

# IV. THE NUTS AND BOLTS OF PROCESSING DEVELOPMENT AGREEMENTS

From a local agency standpoint, the starting point for processing development agreements is the agency’s local procedures for development agreements. The development agreement law contemplates local agencies adopt such procedures.<sup>1</sup> If there are none, some must be adopted upon the request of an applicant.<sup>2</sup> Sample procedures are available online at [www.ilsg.org/devtagmt](http://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 or Termination
- Periodic Review

Such procedures may be adopted by ordinance or resolution.<sup>3</sup> The development agreement law allows local agencies to recover the direct

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<sup>1</sup> See Cal. Gov’t Code § 65865(c) (“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 . . .”).

<sup>2</sup> See Cal. Gov’t Code § 65865(c).

<sup>3</sup> See Cal. Gov’t Code § 65865(c).

**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).

costs associated with adopting procedures for the agencies' consideration of development agreements.<sup>4</sup>

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

## PURPOSE/FINDINGS

The agency's development agreement procedures provide an opportunity for the local agency to state its goals in considering requests to enter development agreements, which is to promote the community's needs and to receive greater community benefits than it can otherwise be achieved through the land use regulatory process. This can be helpful in setting the tone for the negotiations so that both parties are able to have realistic expectations going into the negotiations.

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

## APPLICATION PROCESS

An application form specifying the type of information an agency needs in order to process the development agreement request can be an efficient way of assuring the agency gets the information it needs. Some development procedures authorize the agency's planning director to develop a form application for development agreements. A sample form is included in Appendix C and is available online at [www.ilsg.org/devtagmt](http://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. This save staff time in reviewing development agreements; it also creates greater assurance that the agreement will cover all of the agency's needs. However, the form is a starting point, which typically must be tailored to the individual circumstances of a given proposal. Chapter 6 discusses the content of development agreements. Sample forms are available online at [www.ilsg.org/devtagmt](http://www.ilsg.org/devtagmt).

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<sup>4</sup> See Cal. Gov't Code § 65865(d).

Some 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.<sup>5</sup>

The local agency will also need to assure that the environmental analysis requirements under the California Environmental Quality Act have also been satisfied.<sup>6</sup> Attention must be paid to the requirements of the Permit Streamlining Act.<sup>7</sup>

## 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.<sup>8</sup>

## 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 voter referendum.<sup>9</sup> In fact, a development agreement cannot legally take effect until after the 30-day period for a referendum occurs.<sup>10</sup>

There is also a 90-day statute of limitations to challenge the adoption or amendments of development agreements approved on or after January 1, 1996.<sup>11</sup>

### 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.

<sup>5</sup> 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.

<sup>6</sup> See generally Cal. Pub. Res. Code § 21000 and following.

<sup>7</sup> See generally Cal. Gov’t Code § 65920 and following.

<sup>8</sup> See Cal. Gov’t Code § 65867.

<sup>9</sup> See Cal. Gov’t Code § 65867.5.

<sup>10</sup> 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).

<sup>11</sup> 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 them to sit-in during negotiations, it may be possible to consult with them ahead of time, or perhaps on a “meet and confer” basis, as negotiations proceed.

As the following hypothetical 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.

**Illustration - TAXCO** Destination City is looking for a way to increase the amount of 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 on the property it owns in the city.

Senior staff meet with Taxco personnel to discuss the benefits of building in Destination City. Aware that a neighboring city would also like a Taxco, 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 there. Eighteen months later, a deal is struck and the terms are commemorated in a development agreement, 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 in order to entice Taxco to locate in Destination City. Bill calls for a meeting of the merchants.

During the meeting, merchants express concern that the city should not entice Taxco to locate in the city, that it is not fair for the city to agree to monetary incentives not offered other businesses, that the city ought to be concerned about “the very real threat” that Taxco will run other merchants out of town, and that the city should be focusing on business retention rather than attracting new businesses. The group decides to formally oppose approval of the development agreement, and possibly initiate a recall of the entire city council for secretly acting against its interests. These parties do not live happily ever after.

Meeting with stakeholders ahead of time, to discuss possible actions such as attracting a large retail outlet, can allow legitimate issues to be addressed 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, they may have concluded that attracting Taxco would actually have helped business retention, if they had had an opportunity to evaluate the experiences of other cities.

“Meeting and conferring” during negotiations can allow stakeholders to provide input concerning specific terms and conditions that are being

considered. Many times the underlying goal can be accomplished in a slightly different manner, in order to accommodate stakeholders' needs.

In the Taxco hypothetical, city staff needed to keep the negotiations confidential, so that a neighboring city would not undermine its efforts. While the need for confidentiality may make it difficult to include stakeholders, by attempting to include them even without sharing every detail, a local agency will be on a firmer footing in terms of community relations as it relates to a development agreement.

## **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.<sup>12</sup> Hearings must be held by the agency's planning agency and its governing body<sup>13</sup>. Such hearings are subject to the state's open meetings laws,<sup>14</sup> which require that all interested persons be allowed to attend these meetings<sup>15</sup> and provide public comment before the planning commission's or governing body's consideration of the development agreement.<sup>16</sup> Members of the public are also entitled to request copies of all documents included in the agenda packet.<sup>17</sup> The state's Public Records Act also may entitle members of the public to request other documents relating to the proposed agreement.<sup>18</sup>

## **NOTICE ISSUES**

The development agreement law provides notice requirements for hearings relating to the potential adoption of a development agreement.<sup>19</sup> 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

### **ONE 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.

If provided for in the agency's local procedures, the agency will want to assure that it does not assess the project proponent more than its actual costs. One way is to establish an hourly rate and keep track of staff's time.

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<sup>12</sup> See Cal. Gov't Code § 65867.

<sup>13</sup> See Cal. Gov't Code § 65867.

<sup>14</sup> See Cal. Gov't Code § 54950 and following (The Ralph M. Brown Act).

<sup>15</sup> See Cal. Gov't Code § 54953(a).

<sup>16</sup> See Cal. Gov't Code § 54954.3.

<sup>17</sup> See Cal. Gov't Code § 54954.1.

<sup>18</sup> 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).

<sup>19</sup> See Cal. Gov't Code § 65867.

posting in three public places within the jurisdiction if there is no newspaper of general circulation, with special considerations relating to drive-through facilities)<sup>20</sup> and projects (10-day mailed notice to the property owner, the project proponent, affected local agency service/facility providers,<sup>21</sup> neighboring property owners within 300 feet, as well as published and posted notice, again with special considerations relating to drive-through facilities).<sup>22</sup> The agency must also give notice to anyone who has requested it.<sup>23</sup>

**A NOTE ON  
DEVELOPMENT  
AGREEMENTS IN  
THE COASTAL  
ZONE**

Local agencies in the coastal zone may only approve development agreements if they have a certified local coastal program or 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)
- 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.<sup>24</sup>

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](http://www.ilsg.org/devtagmt).

<sup>20</sup> *See* Cal. Gov't Code § 65090.

<sup>21</sup> 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).

<sup>22</sup> *See* Cal. Gov't Code § 65091.

<sup>23</sup> *See* Cal. Gov't Code § 65092, which provides:

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.

<sup>24</sup> *See* Cal. Gov't Code § 65094.

## DECISION MAKER INPUT ON DEVELOPMENT AGREEMENT AND FINDINGS

A local agency's development agreement procedures are 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.

### 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 the negotiations proceed.

Consequences of having the planning commission feel insufficiently involved may include:

- Bad feelings on the part of individual commissioners
- A lack of planning commission input during negotiations
- Less protection of elected officials' interests by appointed commissioners. However, the planning commission needs to be sensitive to the fact that ultimately the governing body will be held politically accountable for the provisions of any development agreement.

One approach is to schedule the project in question for discussion at a regular planning commission meeting at the start of negotiations. This would provide the planning commission as a whole 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 include a sub-committee of the planning commission as an adjunct to the negotiation process. If the sub-committee is less than a quorum of the commission the discussion may occur without the overlay of the open meetings requirements.<sup>25</sup> While the sub-committee

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<sup>25</sup> 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

could be made a part of the negotiating team, it may be more practical given the competing demands on planning commissioners' time for staff to confer with the sub-committee 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.

**CAN A  
DEVELOPMENT  
AGREEMENT BE  
APPROVED BY  
INITIATIVE?**

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

## PLANNING COMMISSION RECOMMENDATION AND INPUT ON FINDINGS

An agency's development agreement procedures can solicit the planning commission's input on whether the development agreement should be approved and on the findings accompanying any approval. Such findings can 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;
- Promotes the public health, safety and general welfare;
- Is "just, reasonable, fair and equitable" under the circumstances facing the agency;<sup>26</sup>
- 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.

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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, decisionmaking or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, advisory committee, composed solely of members of the legislative body which are less than a quorum of the legislative body are not legislative bodies . . .").

<sup>26</sup> 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).



## GOVERNING BODY HEARING AND DECISION ON DEVELOPMENT AGREEMENT

As discussed in Chapter III, well-articulated planning policies and objectives should increase the likelihood that staff’s and the 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.<sup>27</sup>

Well-conceived and up to date planning policies also avoid asking staff to negotiate in a vacuum, with little or no immediate direction or feedback from decision-makers. 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 staff negotiated.

## ACTION ON THE AGREEMENT

The governing body must approve a development agreement by ordinance.<sup>28</sup> Ordinances must go through a two-reading process, with at least a five-day intervening period.<sup>29</sup> Changes require an additional five-day waiting period.<sup>30</sup>

## 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<sup>31</sup>

<sup>27</sup> See generally Cal. Gov’t Code § 54950 and following (The Ralph M. Brown Act).

<sup>28</sup> See Cal. Gov’t Code § 65867.5.

<sup>29</sup> See Cal. Gov’t Code §§ 36934 (city requirements), 25131 (county requirements).

<sup>30</sup> See Cal. Gov’t Code §§ 36934 (city requirements), 25131 (county requirements).

<sup>31</sup> See Cal. Gov’t Code § 65868.5.

**WHAT  
CONSTITUTES  
“ENTRY” INTO  
THE  
DEVELOPMENT  
AGREEMENT?**

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

- Publish the ordinance approving the development agreement.<sup>32</sup>

In cities, failure to timely satisfy the publication requirement prevents the ordinance from taking effect or being valid.<sup>33</sup>

## AMENDMENT

After a development agreement has been signed, it may only be amended by mutual agreement of parties.<sup>34</sup> Most development agreement procedures require amendments 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 information about the process 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 proponent's responsibilities.<sup>35</sup> The review must require the proponent to demonstrate good faith compliance with the terms of the agreement.<sup>36</sup> If a local agency finds, based on substantial evidence, that

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<sup>32</sup> 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> and 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).

<sup>33</sup> 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).

<sup>34</sup> *See* Cal. Gov't Code § 65868.

<sup>35</sup> *See* Cal. Gov't Code § 65865.1.

<sup>36</sup> *See* Cal. Gov't Code § 65865.1.

such compliance has not occurred, the agency may modify or terminate the agreement.<sup>37</sup>

In addition, the development agreement law provides that the development agreement is “enforceable by any party.”<sup>38</sup> Typically, a development agreement contains provisions specifying procedures for notice and termination in the event of a default by either party.

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<sup>37</sup> See Cal. Gov’t Code § 65865.1.

<sup>38</sup> See Cal. Gov’t Code § 65865.4.

**DEVELOPMENT AGREEMENT PROCEDURES CHECKLIST  
(GOVERNMENT CODE §§ 65864-65869.5)**

- I. INITIAL DEVELOPMENT AGREEMENT
  - A. Application to enter into development agreement
    1. Parties; qualification
    2. Proof of qualification, e.g. title report, ability to finance project
    3. Contents of application
    4. Contents of proposed agreement
      - a. Specify provisions of standard form and request alternate or optional provisions peculiar to the specific proposal.
    5. Fees and costs, e.g. amounts, who bears
  - B. Proceedings by Planning Department and Planning Commission
    1. Staff report and recommendation to Planning Commission
    2. Notice of intent to consider adoption (§65867)
      - a. Form of notice
      - b. Publication (§§65867, 65854, 65856)
    3. Public hearing (§65867)
    4. Standards/findings (§65867.5)
    5. Planning Commission recommendation to Governing Board
  - C. Proceedings by Governing Board
    1. Notice of intent to consider adoption (§65867)
      - a. Form of notice
      - b. Publication (§§65867, 65854, 65856)
    2. Public hearing (§65867)
    3. If changes in agreement proposed, refer back to Planning Commission for report
    4. Standards/findings (§65867.5)
    5. Ordinance approving development agreement (§65867.5)
      - a. Introduction
      - b. Adoption
      - c. Publication/posting
    6. Approval by California Coastal Commission (§65869)
      - a. Not necessary if required local coastal program is certified before agreement entered into (see Publ. Res. Code §§30000 *et seq.*)
      - b. Approval is by formal action of State Commission
  - D. Recordation of development agreement (§65868.5)
  - E. Designation of Property Subject to Agreement on Zoning Maps (Optional)

**DEVELOPMENT AGREEMENT PROCEDURES CHECKLIST  
(CONTINUED)**

- II. AMENDMENT OR CANCELLATION OF DEVELOPMENT AGREEMENT BY MUTUAL CONSENT\*
  - A. Initiation
    - 1. Application by property owner
    - 2. Initiation by city
      - a. Referral of proposal to amend or cancel to Planning Department and Planning Commission for report and recommendation
  - B. Proceedings by Planning Department and Planning Commission
    - 1. Staff report and recommendation
    - 2. Notice of intent to consider amendment or cancellation (§§65868, 65867)
      - a. Form of notice
      - b. Publication (§§65867, 65854, 65856)
    - 3. Public hearing (§65867)
    - 4. Standards/findings (§§65868, 65867.5)
    - 5. Planning Commission recommendation to Governing Body
  - C. Proceedings by Governing Body
    - 1. Notice of intent to consider amendment or cancellation (§65867)
      - a. Form of notice
      - b. Publication (§§65867, 65854, 65856)
    - 2. Public hearing (§65867)
    - 3. Standards/findings (§65867.5)
    - 4. Ordinance approving amendment or cancellation
      - a. Introduction
      - b. Adoption
      - c. Publication/posting
  - D. Recordation of amendment or cancellation (§65868.5)

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\* §65868 makes §65867 applicable to amendment or cancellation (notice of intention be given to amend or cancel in same manner as entering into agreement) but makes §65867.5 (findings necessary and approval by ordinance) applicable only to amendment. It is suggested that the same procedure be followed in each instance.

## DEVELOPMENT AGREEMENT PROCEDURES CHECKLIST (CONTINUED)

### III. PERIODIC REVIEW OF DEVELOPMENT AGREEMENT

- A. Initiation
  - 1. Automatic initiation by staff
  - 2. Initiation upon request
  - 3. Time for review (at least every 12 months, §65865.1)
  
- B. (Optional) Proceedings by Planning Department and Planning Commission
  - 1. Staff report and recommendation
  - 2. Notice of Public Hearing
    - a. Form of notice
    - b. Method of giving notice
  - 3. Public hearing
    - a. Issue: applicant's good faith compliance (§65865.1)
    - b. Burden of proof on applicant
  - 4. (Optional) Planning Commission recommendation to Governing Body
  
- C. Proceedings by Governing Body (or Planning Commission or Planning Director if delegated authority)
  - 1. Notice of intent to consider Planning Commission recommendation
  - 2. Public hearing (§65867)
  - 3. Determination either that:
    - a. Applicant has complied in good faith, or
    - b. Cause exists to proceed with hearing on whether applicant has complied in good faith

### IV. MODIFICATION OR SUSPENSION WHERE AGREEMENT CONFLICTS WITH SUBSEQUENT STATE OR FEDERAL LAND REGULATION (§65869.5)

- A. Determination that conflict exists
  
- B. Proceedings to modify or suspend
  - 1. Procedure (none is specified-should at least include noticed public hearing and decision by City Council)

### V. TERMINATION OR MODIFICATION OF DEVELOPMENT AGREEMENT

- A. Proceedings by Governing Body
  - 1. Notice of City Council intent to proceed with hearing on whether to terminate or modify under §65865.1
    - a. Form of notice
    - b. Method of giving notice
    - c. Who is entitled to notice
  - 2. Public hearing (§65867)
  - 3. Standards/findings (§65865.1)
  - 4. Decision to terminate or modify development agreement
  - 5. Ordinance (is one necessary or desirable?)
  
- B. Recordation of notice of termination or modification (§65868.5)

# V. THE ART OF NEGOTIATING DEVELOPMENT AGREEMENTS

There are a number of facets to the art of negotiations. Fundamentally, it is important to decide *who* is going to negotiate, and *how* the parties will reach consensus. This chapter addresses issues associated with each.

## WHO IS GOING TO NEGOTIATE?

As for 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 whether aspects of the agreement will be valuable 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 project's land use impacts, including its compatibility with surrounding land uses.

The public agency may also want to include its attorney on the negotiating team, rather than just at the 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 legal counsel participates in the negotiations or not, he or she should be fully apprised of the negotiations as they proceed.

If the agreement will cover extensive infrastructure issues, it may be helpful to include the agency's engineer or public works staff on the negotiating team.

As for the project proponent, he or she (or a representative with full legal authority to bind the project proponent) should participate in the

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negotiations. On larger projects, the project proponent may want to assemble a team comprised of 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**

If there is a group of property owners acting as a single applicant, it can be helpful for the group to appoint a lead negotiator.

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 how the negotiations to proceed.

## **KNOWING WHO IS ACROSS THE TABLE**

Before beginning to negotiate, each party should be acquainted with relevant aspects of the other's background. 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 other communities in which the proponent has development agreements. The parties should also determine in advance what they expect to gain in the negotiations, what the other party may need, and what they are willing to give.

## **SETTING EXPECTATIONS**

Once the parties meet, they should discuss their respective expectations frankly. 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 time frame 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, who will make a decision only after a public hearing. The parties may benefit from adopting a "check-off" system so that once they reach "conceptual agreement" on deal points, they do not continually renegotiate those points, absent changed circumstances.



It can also be useful to discuss the schedule by which the various regulatory steps will occur (including California Environmental Quality Act, Local Agency Formation Commission, the development agreement, etc.)

## **THE UTILITY OF GROUND RULES**

Ground rules for negotiations are very important. Typical kinds of 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 decision-makers, including individual members of the governing body?
- How will media inquiries relating to the progress of the negotiations be handled?
- What kinds of strategies, if any, will be employed if bargaining reaches an impasse?

Sample ground rules are included below (also available online at [www.ilsg.org/devtagmt](http://www.ilsg.org/devtagmt)).

### 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

## SETTING PRIORITIES

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

Some 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 facilities?
- **Special Issues Relating to State Requirements.** What role, if any, 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.

### PRACTICE POINTER

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.

## HAVE A STRATEGY

Fundamental to the negotiations is the fact that 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 will react to this stress by displays of anger and will sometimes try to badger their way to 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 approach to negotiations. 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, which 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 brain-storming techniques to develop lists of options from which “out-of-the-box” solutions can flow
- Agree to rely on objective standards or third party authority, to settle differences and overcome obstacles.

While conducting successful negotiations is a much larger topic than can be adequately dealt with here, there are a number of resources that explain the benefits of negotiating in a more dynamic or synergistic fashion.<sup>39</sup>

For the local agency, an interest-based approach works better in light of the constraints of the state’s open meeting laws.

The following illustrates this approach towards negotiations.

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<sup>39</sup> See, for example, *Getting to Yes* by William Ury and Roger Fisher; and *The 7 Habits of Highly Effective People* by Stephen R. Covey.

**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, and planning staff advises 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 explains, for example, that it is 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 to brainstorm, in order to identify mutually acceptable solutions. The parties are careful not to criticize ideas during the process, or to dismiss any as unrealistic. Slowly, ideas emerge, including the far-fetched thoughts that homes ought to be built underground, and that homes should not be visible from public streets.

It occurs to planning staff that the county has infill property that would 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 is also aware, from a number of workshops the county has had on the issue of “smart growth,” that the supervisors are interested in more sustainable forms of development.

By thinking in terms of interests the parties were able to identify a potentially win-win solution.

By preparing in advance, developing a 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 their chances of reaching consensus.



# VI. THE SUBSTANCE OF A DEVELOPMENT AGREEMENT

There are a number of considerations that should be taken into account when drafting a development agreement. For efficiency, many jurisdictions start with a standard form agreement<sup>40</sup> reviewed and approved by the agency’s attorney. It is also helpful for those involved in the negotiations to have reviewed the following:

- The current version of the development agreement law;<sup>41</sup>
- The planning policies for the area in question, including exactions requirements and environmental analyses;
- The agency’s procedures for processing development agreements.<sup>42</sup>

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 issues—including drafting process issues-- that typically arise with development agreements.

**Who Will Do The Drafting? .... 51**

**When Should The Drafting Begin? ..... 52**

**Some Common Provisions In Development Agreements ..... 53**

**Summary ..... 68**

## WHO WILL DO THE DRAFTING?

A threshold issue is: From whose draft will the parties work?

From a public agency standpoint, the agency’s attorney should do the drafting. The common wisdom is the attorney drafting the document has more control over its content.

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<sup>40</sup> A sample form agreement is included as Appendix B (available online at [www.ilsg.org/devtagmt](http://www.ilsg.org/devtagmt)).

<sup>41</sup> See Cal. Gov’t Code § 65864 and following (available online at <http://www.leginfo.ca.gov> and clicking on “California Law”).

<sup>42</sup> See Chapter IV and the sample procedures available in Appendix A (available online at [www.ilsg.org/devtagmt](http://www.ilsg.org/devtagmt)).

As indicated above, for local agencies expecting to be involved in a number of development agreements, it can be helpful for the agency to have a form development agreement that covers key and standard issues of concern to the agency. Sample forms are available online at [www.ilsg.org/devtagmt](http://www.ilsg.org/devtagmt).

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 the 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 emerge can result in expensive and 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. This dynamic can generate the concomitant need for each side's attorneys to thoroughly review every draft and generates possibly avoidable tension in the remaining negotiations.

It can be preferable to keep a written outline of agreed-upon deal points for the entire agreement. Then, the development agreement can be drafted in close-to-finished form, subject to final editing and review by all parties.

### A NOTE ABOUT CLARITY

Sometimes it is tempting to use ambiguous language on 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 only be able to terminate the agreement upon substantial evidence of non-compliance, *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 such ambiguities will ultimately be resolved against the public agency.



## **SOME COMMON PROVISIONS IN DEVELOPMENT AGREEMENTS**

### **THE PARTIES TO THE AGREEMENT**

Local agencies may enter into development agreements only with persons having “legal or equitable interest” in the real property in question<sup>43</sup>.

There may be others who should be parties with 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.<sup>44</sup>

### **USE OF RECITALS**

It is common to include recitals, typically following the first paragraph of the agreement that identifies the parties to the agreement. 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, 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.<sup>45</sup>

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<sup>43</sup> See Cal. Gov't Code § 65865(a). See also *National Parks and Conservation Association v. County of Riverside*, 42 Cal. App. 4<sup>th</sup> 1505 (1996).

<sup>44</sup> See Cal. Gov't Code § 65868.5.

<sup>45</sup> See Cal. Gov't Code § 65865.2.

On occasion, a recital may address contingencies that will delay the effective date of the agreement, such as the need for annexation of the property.<sup>46</sup>

## TERM

The term must be stated in the body of the agreement.<sup>47</sup> Larger projects, especially those constructed in phases, may require 15 to 20 year terms. In other instances, staff may argue for a shorter term, perhaps 5 to 10 years, in order to be able 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 regulations to the development—is one factor the courts will evaluate in the event a development agreement is challenged.<sup>48</sup>

It is generally a good idea to allow the parties to terminate the agreement earlier, 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 time frame within which the annexation must occur. *See* Cal. Gov't Code § 65865(b). The agreement does not become operative until the annexation occurs. *See* Cal. Gov't Code § 65865(b).

## REQUIRED CONTENTS

A development agreement must specify:

- the permitted uses of the property
- the density or intensity of use

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<sup>46</sup> *See generally* Cal. Gov't Code § 65865.3 (development agreements and newly incorporated or annexed areas).

<sup>47</sup> *See* Cal. Gov't. Code § 65865.2.

<sup>48</sup> *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).

- the maximum height and size of proposed buildings.<sup>49</sup>

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.<sup>50</sup> Generally, it is useful to address each of the required content elements.<sup>51</sup>

For example, the permitted uses can be generically established by reference to a zoning category such as "retail commercial" or specifically established 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, ("6 to 10 units per acre," for example), or specifically designated at "2 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**

A development agreement must specify the project proponent's commitment to reserve or dedicate land for a public purpose.<sup>52</sup> A permissive element is 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.<sup>53</sup>

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

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<sup>49</sup> Cal. Gov't Code § 65865.2 (contents of development agreements).

<sup>50</sup> 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).

<sup>51</sup> 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).

<sup>52</sup> Cal. Gov't Code § 65865.2.

<sup>53</sup> Cal. Gov't Code § 65865.2

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 adoption of a development agreement might constitute an illegal “contracting away” of an agency’s “police powers.” “Police powers” in this context refers to a local agency’s governing powers. The word “police” in this context is derived from the Greek word “polis” which means “city.” Cities and counties typically obtain their police powers through the state constitution.<sup>54</sup>

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.”<sup>55</sup> 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.

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.<sup>56</sup> 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 in which this 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 nullify its approvals until such time as the project proponent acquires “vested rights” by obtaining a building permit and doing substantial construction work in reliance on that permit.<sup>57</sup>

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<sup>54</sup> See Cal. Const. art. XI, §7.

<sup>55</sup> Cal. Const. art. XI, § 7.

<sup>56</sup> 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).

<sup>57</sup> See *Avco Community Project Proponents, Inc. v. South Coast Regional Commission*, 17 Cal.3d 785 (1976). An alternative is the vesting tentative map approach.

Second, development agreements do not allow the imposition of new rules that conflict with those in existence when the agreement was approved,<sup>58</sup> (unless parties negotiate otherwise). Without a development agreement, the agency may change the applicable zoning in a manner that is inconsistent with the project proponent’s rights, in which case, the property may acquire what is known as a “non-conforming 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 “non-conforming” uses.

Whether either of these two effects of development agreements constitutes an illegal contracting away of police powers may turn on the *extent* to which an agency is surrendering 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.<sup>59</sup>

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 assure that it does not assess the project proponent more than its actual costs. One way is to establish an hourly rate and keep track of staff’s time.

### POSSIBLE EXCLUSIONS FROM THE FREEZE

Local agencies may wish to discuss retaining their discretion to apply changes in the following to projects that are the subject of a development agreement.

- Impact Fees
- Uniform Codes
- Processing Fees
- Procedural Regulations

<sup>58</sup> Cal. Gov’t Code § 65865.4.

<sup>59</sup> 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).

## WHICH REGULATIONS ARE FROZEN?

There are three drafting considerations concerning 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 that 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 employ in the event the parties agree to allow land uses that are inconsistent with the otherwise applicable zoning requirements then in existence. 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 and to enable the agency to make the consistency finding when approving the development agreement, in order to allow other projects to request that zoning in the future.

Third, the development agreement should recite that the agency's compliance is subject to later-enacted state and federal regulations.<sup>60</sup>

## “MILESTONE” REQUIREMENTS

On larger, phased 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 time frame.

The project proponent may resist agreeing to absolute deadlines, in which case, the public agency may want to consider allowing the time frame to begin upon the occurrence of a specified event, such as issuance of building permits. Before doing so, however, the public agency should make sure there is adequate incentive for the project proponent to stay on

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<sup>60</sup> Cal. Gov't Code § 65869.5.

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 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. Recognize that these provisions are generally advantageous to the project proponent and that having potentially lengthy periods in which the agency is unable to apply new land use rules and regulations may affect the agency's ability to do responsive land use planning.

### PRACTICE POINTER

Early lender input may avoid the need to redraft and/or amend the development agreement to address “lender issues”. Default noticing and timing tend to be areas of particular concern for lenders.

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

The local agency will also find it helpful to consider what kinds of remedies it will want 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
- Withholding certain approvals (for example building permits), until performance occurs

The agency may also want to think through timing issues associated with project proponent performance; in some instances, it may be advisable to

specify time frames for performing aspects of the development agreements and the consequences of not meeting those time frames.

## **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 and that if a state or federal regulation is amended in a way that would preclude further performance under the agreement, that the affected provisions of the development agreement will be modified or suspended.<sup>61</sup>

## **ANNUAL REVIEW**

The parties may want to recite that they are aware of the requirement that there be an annual review of the development agreement by the local entity. Recognize, however, that to the extent the parties make it a contractual obligation of the agency's to conduct such a review, they may be setting the agency up for a failure to perform.<sup>62</sup> Therefore, the agreement should specify that the agency's failure to conduct this review is not a breach of the agreement. The agency's procedures for conducting the annual review should be specified in the agency's procedures ordinance or resolution.

## **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. Another issue to specify is who can and cannot enforce the agreement.

## **RECORDATION**

The parties may want to recite that they are aware of the statutory requirement that the agreement be recorded within 10 days after 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.

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<sup>61</sup> See Cal. Gov't Code § 65869.5.

<sup>62</sup> A number of agencies admit to having ignored annual reviews. You may want to employ a 'tickler system' of some sort, to remind you to hold these hearings once a year.



## **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 ones 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 standard practice 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 entity 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.<sup>63</sup>

## **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 saying 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.

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<sup>63</sup> This is the subject of a pending Attorney General’s opinion.

The project proponent may want to seek that additional language be added stating 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 and it was 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), and that they include any development agreement obligations in the “CC&Rs that survive after individual lot sales,” so that the association, as well as individual property owners, is responsible for assuring performance of the development agreement.

To the extent the CC&R provisions 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 saying that if a lawsuit or other legal action is brought with respect to the agreement, the prevailing party is entitled to recoup its reasonable attorney’s 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 “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 that they are aware of the existence of the development agreement and that they understand its terms.

## CHECKLIST OF COMMON DEVELOPMENT AGREEMENT PROVISIONS

**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 pursued (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”)

**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 proves to have been false in any material respect
- A finding by the agency that the developer fails to comply in good faith with any other material requirement of the agreement
- An express repudiation, refusal, or renunciation of the agreement

**Developer Default; Agency Remedies:** describes the options the agency would have in the event developer is in 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 to health or 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 obligated to do such as what improvements to be constructed and when, property to be dedicated and when, money to be paid and when, etc.

**Development Plan:** a development agreement must specify the permitted uses of the property, the density or intensity of use, and the maximum height and size of proposed buildings; because development agreements can and are being used in a variety of applications, the required content 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. For example, the permitted uses can be generically established by reference to a zoning category such as “retail commercial” or specifically established 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, (“6 to 10 units per acre,” for example), or specifically designated at “2 units per acre”. Similarly, the requirement that the maximum size and height of proposed buildings be included does not mean that every agreement must propose buildings

**Encumbrances On The Subject Property:** identifies subordination and mortgage information regarding protection 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” agreements are valid

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

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

**Force Majeur:** describes that performance may be excused due to war, terrorism, strikes, and other events beyond the control of the parties

**Good Faith And Fair Dealing:** sets forth that the parties expressly acknowledge that any actions they take will be 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 liability the agency may incur as a result of entering into the agreement; states that the developer will indemnify and defend the agency at the developer’s cost against any legal action instituted by a third party to challenge the validity of the agreement, including a challenge based on CEQA compliance

**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 indemnity 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 ex. development agreement application no., general plan amendment application no., type of CEQA review done (if EIR gives state clearinghouse no.), 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

**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 maps – 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

## SUMMARY

There are a number of issues that 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.

# FEEDBACK

I used the material in the *Development Agreement Manual* to:

- Update/create our agency's development agreement procedures
- Update/create our agency's standard form development agreement
- Other (please specify) \_\_\_\_\_

\_\_\_\_\_

I will incorporate ideas from the *Development Agreement Manual* in my agency's procedures. Please specify how if you have the time:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

My suggestions for improvement of the *Development Agreement Manual* are as follows:

\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Thank you in advance for your time in filling out this form. The Institute values your feedback.







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