

Commentary

Development Agreements

by Robert E. Merritt and Geoffrey L Robinson

A developer embarking on a major project in California today should actively pursue obtaining a statutory development agreement with the city or county having approval jurisdiction over the project.

California law gives cities and counties broad powers to deny or condition project approvals, or to add new exactions, at virtually every stage of the development process. The sheer number and variety of discretionary approvals required from a city or county – including general plan amendments, rezoning, development plans, conditional use permits and subdivision map approvals – present a formidable challenge to the developer. Also, increasingly in the post-Proposition 13 era, local agencies have been tempted to tack on new or higher fees even at the latest stages of the project.

Despite the substantial legal and financial commitments required to proceed through this multi-layered approval process, California courts have been unwilling to accord developers vested rights until the construction stage of the project. In the leading case, Avco Community Developers, Inc. v. South Coast Regional Commission, 17 Cal. 3d 785 (1976), the California Supreme Court held that a developer has no vested right to proceed with a project until a building permit has been obtained and substantial work performed and substantial liabilities incurred in good faith reliance on the permit. The court held that because Avco had not obtained such a permit, it had no vested rights despite having spent some \$2,000,000 and having incurred liabilities of \$750,000 for development of its subdivision.

One of the legislative responses to the potential inequities of the vested rights doctrine was the enactment of the Development Agreement Statute (Government Code Sections 65864 et seq.) which allows builders, through contracts with cities and counties, to lock in the rules, regulations and policies in effect at the planning stages of the project. This lock-in provision – which may only be modified by written agreement of the parties – gives the builder the right to develop the property under the rules, regulations and policies governing permitted uses, density, design, improvement and construction standards in effect at the time of execution of the development agreement.

The procedures for adoption of a development agreement are similar to those required for other development approvals, including notice and public hearings by the planning commission and legislative body and a finding of consistency with the general plan and applicable specific plans. A development agreement may be amended through the same procedure, and is subject to annual review by the city or county for good faith compliance.

The use of development agreements is now widespread: nearly one-half of all local governments have reported activity to implement the statute, and over 30% of local governments have development agreements signed or under negotiation. While mid-sized, rapidly-growing cities in the Bay Area and Los Angeles regions have taken the lead in use of development agreements, a substantial number of small towns in rural areas have also used them. Use of development agreements has not been restricted to large builders seeking long-term security for phased projects; mid-range and small projects to be completed in a single phase are also well represented.

Many fast-growing communities have integrated development agreements into long-range planning and infrastructure financing: San Diego and Roseville, for example, have used development agreements to implement specific plans and capital facilities plans. In areas where development has been restricted because of infrastructure needs, builders have used development agreements to arrange funding for partial expansion of capacity in exchange

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for the right to proceed with development. Cities and counties have also used development agreements to attract development generally, or to direct it to specific areas.

Development agreements thus often make sense from both the public agency and developer standpoint, particularly as public agencies increasingly look to developers to fund basic infrastructure that may exceed strict "nexus" requirements, such as major road improvements, schools, parks libraries, police and fire stations. Grant of development rights as a quid pro quo for such infrastructure financing is fully consistent with the purposes of the development agreement statute.

A development agreement can remove many of the risks inherent in the approval process by giving the developer substantial rights to proceed with the project in accordance with the policies and procedures in effect at the time of the planning stages of the project.

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