**
Good Faith and Fair Dealing **60**
Signatures and Subordination **60**
Summary **61**

7. CONCLUSION **69**

FEEDBACK FORM **71**

PUBLICATION ORDER FORM **73**

INDEX **75**

INSTITUTE *for* LOCAL
SELF GOVERNMENT

Spring, 2002

Dear Reader:

On behalf of the Institute's board of directors, we are pleased to be able to offer this resource to assist you in understanding issues relating to development agreements.

A key Institute goal is to make a difference for local agencies and the communities they serve. Your feedback and input is a vital part of our efforts to assess the Institute's value and impact:

- Did this publication help you? How? Did it make a difference in how you approached a local issue or policy relating to development agreements?

- How can the publication be improved? Did we leave anything out? Do you disagree with something we said?

- Do you have examples of the kinds of issues we discuss that we might be able to include in future updates of this publication? Are you interested in contributing to the Institute's programs in general?

To assist you in providing feedback, we have provided a feedback form at the back of this publication. Your feedback is also welcome through our website at www.ilsg.org.

Thank you in advance for your assistance.

Very truly yours,

JoAnne Speers
Executive Director

Jerry Patterson
President, Board of Directors

INTRODUCTION

WHAT ARE DEVELOPMENT AGREEMENTS?

Development agreements are contracts negotiated between project proponents and public agencies that govern the land uses that may be allowed in a particular project.[1] Although subject to negotiation, allowable land uses must be consistent with the local planning policies formulated by the legislative body through its general plan, and consistent with any applicable specific plan. [2]

Neither the applicant nor the public agency is required to enter into a development agreement. When they do, the allowable land uses and other terms and conditions of approval are negotiated between the parties, subject to the public agencies' ultimate approval. While a development agreement must advance the agencies' local planning policies, it may also contain provisions that vary from otherwise applicable zoning standards and land use requirements.

The development agreement is essentially a planning tool that allows public agencies greater latitude to advance local planning policies, sometimes in new and creative ways. While a development agreement may be viewed as an alternative to the traditional development approval process, in practice it is commonly used in conjunction with it. It is not uncommon, for example, to see a project proponent apply for approval of a conditional use permit, zone change and development agreement for the same project.

What Are Development Agreements?..... 9

In This Manual 9

IN THIS MANUAL

As discussed in Chapter 2, both parties to the agreement receive benefits. In addition to the greater latitude afforded by the development agreement to advance local planning policies, the public agency has greater flexibility in imposing conditions and requirements on proposed projects,[3] while the applicant is afforded greater assurance that once the project is

[1] *See* Cal. Gov't Code § 65864 and following.

[2] *See* Cal. Gov't Code § 65867.5.

[3] *See* Cal. Gov't Code § 66000(b).

approved, it can be built.[4] There may be disadvantages associated with development agreements as well (see Chapter 2).

Because development agreements afford greater latitude, local agencies may want to take steps to ensure that local land use objectives are not diminished through the use of development agreements (see Chapter 3). Giving adequate thought to how the parties conduct negotiations can improve an agency's chances of accomplishing its objectives, as well as ensuring that reasonable expectations of both parties are achieved (see Chapter 4). Finally, understanding the "nuts and bolts" of processing development agreements, and the terms and provisions that are typically included, will ensure that procedural requirements are met and legal interests protected (Chapter 5).

In short, this manual provides a practical overview of the development agreement process, including:

- The advantages and disadvantages of using development agreements;
- The role development agreements can play in achieving local agency land use planning objectives;
- Procedural issues related to development agreements;
- Substantive provisions in development agreements; and
- The art of negotiating development agreements.

This manual reflects the variety of experiences that California public agencies and project proponents have had with development agreements, and builds upon the groundbreaking work of the original *Development Agreement Manual* written by Daniel Curtin and published in 1980 (supplemented in 1985) by the League of California Cities.

[4] *See* Cal. Gov't Code § 65865.4.

CHAPTER 2

THE ADVANTAGES AND DISADVANTAGES OF DEVELOPMENT AGREEMENTS

Development agreements have three defining characteristics:

- They allow greater latitude than other methods of approval to advance local land use policies in sometimes new and creative ways;
- They allow public agencies greater flexibility in imposing conditions and requirements on proposed projects; and
- They afford project proponents greater assurance that once approved, their projects can be built.

Advancing Land Use Policies 11

Imposing Conditions 14

Assuring Project Will Be Built 19

Summary 23

Although these characteristics can be advantageous, they can also present challenges. The purpose of this chapter is to discuss potential advantages and disadvantages of development agreements, from the perspective of both the public agency and project proponent.

ADVANCING LAND USE POLICIES

Because development agreements are themselves ordinances, they may supersede existing land use regulations as long as they are consistent with the general plan and any applicable specific plan.[5] As a result, they can afford the public agency and project proponent greater latitude concerning allowable land uses in a particular instance. However, there are potential advantages and disadvantages associated with having this flexibility.

[5] *See* Cal. Gov't Code § 65867.5.

POTENTIAL ADVANTAGES: THE ABILITY TO BETTER IMPLEMENT PLANNING POLICIES

From a planning perspective, development agreements have been instrumental in allowing creative and award-winning land use projects because the agreements can facilitate projects that would not have been allowed under otherwise applicable zoning regulations. The approval of creative land use concepts — and the construction of resulting projects — have advanced the state of urban planning, and allowed public agencies to better combat the visual and aesthetic impacts of "cookie-cutter" development.

In a similar vein, there are instances in which literal compliance with zoning ordinance provisions can thwart promotion of general plan policies. For example, the general plan may encourage the existence of open space, whereas the applicable zoning district does not allow sufficient density to accommodate the clustering of residential units necessary to accommodate an open space component.

There may also be instances in which the legislative body wishes to promote unwritten policies, such as those involving growth management. As long as the project is consistent with the local planning policies formulated by the legislative body through its general plan, the development agreement can provide greater latitude to incorporate land use concepts and components that are tailored specifically to address particular community concerns.

In each of these cases, the ability to vary from strict adherence to otherwise applicable zoning provisions can help ensure that the public agency's land use policies are being advanced, in sometimes new and innovative ways. These advantages are shared by the public agency and project proponent alike.

The following example shows how using a development agreement allows the parties to develop a unique land use project to advance the public agency's land use policies creatively and responsibly through the give-and-take of negotiations, as both parties address their respective needs and desires.

ILLUSTRATION — SPORTS WORLD

Mr. Dee, a developer, wishes to construct a project that will attract people traveling through Grassland on the way to Yosemite. Mr. Dee's "Sports World" will have a combination of attractive components, including a virtual sports center with a simulated ski slope, fairway and rock climb; a gas station; restaurant; hotel; and air strip. If the project succeeds, it will generate substantial profits. Mr. Dee wishes to have his project approved in a manner that will allow him flexibility with respect to both land use and design, so that he can select from a variety of tenants and react to changing market conditions without having to obtain further city approvals. Although the general plan recites the need to attract tourists destined for Yosemite, the zoning ordinance does not allow the particular combination of uses Mr. Dee is proposing.

Cautiously optimistic, the Grassland city council understands that Grassland will benefit from the added sales tax. But the council's concerns are numerous, and include the concern that Mr. Dee may not have the experience to complete the project; that the project may not "pencil out" financially; and that it may not attract the anticipated number of tourists. Finally, the council doesn't know what the project is — what it will look like, what uses will be allowed, and what design standards and architectural controls will govern it. The city council is also concerned about the potential impact of additional traffic on the adjacent freeway overpass.

Given that the zoning ordinance does not allow the proposed project, and the fact that there are a number of council concerns, the parties decide to negotiate a development agreement. As negotiations begin, Mr. Dee initially advocates conceptual development and design standards, while Grassland insists on elevations showing the exact location and type of use for every project component. As the negotiations proceed, the parties approve four alternative plans, each of which will allow Mr. Dee to react to a different market, while also allowing city council to understand what the project is.

In addition, the parties agree that some of the allowable uses for portions of the project will be more generically defined (for example, office/commercial), so that Mr. Dee can select from a number of tenants without first having to obtain additional city approvals. Once a tenant is selected, however, plans and elevations for the site must be submitted to Grassland for architectural review.

In the end, the parties reach agreement on all of the outstanding issues. Planning staff confirms that the final agreement is consistent with and advances the aims of the general plan and associated land use policies, and the project is approved and constructed.

While few things in life go as smoothly as the hypothetical approval of Sports World (above), the process of negotiating development agreements can allow the development of new and creative concepts, address associated issues and concerns unique to a particular project, and ensure adherence to local land use policies in conformance with the general plan.

POTENTIAL DISADVANTAGES: MAY PROMOTE BAD PLANNING

The latitude afforded the parties through use of a development agreement may also have potential disadvantages. For example, the agency's staff and legislative body may become convinced that, in exchange for the significant sales tax revenue the agency is likely to receive from a particular project, or in consideration of the fact that the project proponent is willing to construct a new city park or other significant public amenity, the agency should agree to compromise its planning standards in a manner that could reduce the quality of life in the community. The pressure to compromise may be especially great in the case of a "friendly developer" who has a popular presence in the community.

From the project proponent's perspective, it is possible that the legislative body may decide to disallow uses that would otherwise be allowed, and which are appropriate from a conventional planning perspective.

The suggestions that appear in this manual are intended to help avoid misusing development agreements. They are based on the premise that from the outset, the planning policies and objectives that have been embraced by the community through adoption of the general plan, and those included in any applicable specific plan, should be an integral part of the discussions and negotiations between the parties to a development agreement.

By identifying applicable planning policies early on, and continuing to use them as yardsticks in determining what land uses are appropriate, the parties should be able to avoid unacceptable compromises when negotiating development agreements.

IMPOSING CONDITIONS

Development agreements provide public agencies greater flexibility in imposing requirements on proposed development, such as development conditions, exactions and fees, because constraints and uncertainties that affect a local agency's ability to unilaterally impose such requirements do not apply to mutually agreed upon development agreement provisions.[6]

[6] *See* Cal. Gov't Code § 66000(b) (excluding "fees collected under development agreements" from the type of fee covered under the Mitigation Fee Act).

POTENTIAL ADVANTAGES: MORE ENCOMPASSING DEVELOPER REQUIREMENTS MAY BE ENFORCED

Public agencies face the following types of legal constraints and uncertainties that directly affect their ability to regulate development. Such constraints and uncertainties may be overcome, however, through the use of development agreements.

Voter Initiatives. During the past several decades, public agencies have been subjected to a number of fiscal setbacks that have impeded their ability to meet the service and infrastructure needs of their communities. A number of voter initiatives have limited public agencies' revenue raising authority, and questions associated with these initiatives have created legal uncertainties.

ERAF Shift. In 1992, in reaction to a serious deficit, the state enacted legislation that annually shifts some of the financial responsibility for funding education, pursuant to Proposition 98, to local public agencies. Through the intervening the years, the Educational Revenue Augmentation Fund (ERAF) has deprived local agencies of more than $30 billion.

Since the ERAF shift and passage of initiative measures limiting public agencies' general revenue sources, agencies have increasingly required project proponents to bear the costs to the community associated with development of their projects. Many agencies have adopted development impact fees, for example, that are designed to require project proponents to pay the costs of infrastructure, facilities and public services required to service their projects.

STATUTORY AND CONSTITUTIONAL RESTRICTIONS

Mitigation Fee Act. Commonly referred to as Assembly Bill (AB) 1600, the Mitigation Fee Act was enacted in 1987.[7] It closely regulates the adoption, levy and collection of development fees, including project-specific fees, imposed by local agencies. The act requires the agency to identify the purpose and use of the fee, and to explain why there is a reasonable relationship between the fee and the development.[8] Fees may not exceed the estimated reasonable cost of providing the service for which the fee is collected.[9] These requirements, among other things, have restricted the reach of development impact fees.

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[7] *See* Cal. Gov't Code § 66000 and following.

[8] *See* Cal. Gov't Code § 66001.

[9] *See* Cal. Gov't Code § 66005.

School Facility Fees. Local public agencies historically have been responsible for financing schools. In 1998, however, Senate Bill (SB) 50 significantly changed the extent to which agencies can require developers to contribute to the cost of building new schools.[10] SB 50 sets maximum amounts on such fees.[11] It also prohibits agencies from imposing other conditions on development to ensure the existence of adequate school facilities.[12]

Each of these constraints and uncertainties limits a local agency's ability to adequately condition new development in a manner that will cover the cost of associated infrastructure, facilities and public services.[13]

Regulatory Takings. The term "regulatory takings" derives from the Takings Clause of the Fifth Amendment to the United States Constitution, which states: "… nor shall private property be taken for public use, without just compensation."[14]

A "taking" is any confiscation of private property by a public agency. A "regulatory taking" is an indirect confiscation of private property through government regulation. If a court finds that a challenged regulation constitutes a taking, the public agency must compensate the owner of the property.

In recent years, takings litigation (and the threat of such litigation) has become a significant factor in land use decision-making. Increasingly, project proponents have invoked the Takings Clause in an effort to persuade public agencies to reduce their efforts to require developers to pay various costs associated with infrastructure and public services. Moreover, the courts have displayed a greater inclination to second-guess public officials' decisions—a departure from the traditional deference the courts have afforded decisions of local officials in the past.

The expanding scope of what constitutes a compensable taking is of concern to local agencies because of the potential for being assessed large monetary judgments in connection with the imposition of development requirements.

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[10] *See* Cal. Gov't Code § 65995(a).

[11] *See* Cal. Gov't Code § 65995(b).

[12] *See* Cal. Gov't Code § 65996(b).

[13] An overview of SB 50 is available from the League of California Cities. To obtain a copy, League members may contact the League and request "Strauss Opinion on SB 50, January 1999."

[14] To the same effect is article 1, section 19 of the California Constitution: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid . . .."

AVOIDING CONSTRAINTS AND UNCERTAINTIES

A public agency can avoid the types of constraints and uncertainties described above by entering into development agreements, since the project proponents agree to fees and requirements. Once the agreement is executed, the project proponent has generally waived his or her right to challenge the fairness or appropriateness of a particular requirement.

For example, the local agency can ask that the project proponent agree to finance public facilities and improvements without the specter of a regulatory takings claim. Similarly, the local agency may ask the project proponent to construct a new school without fear that school facility-fee limitations will be invoked. The project proponent must agree to such requirements, of course, before they may become enforceable.

The local agency may also bargain for completion of facilities and improvements at an earlier stage in the development process. This can result in needed infrastructure and facilities being put in place prior to or concurrently with the development, reducing the development's impact on existing facilities or services. Similarly, the project proponent may agree to pay additional fees to protect the agency and existing residents from any budgetary impacts associated with the development.

For facilities and infrastructure that are funded by multiple projects, the development agreement process can provide a mechanism to ensure that each project proponent pays its fair share in a timely manner.

The project-specificity of the development agreement process offers the public agency the opportunity to design more tailored implementation programs for its planning policies and objectives as they relate to the proposed project. The process of negotiating the agreement can help the agency identify and address issues relating to the project before the agency provides final approval. The agency may also require that the agreement include provisions dealing with identifiable contingencies related to the proposed project.

Finally, the fact that the development agreement is recorded provides a convenient mechanism for binding future owners to the requirements and obligations created by the agreement.[15]

[15] *See* Cal. Gov't Code § 65868.5 (" ... the burdens of the agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement").

LEGISLATIVE HISTORY OF DEVELOPMENT AGREEMENT LAW

The Development Agreement Law was enacted in 1979, in response to the *Avco Community Developers, Inc. v. South Coast Regional Commission* decision. *See* 17 Cal. 3d 785 (1976).

The *Avco* case involved a large development in Orange County, some of which was in the coastal zone. Under the newly enacted Coastal Act, the developer had to obtain a permit from the Coastal Commission unless it had obtained a building permit. The developer had secured a final subdivision map and a grading permit, but did not have a building permit. The developer had already spent a great deal of money on the site.

The court ruled that the developer's project was indeed subject to the Coastal Act's additional requirements and restrictions, reaffirming the rule that property owners acquire a vested right to complete construction only after they have performed substantial work and incurred substantial liabilities in good faith reliance on a permit issued by regulatory authorities. Only at that point can a project be completed free of new restrictions.

The result in *Avco* created great consternation in the development community, which lobbied the Legislature to create a mechanism that would allow developers to know earlier on in the process what requirements would apply to their projects. The development agreement law is a result of this effort.

FINANCIAL INCENTIVES MAY TRIGGER PREVAILING WAGE REQUIREMENT

Effective January 1, 2002, many development projects that involve loans, grants or other forms of assistance from local agencies are classified as "public works" projects.[16] As such, they fall under state requirements for payment of "prevailing wages."[17] These requirements establish minimum wage levels for public works projects that vary by location.[18] Application of prevailing wage requirements may lead to higher labor costs for development projects that receive certain forms of financial support or incentives from local agencies. Prevailing wages now may apply to otherwise private projects, where a public agency:

- Pays money or its equivalent to or on behalf of a developer[19;]
- Performs construction work in execution of the project;[20]
- Transfers assets at less then fair market value;[21]
- Waives or forgives fees, costs, rents, insurance or bond premiums, loans, or interest rates;[22]
- Makes available money to be repaid on a contingent basis;[23] or
- Grants credits applied against repayment obligations. [24]

Reimbursing a developer for costs that would normally be borne by the public does not trigger the prevailing wage requirement, nor does a subsidy that is de minimis in the context of the project.[25]

POTENTIAL DISADVANTAGES: UNREALISTIC EXPECTATIONS MAY MAKE PROJECT INFEASIBLE

From the project proponent's viewpoint, local agencies may expect more encompassing project requirements than are financially feasible. The myriad of issues developers face, including land availability, financing, market considerations and federal, state and local regulatory requirements can make it difficult to propose financially feasible development projects.

Against this back drop, some developers have abandoned development agreements altogether. This avoids the risk of discovering after months of negotiations that the local agency expects the developer to construct an

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[16] Cal. Lab. Code § 1720(b).

[17] Cal. Lab. Code §§ 1770; 1771.

[18] Cal. Lab. Code § 1771.

[19] Cal. Lab. Code § 1720(b).

[20] *Id*.

[21] *Id*.

[22] *Id*.

[23] *Id*.

[24] *Id*.

[25] Cal. Lab. Code § 1720(c).

expensive public amenity, such as a school or park, in consideration of the benefits the developer will receive from a development agreement.

As further discussed in Chapter 4, one way of avoiding this type of problem is to discuss the parties' expectations at the outset, as a prelude to beginning negotiations. That allows each party to assess early on whether a development agreement will meet each party's needs.

ASSURING PROJECT CAN BE BUILT

One of the challenges project proponents face in the usual regulatory process is that the project must meet the regulatory standards in effect at each stage of the development process. This can result in a proposed project being subject to new regulations even after it has received final approval, and even if the new regulations preclude or prohibit construction of some or all of the project.

As a result, it can be difficult for a project proponent to know at the outset what criteria the project must meet. It is not until the proponent's right to complete the project has "vested," that he or she has the right to build the project without concern that new regulations may apply.

Unforeseen regulatory changes (including those adopted by the voters through the initiative process) can add time and expense to a proposed project. Moreover, a proponent of a large project must typically invest substantial amounts of time and money in the project before he or she receives "vested rights" to complete the project as approved.

WHEN DOES ONE ACQUIRE A "VESTED" RIGHT TO PROCEED WITH DEVELOPMENT, FREE FROM ADDITIONAL REGULATORY REQUIREMENTS?

Ordinarily, a project proponent acquires a vested right to complete construction when the proponent has:

- Obtained all permits necessary for the proposed structure;
- Performed substantial work in good faith reliance upon those approvals; and
- Incurred substantial liabilities in good faith reliance upon those approvals. The proponent must, of course, complete the work in accordance with the terms of the permit.[26]

A project proponent cannot acquire a vested right under an invalid building permit, even if substantial expenditures have been made in good faith.[26] The rights that vest through reliance on the building or other permit cannot be greater than those specifically granted by the permit itself.[26] For example, perfection of a vested right for one phase of a multiphase project does not create a vested right to build subsequent phases.

[26] *City of San Jose v. State of California*, 45 Cal. App. 4th 1802, 53 Cal. Rptr. 2d 521 (6th Dist. 1996) *rev. denied* (1996).

On the other hand, a project proponent who is a party to a development agreement receives "vested rights" to complete the project as approved. This occurs immediately upon execution of the agreement, by virtue of the fact that a development agreement "freezes" applicable local land use regulations with respect to the proposed project.[27]

POTENTIAL ADVANTAGES: FEWER SURPRISES AFTER PROJECT APPROVAL

From a project proponent's perspective, the added certainty associated with receiving "vested rights" to construct a proposed project without concern that new regulations may apply can be invaluable. It may be especially important to a project proponent worried about a potential ballot measure or a change in the governing body majority that could adversely affect the project. While development agreements are subject to voter referenda,[28] an opponent would have to file his or her submittal within 30 days after final approval of the development agreement in order to preserve the right to put the approval of the agreement on the ballot.[29] Once the 30-day period is over, the project proponent can safely assume that the project will not be affected by future ballot measures.

There are limits to the degree of assurance that a public agency can offer. For example, additional conditions may be imposed on the project if further environmental analysis is needed under the California Environmental Quality Act (CEQA). Also, a development agreement cannot prevent the application of state or federal regulations, as further discussed below.[30]

Another advantage from the project proponent's perspective is limiting the potential for regulatory change. This can be helpful when the proponent seeks financing. It can also be reassuring with respect to large projects that have significant upfront costs.

POTENTIAL DISADVANTAGES: RULES OF ENGAGEMENT ARE LOCKED IN

A development agreement can limit the public agency's ability to respond to a changing regulatory environment, precisely because it locks in the

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[27] *See* Cal. Gov't Code § 65865.4.

[28] *See* Cal. Gov't Code § 65867.5.

[29] *See* Cal. Elect Code § 9237.

[30] *See* Cal. Gov't Code § 65869.5.

regulatory requirements in effect at the time the agreement is approved. If the agency's planning regulations are in need of review or updating, the agency may be subject to criticism if the conditions imposed by the agreement do not sufficiently protect the community's interests. In the absence of a development agreement, and should the need arise, the agency retains the prerogative to change the rules relating to the project, even if that change makes the intended use unlawful.

A development agreement also places a premium on an agency being able at the outset to identify all of the issues presented by a project. Since changes to the agreement require mutual assent, it may be difficult to add conditions or requirements later, should the agency identify the need to do so after the agreement is entered into.

From the proponent's perspective, the project's obligations are also locked in by the agreement. Some elements of market changes—including changes in the project's economics—may not be reflected in the agreement. This can put a premium on a project proponent's ability to anticipate areas of potential change and then negotiate the flexibility to respond to those changes (for example, by negotiating a range of future uses, based on what the market will bear at the time of build out).

Another possible disadvantage is the degree of protection from regulatory change, which is limited to local regulations. The development agreement law specifically provides that a development agreement must be modified if necessary to comply with subsequently enacted state or federal law.[31] The new state or federal law may prevent or preclude compliance with the provisions of the development agreement. The issue for the project proponent is whether some protection from regulatory change is better than none at all.

[31] *See* Cal. Gov't Code § 65869.5.

COMPARISON OF TENTATIVE MAPS, VESTING TENTATIVE MAPS AND DEVELOPMENT AGREEMENTS

Development agreements are one planning tool. This chart provides a side-by-side comparison of how development agreements compare with tentative subdivision maps and vesting tentative maps.

	Tentative Maps	Vesting Tentative Maps	Development Agreements
Description	**Tentative Subdivision Map (or Tentative Map)** – The project proponent's initial proposal for subdividing land, which is the local agency's main opportunity to set conditions on the proposed subdivision.	The point in time when a project proponent has the right to proceed without being subject to changes in land use regulations, typically when the last permit necessary for construction of a project (usually a building permit) has been issued and substantial expenditures have been incurred in reliance on the permit. The concept of vested rights is one of the reasons it is important that concerned citizens make their views known as early as possible in the land use decision making process.	A legislatively-approved contract between a jurisdiction and a person having legal or equitable interest in real property within the jurisdiction (California Government Code Section 65865 and following) that typically "freezes" certain rules, regulations, and policies applicable to a project for a specified period of time, usually in exchange for certain concessions by the project proponent.
Application of Conflicting Local Rules in Future	Yes	Only if necessary to prevent situation dangerous to health and safety	Depends on language in agreement
When Requirements Are Locked In/Not Subject to Change	No vested right even at the final map stage Police power requirements can be changed at each stage of the permitting process Vested right conferred when building permits issued and substantial work completed in reliance on those permits	When application is "complete"	At execution of agreement, unless agreement provides otherwise
Fees and Dedications	Subject to statutory and constitutional restrictions	Subject to statutory and constitutional restrictions	Subject to mutual agreement
Phasing	Allowed	Allowed	Allowed
Effect on Other Agencies' Regulatory Prerogatives	Does not limit	Does not limit	Does not limit
Local Agency Procedures	Agency must adopt	Local agencies may adopt procedures; otherwise, Map Act governs	Local agencies must adopt procedures upon request of applicant
Processing	Mandatory — Local agencies must accept application and process it within statutory time frames	Mandatory — Local agencies must accept application and process it within statutory time frames	Discretionary — Local agencies may chose to use or not
Duration	Specified by statute, which includes both automatic and discretionary extensions	Specified by statute, which includes both automatic and discretionary extensions	Annual review required. County development agreements are time-limited if land is annexed or incorporated (Government Code section 65865.3)
Voter Review	No — approval is an adjudicatory act not subject to referenda	No — approval is an adjudicatory act not subject to referenda	Yes — approval is a legislative act subject to referenda
Time Limit for Challenging	90 day statute of limitations	90 day statute of limitations	90 day statute of limitations
Governing Statutes	Government Code sections 66410 to 66499.37	Government Code sections 66498.1 to 66498.9	Government Code sections 65864 to 65869.5

SUMMARY

This chapter has examined the advantages of the three defining characteristics of development agreements—greater regulatory latitude, flexibility and assurance for project proponents. But these characteristics can also present obstacles for the parties negotiating a development agreement.

Some developers may continue avoiding the use of development agreements because of the potential for expensive project requirements. Some local agency staff may avoid development agreements because of the limitations that development agreements impose on an agency's ability to respond to a changing regulatory environment. Nevertheless, the latitude afforded by development agreements to advance local agencies' planning objectives--in sometimes new and innovative ways--makes the development agreement a useful and viable tool in service to the community in a number of different applications.

For both parties, a development agreement can involve a great deal of time and energy to negotiate and implement. Accordingly, it is important at the outset to carefully evaluate the advantages and disadvantages of using a development agreement in each specific instance.

CHAPTER 3

ACHIEVING LAND USE PLANNING OBJECTIVES THROUGH DEVELOPMENT AGREEMENTS

Development agreements can be used for a wide range of projects, from large mixed-use developments to smaller projects. Moreover, the scope of a development agreement can vary according to the needs of the project in question. Although a development agreement can be comprehensive, detailing every aspect of the project, it can also focus on particular aspects of a project.

This chapter discusses the role that development agreements can play in a local agency's overall planning process. Fundamentally, development agreements are one tool in the local agency's toolbox for achieving the community's long-term planning and development goals.

The Importance of Comprehensive Planning 25

Uses of Development Agreements..... 28

Summary 28

THE IMPORTANCE OF COMPREHENSIVE PLANNING

In authorizing the use of development agreements, the Legislature emphasized that development agreements are intended to serve as a tool to *strengthen* a community's commitment to comprehensive land use planning.[32] The concept behind the use of development agreements is to encourage communities to think ahead, in a comprehensive manner, about the impacts of development within their jurisdiction and the steps necessary to make that development a win-win proposition for both the project proponents and the community.

[32] *See* Cal. Gov't Code § 65864(a) ("The Legislature finds and declares that: (a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and *discourage investment in and commitment to comprehensive planning* which would make maximum efficient utilization of resources at the least economic cost to the public.") (emphasis added).

WHAT DOES A DEVELOPMENT AGREEMENT COVER?

- Permitted uses of the property;
- Density or intensity of use;
- Maximum height and size of proposed buildings;
- Provisions for reservation or dedication of land for public purposes;
- Terms and conditions relating to financing of necessary public improvements, as well as provisions for subsequent reimbursement for that financing, as appropriate;
- Timeframes for commencement and completion of construction, or any phases of construction;
- Subsequent discretionary approval provisions, as long as those approvals do not prevent development of the project as described in the agreement; and
- The duration of the agreement.

A development agreement generally allows a project proponent to proceed with a project that meets the "policies, rules and regulations" in effect at the time the development agreement is approved.[33] A development agreement may also supercede an agency's existing policies, rules and regulations, as long as the project is consistent with the general plan and any applicable specific plan.[34]

THE ROLE OF PLANNING POLICIES IN THE NEGOTIATION PROCESS

A helpful starting point is having well-understood planning regulations that reflect the community's current and anticipated needs. Such policies, when adhered to, facilitate the negotiation process, ensuring that a proposed development agreement reflects the local governing body's policies. This approach can also address a source of decisionmaker discomfort with the development agreement process, because even though the governing body ultimately approves a development agreement, it also needs a mechanism to provide direction to the negotiation process. Planning policies meet this need.

Typically in a negotiation process, decisionmakers provide their negotiators with parameters on key bargaining issues. It is important that the parameters remain confidential, so the other side does not know how much leeway the negotiators have.

Confidentiality is difficult in the context of development agreement negotiations because the state's open meeting laws[35] do not generally allow an exception for public agency negotiators on development agreements to receive direction from the governing body. There may be aspects of a development agreement—for example, the price and terms of payment for acquisition of property—that can be discussed in closed session. However, only those issues may be discussed in closed session—not the development agreement in general.

The agency's planning policies, therefore, may serve as the negotiators' key source of direction in this circumstance. In addition, a local agency may want to consider directing its staff to adopt a different type of negotiating style, where identification of "interests" replaces the need to establish outer

[33] *See* Cal. Gov't Code § 65864(b) ("The Legislature finds and declares that: … (b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.") (emphasis added). *See also* Cal. Gov't Code § 65866.

[34] *See* Cal. Gov't Code § 65867.5.

[35] *See generally* Cal. Gov't Code § 54950 and following (The Ralph M. Brown Act).

"positions" or parameters (see discussion in Chapter 4). If an agency uses an interest-based negotiating strategy, there are fewer strategic disadvantages associated with a governing body's trying to provide direction in open session.

Well-conceived and up-to-date planning policies can also assist local agencies to avoid having to ask the staff to negotiate in a vacuum, with little or no immediate direction or feedback from decisionmakers. When the agreement is before the legislative body for final approval, it may be difficult for the body to modify aspects of the agreement without, in effect, renegotiating the agreement from the dais to change the terms that the staff negotiated.

DEVELOPMENT AGREEMENTS AND ANNEXATIONS/INCORPORATIONS

The development agreement law provides that cities generally inherit development agreements negotiated by counties for newly incorporated or newly annexed areas. *See* Cal. Gov't Code § 65865.3(a) (for incorporations, the effective date of the incorporation must be after January 1, 1987). The development agreement must meet the following requirements, however:

- The application for the agreement must have been submitted before the first signature was placed on the petition for annexation or incorporation (or resolution initiating such proceedings);
- The agreement must have been entered into prior to the incorporation/annexation election (or prior to the date on which the conducting authority ordered the annexation); and
- The annexation is initiated by the city (or, if initiated by someone else, the city does not adopt written findings that the development agreement is injurious to the health, safety or welfare of city residents. *See* Cal. Gov't Code § 65865.3(c) and (d).

The duration of such inherited development agreements is the duration of the agreement or eight years, whichever is shorter. *See* Cal. Gov't Code § 65865.3(a).

The city may modify or suspend the development agreement's provisions if the city determines that failure to do so would place the residents of the territory subject to the development agreement (or the residents of the city in general — or both) in a condition dangerous to their health or safety (or both). *See* Cal. Gov't Code § 65865.3(a).

However, the development agreement law also authorizes cities to enter into development agreements for unincorporated territory within their sphere of influence. *See* Cal. Gov't Code § 65865(b). The agreement does not become operative until the annexation occurs. *See* Cal. Gov't Code § 65865(b). The timeframe for the annexation must be specified in the agreement and the annexation must occur within that timeframe. *See* Cal. Gov't Code § 65865(b). Extensions are possible, however. *See* Cal. Gov't Code § 65865(b).

PLANNING POLICIES AS A MECHANISM FOR DEFINING PROJECT PROPONENT EXPECTATIONS

An agency's planning documents, including its local development agreement procedures, can provide an important source of guidance for project proponents going into negotiations. By stating in the procedures that the local agency is committed to using development agreements as a tool to promote the community's needs, the agency makes clear that it expects to receive greater community benefits than it could otherwise achieve through the land use regulatory process. This level of understanding can be helpful in setting the proper tone, so both parties have realistic expectations going into the negotiations.

Such an approach also may be helpful in responding to community concerns that the community has not received adequate benefits in the past from development agreements. These concerns may arise, especially when the project proponent has an ongoing relationship with the public agency.

DEVELOPMENT AGREEMENTS AND TRANSIT

Development agreements may be used to implement demonstration programs that test the effectiveness of increasing the density of residential development in close proximity to mass transit stations.[36] Local agencies may also require developers to enter into development agreements to implement density-bonus programs in transit village plans[37] or within a half-mile radius of mass transit stations.[38]

USES OF DEVELOPMENT AGREEMENTS

Local government agencies have successfully used development agreements to facilitate:

- School, park and other facility funding;
- Affordable housing projects;
- Large-scale mixed use projects; and
- Multi-phase commercial projects.

Development agreements can also be a vehicle for addressing concerns among developers about perceived adverse impacts of neighboring projects.

SUMMARY

Used judiciously, development agreements are a useful tool for achieving an agency's land use planning objectives. Well-articulated planning policies

[36] Cal. Gov't Code § 14045.

[37] Cal. Gov't Code §§ 65460.10, 65460.2.

[38] Cal. Gov't Code § 65913.5

may also provide important policy direction to staff in negotiating such agreements.

THE NUTS AND BOLTS OF PROCESSING DEVELOPMENT AGREEMENTS

From a local agency standpoint, the development agreement process begins with the local agency's procedures for development agreements. The development agreement law contemplates the adoption of such procedures by local government agencies.[39] If there are none, some must be adopted upon the request of an applicant.[40] Sample procedures are available online at www.ilsg.org/devtagmt and typically include the following:

- A statement of purpose/findings concerning the public benefits of development agreements;
- Application requirements;
- Notice and hearing procedures;
- Planning commission and governing body review;
- Recordation;
- Amendment and termination; and
- Periodic review.

Purpose/Findings 31

Application Process..... 31

Public Hearings and Notice 32

Decisionmaker Input on Development Agreement and Findings 36

Recordation and Other Post-Approval Steps..... 39

Amendment 40

Development Agreements and Accountability 40

Summary 41

[39] *See* Cal. Gov't Code § 65865(b) ("Every city, county, or city and county, shall, upon request of an applicant, by resolution or ordinance, establish procedures and requirements for the consideration of development agreements …").

[40] *See* Cal. Gov't Code § 65865(b).

WHO MAY INITIATE THE DEVELOPMENT AGREEMENT PROCESS?

An owner (with legal or equitable title) must apply in accordance with the local agency's procedures. *See* Cal. Gov't Code § 65865(b).

See also National Parks and Conservation Assn v. County of Riverside, 42 Cal. App. 4th 1505 (1996).

Such procedures may be adopted by ordinance or resolution.[41] The development agreement law allows local agencies to recover the direct costs associated with adopting procedures for the agencies' consideration of development agreements.[42]

This chapter discusses procedures and issues an agency may include in its development agreement procedures resolution or ordinance, as well as the general steps in the process of approving a development agreement.

PURPOSE/FINDINGS

The agency's development agreement procedures provide an opportunity for the local agency to state its goal for considering development agreement requests, which is "…to promote the community's needs and receive greater community benefits than otherwise can be achieved through the land use regulatory process." A goal statement similar to this example can be helpful in setting the tone for negotiations, so that both parties have realistic expectations going into the negotiations.

It is also helpful to refer to the development agreement statute, California Government Code section 65864 and following.

APPLICATION PROCESS

ORDINANCE OR RESOLUTION?

Development agreements are authorized both ways: by ordinance and resolution. Some public agency attorneys recommend resolutions as the more flexible form of authorization.

An application form specifying the type of information an agency needs to process the development agreement request is an efficient way of ensuring that the agency receives all of the information it needs in a timely manner. Some development procedures authorize the agency's planning director to develop a form application for development agreements. A sample form is also available online at www.ilsg.org/devtagmt.

It can also be helpful for an agency's development agreement procedures to authorize the local agency's attorney to develop a form agreement. Having a readily available form agreement saves staff time in reviewing development agreements; it also provides

[41] *See* Cal. Gov't Code § 65865(b).

[42] *See* Cal. Gov't Code § 65865(d).

greater assurance that the agreement will cover all of the agency's needs. Chapter 6 discusses the content of development agreements. Sample forms are available online at www.ilsg.org/devtagmt.

Some public agencies charge fees to process applications. A local agency's development agreement procedures can specify those fees or cross reference a fee schedule that includes this particular type of fee.[43]

The local agency will also need to ensure that the environmental analysis requirements under the California Environmental Quality Act (CEQA) have been satisfied.[44]

PROCESSING DEVELOPMENT AGREEMENTS WITH OTHER APPROVALS

Development agreements may be processed with other land use approvals for the same project, such as a conditional use permit or subdivision map, in which case the parties should consider whether it is advantageous to seek simultaneous approvals, or have one approval follow another.

PUBLIC HEARINGS AND NOTICE

Another important aspect of development agreements is the role of public input. The development agreement law requires a noticed public hearing by both the planning agency and by the local agency's governing body before a development agreement is approved.[45]

DEVELOPMENT AGREEMENTS AND PUBLIC INPUT

Both the project proponent and the local agency have an interest in satisfying community concerns with respect to a development agreement, insofar as development agreements are subject to repeal by voter referendum.[46] In fact, a development agreement cannot legally take effect until after the 30-day period for such a referendum expires.[47]

There is also a 90-day statute of limitations to challenge the adoption or amendments of any development agreement approved after January 1, 1996.[48]

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[43] *See generally* Cal. Gov't Code § 66000(b) (excluding "fees collected under development agreements" from the type of fee covered under the Mitigation Fee Act) and following.

[44] *See generally* Cal. Pub. Res. Code § 21000 and following.

[45] *See* Cal. Gov't Code § 65867.

[46] *See* Cal. Gov't Code § 65867.5.

[47] *See* Cal. Elect. Code § 9141; *Referendum Committee v. City of Hermosa Beach*, 184 Cal. App. 3d 152 (1986); *Midway Orchards v. County of Butte*, 220 Cal. App. 3d 765 (1990).

[48] *See* Cal. Gov't Code § 65009.

As a practical matter, though, it may be advisable to include stakeholders (interested parties such as community groups, business leaders and others interested in the community's development) in the development agreement process. While it may not be practical to allow stakeholders to attend negotiations, it may be possible to consult with them ahead of time, or perhaps on a "meet and confer" basis as negotiations proceed.

ILLUSTRATION — TAXCO

Destination City is looking for a way to increase its general fund. Taxco is a large retail outlet that generates more than $500,000 worth of sales tax revenue each year for other cities in which it is located. Taxco plans to build a store in the vicinity.

Public agency senior staff meet with Taxco senior staff to discuss the benefits of locating in Destination City. Aware that a neighboring city would also like a Taxco retail outlet, these meetings are kept confidential. Senior staff suggest ways that Destination City may be able to write down land costs, waive development fees and otherwise provide incentives for Taxco to locate in their city. Eighteen months later, a deal is struck and the terms are commemorated in a development agreement, which is to be reviewed by the planning commission and approved by city council.

At this point, Bill Chamber, president of the Downtown Merchants Association, sees the public hearing notice and learns for the first time that the city is considering agreeing to a variety of incentives to entice Taxco to locate in Destination City. Mr. Chamber calls a meeting of the merchants.

During the meeting, merchants express their concerns that the city should not entice Taxco to locate in the city; it is not fair for the city to agree to monetary incentives not offered to other businesses; the city ought to be concerned about the very real threat that Taxco will run other merchants out of town; and the city should focus on business retention rather than attracting new businesses. The group decides to formally oppose approval of the development agreement. They also discuss initiating a recall of the entire city council, for secretly acting against the business community's interests. Unlike the Sports World illustration, these parties do not live happily ever after.

As the following example illustrates, the process of negotiating a development agreement is susceptible to "community backlash" in instances when community members find out after the fact, that public agency staff has agreed to recommend what they perceive as controversial concessions.

Meeting with stakeholders ahead of time to discuss possible actions, such as attracting a large retail outlet, allows legitimate issues to be aired before serious negotiations begin. After some evaluation, stakeholders may decide their issues can be resolved, or the agency may decide it should re-evaluate its priorities. In the case of the merchants in this illustration, had they been given the opportunity to meet with the agency to learn about the experiences of other cities, they might have concluded that attracting Taxco would actually help business retention.

Meeting and conferring with stakeholders during the negotiation process allows them to provide input on the specific terms and conditions that are being negotiated. Many times, the same underlying goal can be accomplished in a slightly different manner to accommodate stakeholders' needs.

In the Taxco example, city staff needed to keep the negotiations confidential, so that a neighboring city would not undermine their efforts. While the need for confidentiality makes it more difficult to include stakeholders, including them in the process without sharing every detail enables the local agency to be on a firmer community relations footing when it comes to approving the development agreement.

ON CENTRAL RECOVERY OF COSTS

Depending on the nature of the project, negotiating a development agreement can involve significant costs for the public agency in the form of staff time and legal fees. An agency may want to provide for the recovery of some or all of those costs either in its local procedures, as part of the cost of processing a development agreement or as a term of the agreement itself.

The agency will want to ensure that it does not assess the project proponent more than the agency's actual costs. One way is to establish an hourly rate and regularly record staff time.

PUBLIC INPUT ON CONSIDERATION OF THE PROPOSED AGREEMENT

The development agreement law specifies what kind of public hearings and notice must be given when an agency gets to the point of considering whether to approve development agreements.[49] Hearings must be held by the local planning agency and its governing body.[50] Such hearings are subject to the state's open meetings laws,[51] which require that all interested persons be allowed to attend these meetings[52] and provide public comment before the planning commission's or governing body's consideration of the development agreement.[53] Members of the public are also entitled to request copies of all documents included in the agenda packet.[54] The state's Public Records Act also may entitle members of the public to request other documents relating to the proposed agreement.[55]

[49] *See* Cal. Gov't Code § 65867.

[50] *See* Cal. Gov't Code § 65867.

[51] *See* Cal. Gov't Code § 54950 and following.

[52] *See* Cal. Gov't Code § 54953(a).

[53] *See* Cal. Gov't Code § 54954.3.

[54] *See* Cal. Gov't Code § 54954.1.

[55] *See* Cal. Gov't Code § 6250 and following. An exception may be preliminary drafts of development agreements if they are not kept in the ordinary course of business. *See* Cal. Gov't Code § 6254(a).

NOTICE ISSUES

The development agreement law provides notice requirements for hearings related to the potential adoption of a development agreement.[56] The notice is the same as that required under the planning and zoning law for:

- Plans (publication in at least one newspaper of general circulation or posting in three public places within the jurisdiction if there is no newspaper of general circulation, with special consideration given to drive-through facilities);[57]

- Projects (10-day mailed notice to the property owner, the project proponent, affected local agency service/facility providers; and[58]

- Neighboring property owners within 300 feet, as well as published and posted notice, again with special consideration given to drive-through facilities).[59] The agency must also give notice to anyone who has requested it.[60]

A NOTE ON DEVELOPMENT AGREEMENTS IN THE COASTAL ZONE

Local agencies in the coastal zone may approve development agreements only if they have a certified local coastal program or if the California Coastal Commission formally approves the development agreement. *See* Cal. Gov't Code § 65869.

The notice must contain:

- The date, time, and place of the hearing;

- The identity of the hearing body;

- A general explanation of the matter to be considered (in other words, the development agreement); and

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[56] *See* Cal. Gov't Code § 65867.

[57] *See* Cal. Gov't Code § 65090.

[58] This includes each local agency expected to provide water, sewage, streets, roads, schools, or other essential facilities or services to the project, whose ability to provide those facilities and services may be significantly affected. *See* Cal. Gov't Code § 65091(a)(2).

[59] *See* Cal. Gov't Code § 65091.

[60] *See* Cal. Gov't Code § 65092: "When a provision of this title requires notice of a public hearing to be given pursuant to Section 65090 or 65091, the notice shall also be mailed or delivered at least 10 days prior to the hearing to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests. The local agency may charge a fee which is reasonably related to the costs of providing this service and the local agency may require each request to be annually renewed."

- A general description, in text or by diagram, of the location of the property that is the subject of the development agreement, and hence the hearing.[61]

To facilitate informed public discussion of the matter, it may be helpful to include a brief explanation of what development agreements are. A sample of such a description is available online at www.ilsg.org/devtagmt.

DECISIONMAKER INPUT ON DEVELOPMENT AGREEMENTS AND FINDINGS

A local agency's development agreement procedures present an opportunity for the governing body to ask the planning commission to make a recommendation on whether to approve the agreement and weigh in on proposed findings.

CAN A DEVELOPMENT AGREEMENT BE APPROVED BY INITIATIVE?

Yes. *See: Citizens for Responsible Government v. City of Albany*, 56 Cal. App. 4th 1199 (1997).

INVOLVING THE PLANNING COMMISSION EARLY ON

When development agreements are negotiated by staff, subject to planning commission review before final approval by the legislative body, planning commissioners may feel they have been "left out of the loop." This may be especially true if the legislative body is the only one receiving updates as negotiations proceed.

The consequences of the planning commission feeling insufficiently involved may include:

- Bad feelings on the part of individual planning commissioners;
- A lack of planning commission input during negotiations; and

WHAT CONSTITUTES ENTRY INTO THE DEVELOPMENT AGREEMENT?

The development agreement law is not entirely clear. A good practice is to secure on the agreement the signature of the person authorized to execute agreements on behalf of the local agency shortly after the adoption of the development agreement ordinance by the governing body.

[61] *See* Cal. Gov't Code § 65094.

- Less protection of elected officials' interests by appointed commissioners.

One approach to informing the planning commission early on is to schedule the project for discussion at a regular planning commission meeting at the start of negotiations. This provides the planning commission with an opportunity to provide its input to the negotiating team on key policies and objectives to be achieved on behalf of the community through the development agreement.

Another approach is to convene a subcommittee of the planning commission as an adjunct to the negotiation process. If the subcommittee is less than a quorum of the commission, the discussion may occur without the overlay of open meetings requirements.[62] While the subcommittee could be made part of the negotiating team, it may be more practical, given the competing demands on planning commissioners' time, for staff to confer with the subcommittee outside of negotiations. This approach allows the negotiating team to benefit from at least some planning commissioners' perspective, while the negotiating team remains reasonably sized.

PRACTICE POINTER

Some practitioners ask the project proponent to sign the proposed agreement before the agreement is introduced for approval.

PLANNING COMMISSION RECOMMENDATION AND INPUT ON FINDINGS

An agency's development agreement procedures can solicit the planning commission's input both on whether the development agreement should be approved, and on the findings accompanying any approval. Such findings may include whether the agreement:

- Is consistent with the objectives, policies, general land uses and programs specified in the agency's general plan and any applicable specific plan;

- Is consistent with the provisions of the agency's zoning regulations;

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[62] *See* Cal. Gov't Code §§ 54952.2(a) ("As used in this chapter, 'meeting' includes any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.") 54952 ("As used in this chapter, 'legislative body' means: … (b) A … committee … of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, any advisory committee, composed solely of members of the legislative body which are less than a quorum of the legislative body are not legislative bodies …").

- Promotes the public health, safety, and general welfare;
- Is just, reasonable, fair and equitable under the circumstances facing the agency;[63]
- Has a positive effect on the orderly development of property or the preservation of neighboring property values; and
- Provides sufficient benefit to the community to justify entering into the agreement.

GOVERNING BODY HEARING AND DECISION ON THE DEVELOPMENT AGREEMENT

As discussed in Chapter 3, well-articulated planning policies and objectives should increase the likelihood that the staff's and planning commission's input to the development agreement negotiation process produces a satisfactory agreement for the governing body. Adoption of an interest-based negotiation approach may also allow the governing body to provide direction to negotiators early on in the process in open session, consistent with the state's open meeting laws.[64]

Well-conceived and up-to-date planning policies also avoid the prospect of asking staff to negotiate in a vacuum, with little or no immediate direction or feedback from decisionmakers. This maximizes the likelihood that the agreement presented for decision-maker approval reflects their concerns and policy direction. It minimizes the likelihood of having to renegotiate the agreement from the dias. (The downside of which, is inclusion of language in the agreement which may have unintended consequences or not fully protect the agency's interests.)

PRACTICE POINTER

A development agreement typically freezes regulatory requirements in effect at the time the agreement is executed. For that reason, it is helpful to collect all of those regulatory documents and file them with the approved development agreement. This avoids confusion several years afterwards as to what regulatory requirements apply.

Copies should also be provided to the project proponent.

[63] *See generally Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724 (1976) (analyzing the "contracting away the police power" issue in the context of an annexation agreement). *See also Denio v. City of Huntington Beach*, 22 Cal. 2d 589 (1943); *Carruth v. City of Madera*, 233 Cal. App. 2d 688 (1965).

[64] *See generally* Cal. Gov't Code § 54950 and following (The Ralph M. Brown Act).

ACTION ON THE AGREEMENT

The governing body must approve a development agreement by resolution or ordinance.[65] Ordinances must go through a two-reading process, with at least a five-day intervening period.[66] Changes require an additional five-day waiting period.[67]

RECORDATION AND OTHER POST-APPROVAL STEPS

After a development agreement is approved, the clerk of the governing body must:

- Record a copy of the development agreement within 10 days of the entity's entry into the agreement, along with a description of the land subject to the development agreement;[68] and

- Publish the ordinance approving the development agreement.[69]

[65] *See* Cal. Gov't Code § 65867.5.

[66] *See* Cal. Gov't Code §§ 36934 (city requirements), 25131 (county requirements).

[67] *See* Cal. Gov't Code §§ 36934 (city requirements), 25131 (county requirements).

[68] *See* Cal. Gov't Code § 65868.5.

[69] A clerk must publish each ordinance (or a summary of it) within 15 days after passage as follows: 1) In a newspaper of general circulation published within the jurisdiction, or 2) If there is none, by posting as required by state law. Cal. Gov't Code §§ 36933 (cities), 25124 (counties) (note that state codes are available online at http://www.leginfo.ca.gov by clicking on "California Law"). The publication must include the names of the governing body members voting for and against the ordinance. Cal. Gov't Code §§ 36933(c) (cities), 25124 (counties).

PRACTICE POINTER

Some agencies specify the agencies' annual review procedures in the agency's ordinances and resolutions relating to development agreements Others specify the annual review procedures in the development agreement itself. The latter approach makes the annual review process part of the negotiations process as it is the subject of negotiation and the resolution of that negotiation memorialized as a term of the development agreement itself.

Other implementation strategies include:

1. Assigning one person to monitor agreement performance.
2. Creating an implementation matrix (cross-referencing the section of the development agreement, the obligation, the trigger/timing, which local agency department has lead responsibility, and the status).

Having a well-thought out implementation strategy helps ensure the agency gets the benefit of its bargain.

In cities and counties, failure to satisfy the publication requirement in a timely manner prevents the ordinance from taking effect or being valid.[70]

AMENDING THE DEVELOPMENT AGREEMENT

After a development agreement has been signed, it may be amended only by mutual agreement of parties.[71] Most development agreement procedures require amendments that are initiated by the project proponent to go through the same process as the initial application for the development agreement. For local agency-initiated amendments, the procedures usually require notice to the project proponent and provision of information about the process that the agency will employ.

DEVELOPMENT AGREEMENTS AND ACCOUNTABILITY

Fundamental to the concept of an enforceable agreement is the notion that each party will do what it promises to do in the agreement. To underscore that notion, the development agreement law requires local agencies to include at least an annual review of the project proponent's compliance with the delineated responsibilities.[72] The review must require the proponent to demonstrate good faith compliance with the terms of the agreement.[73] If a local agency finds, based on substantial evidence, that such compliance has not occurred, the agency may modify or terminate the agreement.[74]

In addition, the development agreement law provides that the development agreement is "enforceable by any party."[75] A development agreement typically contains provisions specifying procedures for notice and termination in the event of a default by either party.

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[70] Cal. Gov't Code § 36933(b) (cities). *Cf.* Cal. Gov't Code § 25124(c) (providing failure of county clerk to publish means the ordinance does not take effect for 30 days).

[71] *See* Cal. Gov't Code § 65868.

[72] *See* Cal. Gov't Code § 65865.1.

[73] *See* Cal. Gov't Code § 65865.1.

[74] *See* Cal. Gov't Code § 65865.1.

[75] *See* Cal. Gov't Code § 65865.4.

SAN DIEGO DATABASE KEEPS DEVELOPMENT AGREEMENTS ON TRACK

The City of San Diego's Development Agreement Monitoring System tracks the status of payments owed by developers to cover the cost of project-related infrastructure, facilities and public services.[76] In addition to helping city staff monitor compliance with the terms and conditions of development agreements, the system also generates reminders of annual report deadlines and due dates for administrative costs owed to the city.

Before the city developed the system in 1997, several departments shared responsibility for monitoring the status of development agreements. The lack of effective coordination made oversight of the agreements uncertain. If, for example, the city's issuance of a building permit for the 250th unit of a residential project obligated the developer to pay the city $250,000 for completion of a library, the city had no means to ensure that it requested the funds in a timely manner.

To address this problem, city staff formed an inter-departmental task force called the Development Monitoring Team. The Monitoring Team worked with city Management Information Systems personnel to create the Development Agreement Monitoring System. The system comprises a database containing files for each development agreement. The files list developer obligations and due dates under each agreement.

The monitoring team updates the status of developer obligations and shares this information with appropriate departments on a regular basis. As a result, the city has improved the timeliness of developer invoicing and collection. By February 2000, the Development Agreement Monitoring System helped the city to collect $17 million in developer obligations, and to track another $28 million that the city is due to receive by 2005.

SUMMARY

A well-crafted set of development agreement procedures will provide a useful road map to staff and others in sheparding an agreement through the approval process. Such procedures are also useful for considering any amendments to and termination of an agreement.

Important parts of the process include the notice and hearing process, as well as mechanisms for providing decision-maker input.

[76] City of San Diego, Development Agreement Monitoring System, February 2000 (Submission for League of California Cities Helen Putnam Award for Excellence).

THE ART OF NEGOTIATING DEVELOPMENT AGREEMENTS

CHAPTER 5

The art of negotiation comprises several facets. Fundamentally, it is important to decide *who* is going to negotiate and *how* the parties will reach consensus. This chapter addresses the issues associated with each facet of negotiation.

Who Is Going to Negotiate? 43

Reaching Consensus 44

Summary 48

WHO IS GOING TO NEGOTIATE?

Within the public agency, senior staff or their representatives typically negotiate development agreements. The manager (or representative) should be involved because he or she presumably knows the community, understands the desires of the legislative body and can gauge the agreement's value to the community.

The agency's planning director (or representative) is typically on the negotiating team because of his or her planning background. While the manager may focus on financial benefits to the community, the planning director will be concerned with the impact of the project on land use issues, including its compatibility with surrounding land uses. Engineering or public works staff should be included if infrastructure issues are involved.

The public agency also may want to include the attorney on the negotiating team, rather than just at the agreement's drafting stage, especially if the project proponent is represented by legal counsel. Legal issues will undoubtedly arise during negotiations, and drafting issues may overlap with substantive deal points. Whether or not legal counsel participates in the negotiations, he or she should be fully apprised as the negotiations proceed.

PRACTICE POINTERS

Legislative Body Member Participation. Veterans of the development agreement negotiation process typically advise against including a governing body representative on the negotiating team.

Such involvement can put the elected official in a constrained position when the final agreement goes before the council or board.

Conflicts of Interest Issues. In selecting negotiating team members, keep in mind conflicts of interest issues. For example, the Attorney General opined in 2002 that a senior local agency staff member may not participate in the negotiations and drafting of a development agreement if her spouse is employed by a firm that will provide outreach services for the developer with respect to the project pursuant to a yearly retainer agreement. The Attorney General found that the staff member's participation would violate conflicts of interest laws relating to contracts,[77] even though the spouse had no ownership interest in the firm, he will not work on the city's project, and his income will not be affected by the outcome of the development agreement or project.

For more information about ethics laws, please *See The Local Official's Guide to Ethics Laws* published by the Institute for Local Self Government.

As for the project proponent, he or she (or a representative with full legal authority to bind the project proponent) should participate in the negotiations. On larger projects, the project proponent may want to assemble a team that includes the project proponent, an architect, planner and land use attorney. Depending on what aspect of the agreement is being negotiated, the project proponent may want to include one or more of the team members in the negotiations.

REACHING CONSENSUS

How parties conduct negotiations may be the best indicator of whether they will achieve consensus. Participants should be trained in the process of negotiations, and have a framework in mind to guide the negotiation process.

KNOWING WHO IS ACROSS THE TABLE

Before negotiations begin, each party should become familiar with the other's background. In addition, the project proponent should become familiar with the local political climate, while local agency staff should learn about the project proponent's reputation in the community, or in other communities where the proponent's developments have been approved. The parties should also determine in advance what they expect to gain through the negotiations, what the other party may need, and what they are willing to give.

SETTING EXPECTATIONS

Once the parties meet, they should frankly discuss their respective expectations. The local agency should emphasize that it expects to gain greater exactions than it could require under its regulatory authority. The project proponent should explain why the particular project requires a development agreement. The parties should agree upon an initial timeframe in which to complete negotiations.

The agency negotiators should explain that they do not have authority to bind the agency—that is the province of the legislative body during final public hearings. The parties may benefit from adopting a "check-off" system so that once they reach a conceptual agreement on deal points, they

[77] *See* Cal. Gov't Code § 1090. the Attorney General reached this conclusion even though the spouse had no ownership interests in the firm, he would not work on the agency's project, and his income would not be affected by the outcome of the development agreement or project. The Attorney General's opinion will be published at 85 Cal. Op. Att'y Gen.____(2002), and is available online at http://caag.state.ca.us/opinions/index.htm.

do not need to continually renegotiate those points, unless circumstances change.

THE UTILITY OF GROUND RULES

Ground rules for negotiations are very important. Typical ground rules include:

- Who is the spokesperson for each side? To what extent does that person have authority to bind their respective principals?
- Who will take notes and document the points of agreement?
- Where, when and for how long will the negotiators meet? Will telephone negotiations be allowed?
- Are these meetings open to the media and public?
- When and how will issues related to the development be presented to decisionmakers, including individual members of the governing body?
- How will media inquiries be handled?
- What strategies, if any, will be employed if bargaining reaches an impasse?

SAMPLE GROUND RULES FOR NEGOTIATIONS

The following types of ground rules may be adopted prior to negotiating a development agreement, in order to improve the parties' chances of negotiating mutually acceptable terms and provisions.

The parties agree during negotiations to:

1. Listen to the other party's needs and desires
2. Discuss mutual "interests" rather than individual "positions"
3. Encourage creative ideas by agreeing there are no stupid suggestions
4. Take into account each other's needs and desires
5. Use objective standards and criteria to assess interests
6. Use a check-off system to conceptually approve deal points along the way
7. Avoid returning to approved points absent changed circumstances
8. Use a deal point outline rather than iterations of the agreement itself
9. Avoid drafting the agreement itself until all deal points are agreed upon
10. Develop a common understanding of the agency's land use policies

PRACTICE POINTERS

It can be useful to have a list of what the agency must receive as a condition of agreeing to the development agreement and what the agency is willing to trade for other concessions.

The list should include the various options available to satisfy the agency's objectives (for example, building versus funding an improvement). The list should also include any limits on what the agency can do (for example, waiving a fee that others must pay).

Making such determinations in the heat of negotiations can sometimes be a risky strategy.

Such ground rules should be memorialized in writing.

SETTING PRIORITIES

Each party should be clear on their organization's priority issues going into the negotiations, so each priority can be addressed early on. Reaching agreement on these priority issues is, of course, the key to successful negotiations.

Typical priority issues for local agencies include:

- ***Land Use Issues***. What regulations relating to density, design, uses, and construction standards is the agency willing to freeze in place at the time the agreement is executed? On what issues does the agency wish to retain the flexibility to adapt its regulations to changing circumstances and new information?

- ***Exaction Issues***. Which public improvements and facilities will be constructed, dedicated or financed by the project proponent? On what schedule? Will there be a reimbursement provision if the project proponent fronts the financing for a facility?

- ***Special Issues Relating to State Requirements***. What role will school facilities and affordable housing issues play?

Thinking through these issues and what the local agency will need to make the development agreement a net gain in terms of the public's interest is a key to successful negotiations.

HAVE A STRATEGY

Fundamentally, each party comes to the negotiations with certain priorities and objectives—some of which may be unrealistic. Finding compromise solutions can require a sense of the other party's true objectives (and presenting one's proposals in terms of those objectives) and patience while the other party works through what they had hoped to receive as the result of the negotiations and what they actually can receive. Moreover, negotiations can be stressful; less skilled negotiators may react to such stress with displays of anger and attempts to badger their way into prevailing.

In most instances, it is important for both sides to keep in mind that there is a long-term relationship to be fostered. This relationship is frequently more important than short-term gains or "gotchas" on elements of the deal.

INTEREST-BASED BARGAINING TECHNIQUES

The parties may also agree in advance to use a particular negotiating approach. Historically, the negotiating model has involved a static process of developing positions in advance, based on confidential parameters set by the principals. More recently, professionals have advocated a more dynamic or synergistic approach that involves both parties working together to transcend competing interests.

Advocates of synergistic negotiations suggest that parties should:

- Share interests during negotiations (for example, what they fundamentally wish to accomplish or avoid) rather than pre-determine, then haggle over positions;
- Acquire a real (in other words, empathetic) understanding of what the other party needs;
- Use brainstorming techniques to develop lists of options from which "outside-the-box" solutions can flow; and
- Agree to rely on objective standards or third-party authority to settle differences and overcome obstacles.

Although conducting successful negotiations is a much larger topic than can be adequately addressed here, there are a number of resources that explain the benefits of negotiating in a more dynamic or synergistic fashion.[78]

For the local agency, an interest-based approach works better in light of the constraints of the state's open meeting law. As a general matter there is no exception to the open meeting laws for local agencies to instruct their negotiating team on the provisions of a development agreement.

[78] *See*, for example, *Getting to Yes* by William Ury and Roger Fischer, *and The Seven Habits of Highly Effective People* by Stephen R. Covey.

The following illustrates this approach toward negotiations.

ILLUSTRATION—THE URBAN LIMIT LINE AND BEYOND

Serene Valley is a large unincorporated area with an agricultural past. Much of the area is now built out, and the outlying farmland is seriously threatened by ever-expanding suburban development. As a result, the board of supervisors has established an urban limit line to prevent further sprawl**.**

Henry House is a project proponent who wishes to construct homes in Serene Valley. He is accustomed to building typical subdivisions projects with little open space, noting the continually increasing need for additional housing.

Mr. House applies for a development agreement to allow him to construct high-density housing beyond the urban limit line. Planning staff advises him that his application is likely to be denied (some would say dead on arrival). Some of his equity partners have owned property beyond the urban limit line for decades, and resent the influence of no-growth advocates who have only recently moved to the area.

As negotiations begin, the (somewhat skeptical) parties adopt a dynamic approach to negotiations, in which they agree to discuss respective interests rather than relative positions. Planning staff explain, for example, that they are interested in preserving the scenic nature of Serene Valley for future generations, rather than taking the position that they will never recommend construction beyond the urban limit line.

In turn, Mr. House explains that he is interested in constructing a project that will pencil out financially, rather than taking the position that the project must be constructed in a certain manner.

The parties eventually reach the conclusion that it is impossible to construct a conventional residential project that will make business sense while also respecting the urban limit line.

Nonetheless, they begin the next step in the process, which is brainstorming to identify mutually acceptable solutions. The parties are careful not to criticize ideas during the process or to dismiss any ideas as unrealistic. Slowly, suggestions emerge, ranging from creative suggestions that homes should not be visible from public streets to building underground homes.

It occurs to planning staff that the county has infill property that could fill out a town center concept envisioned by the specific plan for this part of the county's unincorporated area. Moreover, the county has access to state park bond funds to potentially purchase conservation easements over Mr. House's existing parcel, thereby helping the project pencil out for Mr. House and his partners. The mixed-use development contemplated by the specific plan is also consistent with Mr. House's familiarity with higher density projects. Helping Mr. House acquire the land may even help the county meet its affordable housing goals .

Planning staff also are aware, from a number of workshops the county has held on smart growth issues, that the supervisors are interested in more sustainable forms of development. The negotiators go forward with this concept successfully, creating a win-win situation.

SUMMARY

By preparing in advance, developing a negotiating framework in which to proceed, and adopting ground rules, including how negotiations should be conducted, the parties should be able to create a negotiating environment that will increase the likelihood of reaching consensus.

THE SUBSTANCE OF A DEVELOPMENT AGREEMENT

CHAPTER 6

A number of considerations should be taken into account when drafting a development agreement. For efficiency, many jurisdictions start with a standard form agreement that has already been reviewed and approved by the agency's attorney. It is also helpful for negotiators to have reviewed:

- Current version of the development agreement law;[79]
- Planning policies for the area in question, including fee and dedications requirements and environmental analyses; and
- Agency procedures for processing development agreements.[80]

These steps help those involved in the negotiations identify the issues that will need to be negotiated to protect the public's interests when drafting the agreement. It is also important to think ahead about implementation issues.

This chapter discusses some of the drafting and drafting-process issues that typically arise with development agreements.

Who Will Do The Drafting? 49

When Should The Drafting Begin? 50

Common Provisions in Development Agreements..... 50

Summary 67

WHO WILL DO THE DRAFTING?

A threshold issue is: From whose draft will the parties work? As indicated above, for local agencies expecting to be involved in a number of development agreements, it can be helpful for the agency to begin with a standard development agreement form that covers key and standard issues of concern to the agency. Sample development agreements are available online at www.ilsg.org/devtagmt.

[79] *See* Cal. Gov't Code § 65864 and following (also available online at http://www.leginfo.ca.gov by clicking on "California Law").

[80] *See* Chapter IV and the sample procedures available online at www.ilsg.org/devtagmt.

A NOTE ABOUT CLARITY

Sometimes it is tempting to use ambiguous language to describe issues on which the parties are having difficulties agreeing. This temptation should be avoided, inasmuch as it only postpones problems.

Moreover, given that the agency will be able to terminate the agreement only upon substantial evidence of noncompliance, *see* Cal. Gov't Code § 65865.1 (there must be substantial evidence the project proponent has not complied in good faith with the agreement), there is a high degree of risk that ambiguities will ultimately be resolved against the public agency.

Of course, the standard form agreement can take negotiators only so far. The next question is which party's attorney will take the first crack at filling in the project-specific elements of the form. Development agreement negotiation veterans typically advise that the public agency's counsel retain this role. In either event, it is not desirable to have both attorneys generating drafts of their own.

WHEN SHOULD THE DRAFTING BEGIN?

It may be tempting to prepare drafts of the development agreement as negotiations proceed. Some participants may derive comfort from having concrete proof that they are actually making progress.

However, the practice of preparing a draft as each of the deal points emerges can be expensive and result in unnecessary rewrites of the agreement. This practice may also afford the opportunity for drafting gamesmanship, in which slight but important changes are attempted beyond the scope of what the negotiators agreed to. The attorneys for each negotiating team must thoroughly review every draft, elevating otherwise avoidable tension in the remaining negotiations. It is preferable to list agreed-upon deal points for the entire agreement, including dates of each proposal and the name of the person who made it. Then, the development agreement can be drafted in close-to-finished form and subjected to final editing and review by all parties. Use of the redline/strikeout computer function simplifies the process.

COMMON PROVISIONS IN DEVELOPMENT AGREEMENTS

THE PARTIES TO THE AGREEMENT

Local agencies may enter into development agreements only with persons who have a "legal or equitable interest" in the real property in question.[81]

There may be others who should be parties to the agreement (for example, lenders). The goal is to identify whether there is anyone whose participation is necessary for the local agency to receive the benefit of its bargain, who would not automatically be bound by the agreement by its provisions as a successor-in-interest when the agreement is recorded.[82]

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[81] *See* Cal. Gov't Code § 65865(a). *See also National Parks and Conservation Association v. County of Riverside*, 42 Cal. App. 4th 1505 (1996).

[82] *See* Cal. Gov't Code § 65868.5.

USE OF RECITALS

It is common to include recitals, typically following the first paragraph of the agreement, that identify the parties to the agreement. Many development agreements begin with a recital explaining the advantages offered by this development agreement, and stating that the agreement is entered into pursuant to state development agreement law, Government Code section 65864 and following.

Recitals typically explain:

- Who the parties are;
- What the project is;
- That the project is consistent with the general plan and any applicable specific plan; and
- That the parties have complied with the California Environmental Quality Act.

Recitals may also identify other discretionary land use approvals that are required for the project (for example, approval of a subdivision map or discretionary land use permit), and whether those approvals have previously occurred, will occur simultaneously, or will occur only after the development agreement has been approved.[83]

On occasion, a recital may address contingencies that will delay the effective date of the agreement, such as the need for property annexation.[84]

TERM

The term must be stated in the body of the agreement.[85] Larger projects, especially those constructed in phases, may require longer terms. In other instances, planning staff may argue for a shorter term, perhaps five to ten years, to enable the local entity to revisit the property's zoning and general plan designations sooner rather than later

There is some indication that the term of the agreement — or at least the time during which the agency agrees not to apply changes in land use

[83] *See* Cal. Gov't Code § 65865.2.

[84] *See generally* Cal. Gov't Code § 65865.3 (development agreements and newly incorporated or annexed areas).

[85] *See* Cal.Gov't Code § 65865.2

PRACTICE POINTER

A good rule of thumb for the term of a development agreement is five to ten years. Any longer may constrain a local agency's ability to impose new regulatory requirements to respond to changing needs and issues in the community.

regulations to the development—is one factor that the courts will evaluate if the development agreement is challenged.[86]

It is generally a good idea to allow the parties to terminate the agreement early in the event of a material breach. (See further discussion concerning default, remedies, and termination, below.)

Note that development agreements for unincorporated territory within cities' sphere of influence must specify a timeframe within which the annexation must occur.[87] The agreement does not become operative until the annexation occurs.[88]

REQUIRED CONTENTS

A development agreement must specify the:

- Permitted uses of the property;
- Density or intensity of use; and
- Maximum height and size of proposed buildings.[89]

These are also known as the development plan. Because development agreements can and are being used in a variety of applications, the required content outlined above can be addressed more generically or more specifically, depending on the goals of the parties and the degree to which the absence of such specification in the agreement means that the agency's regulations apply.[90] As a matter of draftsmanship and avoiding a basis for challenge, however, it is useful to address each of the required content elements.[91]

For example, the permitted uses can be generically established by reference to a zoning category, such as retail commercial, or specifically established

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[86] *See generally Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 84 Cal. App. 4th 221 (2000) (suggesting such freezes cannot be of unlimited duration and upholding a zoning freeze for five years)

[87] *See* Cal. Gov't Code § 65865(b).

[88] *See* Cal. Gov't Code § 65865(b).

[89] Cal. Gov't Code § 65865.2 (contents of development agreements).

[90] *See generally Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 84 Cal. App. 4th 221 (2000) (finding the fact that the agreement did not mention maximum height and size of proposed buildings was not fatal because the agreement was subject to the county regulations of these variables).

[91] *See generally Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 84 Cal. App. 4th 221 (2000) (adopting a "substantial compliance" approach to these required content elements).

by reference to a site plan detailing every aspect of a proposed project. Likewise, the density and intensity can be generically designated by using a range of possibilities, (six to ten units per acre, for example), or specifically designated (two units per acre). Similarly, the requirement that the maximum size and height of proposed buildings be included does not mean that every development agreement must propose buildings.

PUBLIC BENEFITS

Another required element of a development agreement is the provision for reservation or dedication of land for a public purpose.[92] A "permissive element" refers to the terms and conditions relating to the project proponent's financing of necessary public facilities and the subsequent reimbursement of the project proponent for its non-pro rata share over time.[93]

In fact, it is a good idea to specify all of the public benefits that will result from the agreement, following a recital explaining that the project proponent recognizes that he or she is being afforded greater latitude in exchange for agreeing to contribute greater public benefits than could otherwise be required, and that the project proponent does so freely and with full knowledge and consent.

ADDRESSING A POTENTIAL POLICE POWER CHALLENGE

Early on, commentators speculated whether adopting a development agreement might constitute an illegal "contracting away" of an agency's police powers, which, in this context, refers to a local agency's governing powers. "Police" derives from the Greek word polis, which means city. Cities and counties typically obtain their police powers through the state Constitution.[94]

The California Constitution says, for example: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."[95] These powers afford the local agency latitude in dealing with issues that are local in nature and have not been addressed by the state legislature.

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[92] Cal. Gov't Code § 65865.2.

[93] *See generally Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 84 Cal. App. 4th 221 (2000) (finding the fact that the agreement did not mention maximum height and size of proposed buildings was not fatal because the agreement was subject to county regulations of these variables).

[94] *See* Cal. Const. Art. XI, §7.

[95] Cal. Const. art. XI, § 7.

One thing a public agency *cannot* do is to contract away its police powers by enabling a private body or individual to control the exercise of its governing powers.[96] In the case of development agreements, the question is whether the "freezing" of applicable land use regulations, so that the public agency cannot change the rules in a way that will prevent the project proponent from constructing or operating the project as approved, constitutes an illegal contracting away of police powers.

There are two ways that freezing of rules and regulations could conceivably constitute an illegal contracting away of police powers.

First, development agreements lock in the right to construct the project as approved once the agreement is in effect. Without a development agreement, the law allows the agency to impose additional requirements on a project up to the point at which the project proponent acquires vested rights by obtaining a building permit and doing substantial construction work in reliance on that permit.[97]

Second, development agreements do not allow the imposition of new rules that conflict with those in existence when the agreement was approved.[98] Without a development agreement, the agency may change the applicable zoning in a manner that is inconsistent with the project proponent's vested rights, in which case, the property may acquire what is known as a "nonconforming use status" because the development on the property no longer conforms with the applicable zoning. While vested rights allow the owner to continue building and operating the project as originally approved, there may nonetheless be limitations on how the property can be used, including a prohibition against expanding nonconforming uses.

Whether either of these two aspects of development agreements constitutes an illegal contracting away of police powers may turn on the *extent* to which an agency surrenders all of its control over land use functions, rather than *reserving* most of its police powers except to the limited extent otherwise provided by the agreement.[99]

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[96] *See generally Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors*, 84 Cal. App. 4th 221 (2000) (finding government entity does not contract away its police power unless the contract amounts to a surrender or abnegation of a proper governmental function).

[97] *See Avco Community Project Proponents, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976).

[98] Cal. Gov't Code § 65865.4.

[99] *See Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3d 724 (1976) (holding that an annexation agreement did not constitute an illegal "contracting away" of its legislative authority because it did not contract away all of the agency's authority).

Accordingly, it is a good idea for the drafters to include a provision in the development agreement explaining the extent to which the property will continue to be subject to the entity's zoning rules, regulations and policies, as well as a provision explicitly reserving the entity's police powers unto itself, except as otherwise provided in the agreement.

RECOVERY OF COSTS

Depending on the nature of the project, negotiating a development agreement can involve significant costs for the public agency in the form of staff time and legal fees. The agency may want to provide for the recovery of some or all of those costs, either in its local procedures (as part of the cost of processing a development agreement) or as a term of the agreement itself. If provided for in the agency's local procedures, the agency will want to ensure that it does not assess the project proponent more than its actual costs. One way is to establish an hourly rate and record the staff's time spent working on the project.

WHICH REGULATIONS ARE FROZEN?

Three drafting considerations affect which local land use rules and regulations will apply under the terms and conditions of the development agreement.

First, state law says that unless the agreement provides otherwise (see sidebar at right), the rules and land use policies in effect when the development agreement is adopted will apply to the project. The project proponent will be inclined to want language to the effect that the local agency is not allowed to apply rules or land use policies that would effectively nullify its prior approval of the project. In turn, the agency's attorney will want language that confirms the statute allows the agency to apply new rules in the future, as long as they are not in conflict with the rules and regulations that were in place when the agreement was adopted.

Second, the attorneys need to decide what language to use in the event the parties agree to allow land uses that are inconsistent with the otherwise applicable zoning requirements in existence at the time the development agreement was negotiated. One approach is to include language saying the then-existing zoning ordinance governs, but only to the extent it is not inconsistent with any provisions of the agreement. Depending on the circumstances, the agency attorney may prefer to actually amend the zoning ordinance so that it is consistent with the development agreement, in order to allow other projects to request that zoning in the future.

POSSIBLE EXCLUSIONS FROM THE FREEZE

Local agencies may wish to discuss retaining their discretion to apply changes to the following components of a development agreement:

- Impact fees;
- Uniform codes;
- Processing fees; and
- Procedural regulations.

Third, the development agreement should state that the agency's compliance is subject to later-enacted state and federal regulations.[100]

"MILESTONE" REQUIREMENTS

On larger, phased-in projects, it may be useful to include "milestone" requirements so the agency can terminate the agreement if phases of construction have not been completed within a specified timeframe.

The project proponent may resist agreeing to absolute deadlines. In this case, the public agency may want to consider allowing the timeframe to begin with a specified event, such as issuance of building permits. Before doing so, however, the public agency should make sure there are adequate incentives for the project proponent to stay on schedule, and that the decision to begin the next phase is not left entirely to the project proponent's discretion.

DEFAULT, REMEDIES AND TERMINATION

Drafters typically recite that upon the commission of a material breach, the other party may terminate the agreement and exercise other legal remedies that it may have.

Especially with respect to larger projects, parties may be motivated to enter into elaborate provisions concerning default, available remedies and termination, so that in the event of a material breach, the breaching party has a specified time to "cure" the breach, before the other party can terminate the agreement. These provisions may contain what are known as "force majeure" recitals that preclude terminating the agreement, or that extend the term of the agreement when performance is not possible due to war, insurrection, terrorism, strikes and other events that are beyond the control of the parties. Such provisions are generally advantageous to the project proponent, and create potentially lengthy periods in which the agency is unable to apply new land use rules and regulations that may affect the agency's ability to do responsive land use planning.

NON-PERFORMANCE ISSUES

It is important to remember that a development agreement is indeed a contract, the breach of which may be subject to monetary damages. Some local agency attorneys include clauses limiting remedies against the agency to specific performance. Under some circumstances, liquidated damages

[100] Cal. Gov't Code § 65869.5.

clauses may protect the agency from the upside risks associated with damages awards.

The local agency will also find it helpful to consider what kinds of assurances it wants to have available in the event the project proponent defaults on certain obligations. Some of the options local agencies may want to consider include:

- Letters of credit;
- Performance bonds; and
- Withholding certain approvals (for example building permits, until satisfactory performance occurs).

The agency may also want to think through timing issues associated with the project proponent's performance. In some instances, it may be advisable to specify timeframes for performing aspects of the development agreements and the consequences of not meeting those timeframes.

STATE OR FEDERAL LAWS

The parties may want to include a provision addressing the fact that state and federal regulations are not suspended by a development agreement. If a state or federal regulation is amended in a way that would preclude further performance under the agreement, the affected provisions of the development agreement will be modified or suspended.[101]

ANNUAL REVIEW

The parties may want to recite their awareness of the requirement for an annual review of the development agreement by the local entity. Recognize, however, that to the extent the parties make it the agency's contractual obligation to conduct such a review, they may be setting the agency up for a failure to perform.[102] It is preferable to specify the agency's procedures for conducting its annual review in the agency's procedures ordinance or by resolution.

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[101] *See* Cal. Gov't Code § 65869.5.

[102] A number of agencies admit to having neglected annual reviews, which is inadvisable. A "tickler" system developed in collaboration with the clerk's office can be a helpful reminder to hold these hearings once a year.

ENFORCEMENT

The parties may want to include an enforcement provision reciting that the agreement is enforceable notwithstanding any changes to the general plan, specific plan (if any), or the zoning, which alters or amends an ordinance, rule, regulation or policy governing the zoning of the property during the term of the agreement.

RECORDATION

The parties may want to recite their awareness of the requirement that the agreement be recorded within 10 days following execution. Recognize, however, that to the extent the parties make it a contractual obligation of the local agency to timely record the agreement, they may be setting the agency up for a failure to perform.

CERTIFICATE OF SATISFACTION

The project proponent may wish to obtain "certificates of satisfaction" from the agency as phases of construction are completed, reciting that each phase is in full compliance with its obligations under the development agreement. This certificate may be important to potential lenders. To the extent there are ongoing obligations, or obligations that transcend the physical boundaries of a particular phase, it may be difficult for the local agency to make such attestations until the term of the development agreement has fully expired.

INDEMNIFICATION AND HOLD HARMLESS PROVISION

It is not uncommon to have the project proponent hold the local agency harmless from any liability the agency may incur as a result of entering into the agreement. Also helpful is a provision requiring the project proponent to indemnify and defend the agency at the proponent's cost against any legal action instituted by a third party to challenge the validity of the agreement, including a challenge based on an assertion that the California Environmental Quality Act has not been complied with.[103]

[103] Such arrangements have received the blessing of the California Attorney General's Office. *See* 85 Cal. Op. Att'y Gen. ___ (2002), available online at http://caag.state.ca.us/opinions/index.htm.

AMENDMENT OR CANCELLATION

State law provides that a development agreement can be amended or canceled, in whole or in part, by the mutual consent of the parties upon notice of intention to amend or cancel in the form required by Government Code sections 65090 and 65091, and adoption of an ordinance amending the agreement. The ordinance must also be found to be consistent with the general plan and any applicable specific plan, and is subject to referendum, just as the original ordinance adopting the development agreement was. Drafters typically recite these statutory requirements in the agreement for the convenience of the parties.

ASSIGNMENT

Drafters typically include a provision that neither party shall assign or transfer any of its rights, interests or obligations under the agreement without the prior written consent of the other, which consent shall not be unreasonably withheld.

The project proponent may want to seek additional language, which states that subsequent purchasers automatically become parties to the agreement upon transfer of ownership.

SUCCESSORS

It is common to include a provision indicating that the obligations imposed by the agreement constitute "covenants running with the land" and that the burdens and benefits bind and inure to all estates and interests created in the subject property and to all "successors-in-interest" of the original parties.

Public agencies have faced difficulties once a number of people become successors-in-interest by virtue of acquiring property governed by the agreement. In some cases, project proponents have gone bankrupt, making it difficult to justify enforcing the agreement against individual owners.

Depending on the circumstances, public agencies may want to require as a condition of approval that project proponents have homeowners (or property owners) associations governed by covenants, conditions, and restrictions (CC&Rs). The CC&Rs should include the development agreement obligations so that the association, as well as individual property owners, is responsible for ensuring performance of the development agreement.

To the extent the provisions of the CC&Rs supersede the development agreement, the association may have the flexibility to amend development

agreement obligations by a vote of less than 100 percent of the association membership. Also, the public agency may be granted enforcement rights under the CC&Rs.

VALIDITY OF PORTIONS OF THE AGREEMENT SEVERABILITY

It is common to include a provision stating that if one aspect of the agreement is held by a court to be illegal, the validity of the remaining provisions are not affected.

ATTORNEYS FEES

In lawsuits involving contracts, the law does not allow a party to recoup its attorneys fees as part of its damages unless the agreement so provides. As a result, many written agreements contain a provision stating that if a lawsuit or other legal action is brought with respect to the agreement, the prevailing party is entitled to recoup reasonable attorneys fees and costs.

GOOD FAITH AND FAIR DEALING

Many agreements recite that the parties expressly acknowledge that any actions they take pursuant to the development agreement will be measured by the "implied covenant of good faith and fair dealing."

SIGNATURES AND SUBORDINATION

The drafter will want to decide who should sign the development agreement. In addition to the property owner and public agency, some practitioners require lenders, lessees and others with an interest in the property to sign the development agreement. Other attorneys require lenders, lessees and other interested parties to sign subordination agreements, which make their interests in the property subject to the terms and conditions of the development agreement. In the event subordination agreements are balked at, local agencies may want to consider requiring other interested parties to at least sign a written acknowledgment and consent, stating they are aware of the existence of the development agreement and that they understand its terms.

SUMMARY

A number of issues warrant consideration when drafting a development agreement. In the final analysis, a well-drafted development agreement should accurately capture the deal points negotiated by the parties, and anticipate and address potential problems that may arise during implementation of its terms.

The Institute offers a variety of sample development agreements online through its database. The database is accessible through www.ilsg.org\devtagmt. The Institute also welcomes submittals from public agencies of additional samples for this database.

GLOSSARY OF KEY TERMS

Actions By Third Parties Necessary To Implement The Agreement: describes permits or fees required by other agencies such as school mitigation fees, environmental mitigation measures, etc.

Agency Default: describes the instances in which the agency would be in default such as:

- If a material warranty, representation or statement made or furnished by agency to the developer is false or proves to have been false in any material respect
- The agency fails to comply in good faith with a material requirement
- An express repudiation, refusal, or renunciation of the agreement

Agency Default; Developer Remedies: describes the options the developer would have in the event the agency is in default such as:

- To waive the default as not material
- To pursue legal remedies provided for elsewhere in agreement
- To terminate the agreement
- To delay or suspend developer performance which is delayed or precluded by the default of the agency

Agency Obligations: heart of development agreement; describes what the agency is obligated to do such as diligently process further discretionary approvals, provide capacity, construct some improvements, reimburse certain funds advanced by developer, etc.

Amendment Of Agreement: describes how agreement will be amended; standard is that it is amended in same manner in which it was initially adopted (public hearing process through agency) (but see "Operating Memorandum")

Annual Review: a reminder that there is a state law requirement that there be an annual review of the agreement by the agency

Assignment: sets forth that neither party shall assign or transfer any of its rights, interests or obligations, without the prior written consent of the other, which consent shall not be unreasonably withheld

Attorneys' Fees And Applicable Law: states that if a lawsuit or other legal action is brought with respect to the agreement, the prevailing party is entitled to reasonable attorney's fees and costs and identifies that California law will be used to interpret agreement

Bankruptcy: describes what happens in the case of a bankruptcy

Certificate Of Satisfaction: a writing from the agency, as phases of construction are completed, stating that each phase is in compliance with its obligations under the agreement, often important to potential lenders

Consistency With General Plan: required provision which states that the agreement is consistent with agency's general plan

Cost Recovery: describes the method by which the agency will recover costs of staff time including legal fees for negotiation of the agreement

Covenants Run With The Land: states that the agreement is specific to the property, binds future owners and is not transferable to another property

Default And Remedies: describes what constitutes a default, what notice is required if one party thinks there is a default (generally a material breach), what remedies can be purused (for ex. damages, injunction, termination)

Delay, Extension Of Times Of Performance: identifies that performance by a party may not be a default if the delays are due to war, strikes, riots, acts of God, or governmental entities other than agency ("see Force Majeur")

GLOSSARY OF KEY TERMS (CONTINUED),

Developer Default: describes the instances in which the developer would be in default such as:

- If a material warranty, representation, or statement made by the developer to the agency is false or p been false in any material respect
- A finding by the agency that the developer fails to comply in good faith with any other material requ agreement
- An express repudiation, refusal, or renunciation of the agreement

Developer Default; Agency Remedies: describes the options the agency would have in the event dev default such as:

- To waive the default as not material
- Refuse processing of a permit, approval, or other entitlement for
- To terminate the agreement
- To delay or suspend agency performance which is delayed or precluded by the default of developer
- To cure and charge back costs to the developer in emergency situations posing an immediate danger safety

Developers' Interest: describes what legal interest the developer has in the property

Developer Obligations: heart of development agreement; describes what property owner/developer is obl such as what improvements to be constructed and when, property to be dedicated and when, money to when, etc.

Development Plan: a development agreement must specify the permitted uses of the property, the intensity of use, and the maximum height and size of proposed buildings; because development agreements being used in a variety of applications, the required content can be addressed more generically or more depending on the goals of the parties and the degree to which the absence of such specification in the agree that the agency's regulations apply. For example, the permitted uses can be generically established by re zoning category such as "retail commercial" or specifically established by reference to a site plan detailing of a proposed project. Likewise, the "density and intensity" can be generically designated by using possibilities, ("6 to 10 units per acre," for example), or specifically designated at "2 units per acre". S requirement that the maximum size and height of proposed buildings be included does not mean that ever must propose buildings

Encumbrances On The Subject Property: identifies subordination and mortagee information regardin and obligations including notice of default and right to cure

Entire Agreement: provides that the agreement embodies all the terms of the agreement and no "outside" are valid

Estoppel Certificate: a written notice that the agreement is in full force and effect, a binding obligation o and there is not a default

Exhibits: outlines what exhibits are attached and made a part of the agreement

Force Majeure: describes that performance may be excused due to war, terrorism, strikes, and other ev the control of the parties

Good Faith And Fair Dealing: sets forth that the parties expressly acknowledge that any actions they measured by the "covenant of good faith and fair dealing"

Hold Harmless And Indemnification: requires the developer to hold the local agency harmless from any agency may incur as a result of entering into the agreement; states that the developer will to indemnify and agency at the developer's cost against any legal action instituted by a third party to challenge the val agreement, including a challenge based on CEQA compliance

GLOSSARY OF KEY TERMS (CONTINUED),

Incorporation Of Recitals: generally states that the recitals which precede the "now therefore" clause are incorporated into the agreement itself.

Insurance: sets forth types and amounts of insurance that the developer is to provide as security for the hold harmless and indenmnity requirements

Jurisdiction And Venue: identifies the county in which any litigation should be filed and that the interpretation, validity, and enforcement of the agreement shall be governed by California law

Liquidated Damages: identifies circumstances which would limit remedies against the agency to specific performance (no ability to receive money damages); under some circumstances, liquidated damages clauses may protect the agency from upside risks associated with damages awards. There may be instances in which the agency desires liquidated damages if developer fails to perform (such as failure to dedicate property

Milestones: see Phasing

Notices: describes where and how notices required in the agreement are to be sent

Operating Memorandum: describes instances in which formal amendment to agreement is not needed to implement the agreement such as minor refinements and/or clarifications; should be up to agency's sole discretion to determine whether amendment or "Operating Memorandum" is appropriate

Parties To The Agreement: identifies the persons having "legal or equitable interest" in the property

Phasing Of Development: describes the "triggers" or "milestones" of the project; may also be known as the "development plan"; on larger, phased projects, it may be useful to include "milestone" requirements so the agency can terminate the agreement if phases have not been completed within a specified time frame

Private Undertaking: identifies that the project is a private development and there is no partnership, joint venture, or other association of any kind between the developer and the agency

Project And Property Subject To This Agreement: describes the project name, street address and references a legal description of the property (generally an exhibit)

Protest Rights: provides for the developer to waive protest rights, and releases the agency from any claims arising out of the calculation, allocation, and use of development mitigation fees (AB 1600 fees)

Public Benefits: this provision is a required element of a development agreement related to the reservation or dedication of land for a public purpose; a permissive element is the terms and conditions relating to the project financing of necessary public facilities and the subsequent reimbursement for the developer's non-pro rata share over time, and generally includes a description of the public benefits that will result from the agreement, following a recital explaining that the developer recognizes that greater latitude is provided in exchange for agreeing to contribute greater public benefits than could otherwise be required.

Recitals: describes the parties to the agreement; also describes applications and hearing process as well as CEQA review (for example: development agreement application number, general plan amendment application number, type of CEQA review done (if EIR gives state clearinghouse number), also identifies dates of public hearings before planning commission and agency; many development agreements begin with a recital explaining the positive effects of entering into a development agreement, and that the agreement is entered into pursuant to the state development agreement law; a recital may address contingencies that will delay the effective date of the agreement, such as the need for annexation of the property

Recordation: implements state law requirement which requires the agreement to be recorded

GLOSSARY OF KEY TERMS (CONTINUED)

Reserved Discretionary Approvals: describes, generally in some detail, the approvals which are subject to discretion even after the agreement locks in or freezes other regulations; some regulations which may be important to "reserve" are impact fees, uniform codes, processing fees, certain procedural regulations (method of submitting final map – number of copies, Mylar, GIS format, etc.)

Security: describes what the agency will require to assure performance such as letters of credit, performance bonds, or the ability to withhold certain approvals (for example building permits), until performance occurs

Severability; also called Validity: sets forth that if one aspect of the agreement is held by a court to be illegal, the validity of the remaining provisions are not affected

Signatures: identifies who should sign the development agreement; in addition to the property owner and agency, some agencies require lenders, lessees and others with an interest in the property, to sign the development agreement or to sign subordination agreements (see "subordination").

Subordination: an action by which another entity makes their interests in the property subject to the terms and conditions of the agreement and acknowledges the existence of the agreement

Successors: identifies that the obligations imposed by the agreement constitute "covenants running with the land" and that the burdens and benefits bind all future purchasers

Term: identifies the length of time the agreement (which must be stated in the agreement); larger projects, especially those constructed in phases, may require 10, 15 or 20 year terms

Termination (upon completion of development): provides that upon sale of individual lots all obligations of developer are discharged with respect to lots upon final inspection and issuance of certificates of occupancy

Vested Components: describes, generally in some detail, the existing development regulations, etc. that are "frozen" or "locked in" by the agreement

Waivers: states that a waiver of one breach is not a waiver of any other breach

CONCLUSION

CHAPTER 7

Development agreements can be a useful tool in land use planning, creating win-win opportunities for both project proponents and local agencies when dealing with uncertainties associated with the regulatory environment.

The goal of this manual is to help local agencies in understanding development agreements and to provide them with practical tools to assist them in using development agreements within their jurisdiction.

Did the manual succeed in achieving this goal? The Institute and its financial supporters are very interested in local agency feedback. Please fill out the form at the end of this publication to let the Institute know whether this material was useful and how it could be improved.

Feedback Form..... 67

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INDEX

A-B

AB 1600 65

Affordable housing 28

Amendment 16, 30, 59, 62

Annual review 22

Application 18, 22, 30, 31

Application Process 30, 31

Assignment 59, 62

Attorneys fees 60

Brown Act 26, 37, 45

Building permit 17, 19, 22, 41, 54, 56, 57, 67

C-E

California Environmental Quality Act (CEQA) 20, 32, 51, 58

Cancellation 59

Certificate of satisfaction 58

Challenge, statute of limitations for 17, 22, 23, 32, 54

Coastal zone 17, 35

Conditional use permit 9, 32

Confidentiality, see also Brown Act 26

Covenant of good faith and fair dealing 17, 19, 40, 50, 60, 62, 64

Covenants, conditions and restrictions (CC&Rs) 59

Default, remedies and termination 56, 62, 64

Density 26, 52

Development Agreement:

Act, ...22 ,31, 51

Law, Legislative history..2, 4, 17, 21, 26, 27, 30, 31, 32, 34, 36, 40, 49, 51, 54, 65

Development Agreement (continued)

Checklist of common provisions 50

Defined 22, 31, 51

Maximum height and size of proposed buildings 26, 52, 64

Permitted uses of property.4, 16, 17, 26, 35, 48, 50, 51, 52, 5458, 59, 60, 62, 64,65, 67

Purpose..11, 15, 26, 30, 31, 53 ,65

Recitals.....51, 65

Required Contents 52

Term....9, 10, 19, 26, 27, 34, 34, 40, 41, 45, 47, 52, 53, 55, 58, 60, 60, 64, 65, 67

Termination....30, 40, 41, 52, 56, 62, 67

Accountability 40

Compared to vesting tentative map.....22

Statute of limitations...17, 22, 23, 32, 54

Effect of annexation and incorporation.....27, 51, 52, 65

Fees ...14, 15, 17, 17, 18, 22, 32, 33, 34, 62, 67

Findings.....27, 30, 31, 36, 37

Recordation.....30, 39, 58, 65

Statutory authority for ..15, 22, 59

Subordination.....60, 64, 67

Successors.....59, 67

Development impact fees..... .....15, 55, 67

Development plan.52, 64, 65

Educational Revenue Augmentation Fund (ERAF) 15

Enforcement 58, 60, 65

Exactions..... 14, 44, 47

F-K

Findings..... 27, 30, 31, 36, 37

"Frozen" regulations..... 55, 67

General plan 9, 11, 13, 13, 14, 26, 37, 51, 58, 59, 62, 65

Growth management 12

Indemnification 58, 64

L-N

Lenders..... 50, 58, 60, 62, 67

Letters of credit..... 57, 67

Liquidated damages 56, 65

"Milestone" requirements... 56, 65

Mitigation Fee Act.. 15, 14, 32

Negotiating team37, 43, 44, 47, 50

Negotiations10, 12, 13, 14, 18, 26, 28, 31, 33, 33, 36, 40, 43, 44, 45, 46, 47, 48, 49, 50

Non-performance issues 56

Notice issues 35

O-R

Open meeting law 26, 38, 47

Open space 12, 48

Parties to the agreement9, 50, 51, 59, 65

Performance bonds..... 57, 67

Planning Commission... 30, 33, 34 ,36, 37, 65

Police power 22, 38, 53, 54

"police power" challenge 53

Prevailing wage requirement.. 18

Proposition 98 15

Public benefits..... 30, 53, 65

Public hearings 32, 34, 44, 65

Public input..... 32, 34

Public Records Act 34

Recovery of costs.....34, 55

Referendum.....32, 59

Regulatory takings 2, 16

S-T

Sales tax.....13, 33

SB 50 16

School facility fees.....16

Specific plan9, 11, 14, 26, 37, 48, 51, 58, 59

Sphere of influence 27, 52

Stakeholders.....33, 34, 34

U-Z

Unincorporated territory .27, 52

Urban limit line.....48

Vested right....17, 20, 20, 22, 54

Zoning9, 12, 13 ,35, 37, 51, 52, 54, 55, 58, 64

5 Key Aspects of the Development Agreement Process

1. Evaluating the **advantages and disadvantages** of using development agreements;
2. Understanding the role development agreements can play in **achieving local agency land use planning objectives**;
3. Knowing the **procedural issues** related to development agreements;
4. Incorporating the **necessary substantive provisions** in development agreements; and
5. Mastering the **art of negotiating development agreements**.

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