Vested Rights and Development Agreements
What Planners Should Know

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Your Presenters

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Program Outline

- What is a development agreement?
- Why enter into a development agreement?
- What is the legal authority for a development agreement?
- What are some of the typical components of a development agreement?
- How do development agreement negotiations really occur?
- Legal Challenges
- Questions and answers

What is a development agreement?
What is a development agreement?

*An agreement between municipality and property owner that defines rights and conditions of development project.*

*Contracts 101:*

"Meeting of the minds"
Different Perspectives

- Annexations
- Planned Unit Developments
- Urban Renewal Projects/DDAs
- Public Infrastructure
- Phasing
- Public Benefits
- Payments, Financing, Tax Credits
Wyndham Ownership Resort: Avon

Wyndham: Avon
Wyndham: Avon – Possibility Plaza

Wyndham: Avon - Lettuce Shed Lane
Wyndham: Avon

Public Infrastructure Improvements, sidewalks and landscaping on Town property.

Cost sharing of public plaza pedestrian access with Avon URA funding.

Definition of on-going maintenance responsibilities.

Definition of Real Estate Transfer Tax applicability.

Definition of “Resort Amenity Fee”

Denver Union Station
Denver Union Station

- Redevelopment of 42 acres
- RTD acquired in 2001
- Denver created Denver Union Station Project Authority ("DUSPA") and DDA in 2008
- Metro Districts created in 2008
- Development Agreement with Master developer in 2008
Denver Tech Center

Development Agreements: Benefits for Landowners

- Vested property rights
  - “Lock in” approvals
  - Remedies for breach of vested rights
  - Benefits for projects with long-term horizons
- Set assumptions
  - Zoning and land planning
  - Infrastructure obligations
  - Fees and costs
Development Agreements: Benefits for Landowners

- Deviate from code requirements
  - Legislative nature of development agreements
- Financing assumptions
  - Establish development assumptions
  - Certainty for banks, bond markets

Development Agreements: Benefits For Local Governments

- Enhanced control over project development as compared with standard zoning and subdivision provisions
- Project-specific infrastructure obligations
- Coordination between multiple projects
- Anticipate phasing of development
- Contractual arrangements
  - Property transfers, water rights, allocation of infrastructure work

12/8/2017
Development Agreements: Benefits For Local Governments

- Reduced liability
  - Unconstitutional conditions
  - Rule 106(a)(4) (maybe)
- Deviations from local codes
- Assure fiscal stability of special districts and development projects

Enhanced consistency across political shifts.
What is the legal authority for vested rights and development agreements?
- Specifically authorized by CRS §§24-68-104(2)

-Municipal Annexation Act of 1965 contemplates annexation agreements, CRS §§31-12-106(4), 31-12-107(4), 31-12-108.5(1), 31-12-111, 31-12-112(1) and 31-12-121

- Home rule charter/municipal code provisions can authorize development agreements as well.


- Development Agreements are not an unlawful surrender of police power (within reason) Santa Margarita Area Residents Together (SMART) v. San Luis Obispo County, 84 Cal. App. 4th 221
- However, agreements that “delegate” legislative authority are not enforceable. *Wheat Ridge URA v. Cornerstone Group*, 176 P.3d 737 (2007). Agreement that stated Wheat Ridge URA would condemn property at request of development held unenforceable.

**VESTED RIGHTS:**

**statutory and common law**

**Statutory**

Granted by virtue of approval of a site specific development plan (SSDP) 3 years

If term modified or extended in development agreement, development agreement must be adopted by ordinance (See CRS §24-68-104(2): development agreements granting vested rights in excess of three years “shall be adopted as legislative acts subject to referendum.”)

What is vested? Everything shown on SSDP? How much deviation can be allowed without forfeiture of vested right? Note: CRS §24-68-103(1)(c): “failure to abide by such terms and conditions will result in a forfeiture of vested property rights.”
Statutory
Granted through Development Agreement

DA must be adopted by ordinance and is now legislative, e.g., subject to referendum and initiative (CRS §24-68-104(2))

Common law
Perfected by commencement of vertical construction such as pouring foundation (grading permit not sufficient)

HOWEVER common law vested right may not be same as statutory vested right

Can be modified by agreement.

Modified by ordinance? Probably not.

What are the typical components of a development agreement?
Parties

- Consider:
  - Who should be liable for development obligations?
  - Who do we want to bind? Who don’t we want to bind?

- Landowner
  - Vested Rights Act confers vesting upon property and landowner

- Local government
  - Corporate entity: city, town, county
  - Legislative body

- Other parties
  - Master developer
  - Special district

Vesting

What is a site specific development plan?

- Development agreement
  - Infrastructure obligations
  - Conditions of permit issuance
  - Other approvals: service plan, subdivisions, etc.

- Zoning
  - Uses
  - Development densities
  - Development standards

- Subdivision
- SIA
Term

- Term of vested rights
  - Development agreement required for term of three-plus years
  - Considerations
    - Anticipated development horizon
    - Financing
    - Political feasibility
    - Potential for changes in community needs, market

- Term of development agreement
  - May not be the same as vesting term ("what happens when vesting ends?")
  - Will obligations and limitations survive vesting period?

Development Obligations

- Substantive obligations
  - Onsite vs. offsite
  - Roads, water/sewer, trails, parks, schools, public buildings (fire stations, libraries, etc.)

- Triggers
  - Date certain
  - Building permit counts

- Cost sharing
- Reimbursements
Fees and Dedications

- Project-specific fees and dedication requirements in development agreements:
  - Transportation
  - Water/sewer
  - Parks/open space
  - Schools
  - Application fees
- Beware fee vs. tax distinction

Remedies

- Default remedy for landowner under Vested Rights Act: just compensation
  - Different from takings law
  - Post-approval reliance damages
    - Design, engineering, legal fees
    - Actual construction costs
- Alternatives
  - Mutual waiver of default remedy
  - Specific performance/injunctive relief
    - Wheat Ridge Urban Renewal Auth. v. Cornerstone Group XXII, LLC, 176 P.3d 737 (Colo. 2007)
Remedies

- Typical boilerplate: “all remedies at law or equity”
- What goal are you trying to achieve with the remedies selected?
- Notice and Cure provisions
- Breach by municipality v. breach by developer
- Basic contract law principles apply

Remedies

- **Breach by municipality**
  - Failure to grant subsequent approvals or permits
    - Reserved plenary powers. *LaSociete Generale Immobiliere v. Minneapolis Community Development Authority*, 44 F.3d 629 (8th Cir. 1994).
  - Failure of government to construct certain improvements
    - Right of self-help for developer
    - Release of developer’s related obligations - e.g. if municipality doesn’t construct intersection it is obligated to construct, developer may do so, and receive impact fee refund, and intersection is no longer a precondition to opening of center
Remedies

• **Breach by municipality – cont’d**
  – Enactment of new regulations; attempts to apply new regulations to project
    • Specific performance
    • Exemption
    • CRS §24-68-105(2) “The establishment of a vested property right shall not preclude the application of ordinances or regulations which are general in nature and are applicable to all property subject to land use regulation by a local government, including, but not limited to, building, fire, plumbing, electrical, and mechanical codes.”

Remedies

• **Damages**
  – Mutual waiver of all forms of damages, including lost profits, is more valuable protection for local government than for developer. See *Denny Const. v. City and County of Denver*, 199 P.3d 742 (2009) regarding claims for lost profits.
  – Protects local government against huge “benefit of the bargain” money claims
  – Mutual waiver also likely waives ability of local government to pay, and developer to receive, compensation for breach of vested right under CRS 24-68-105(1)(c).
Remedies

• **Specific Performance**

• **Disconnection as remedy**
  - Rarely practical
  - Uncertain if legally enforceable (specific performance of legislative act)
  - Potentially harmful in future if development is partially complete

Remedies

• **Breach by Developer**
  - Boiler plate language often leaves remedies uncertain until litigated (costly and time consuming).
  - Lawsuit may also not be practical if timing is critical
  - Specific performance – not practical remedy in some instances – e.g. if market for product no longer exists or developer is insolvent
Remedies

- **Breach by Developer**
  - Municipality typically also has right to take performance guarantee in order to construct or finish public improvements
  - Ability to withhold development permits and processing of development applications
  - Ability to declare forfeiture of vested rights

Amendments

- Flexibility vs. predictability
- Vesting term extensions
- Changes in infrastructure obligations
- Zoning amendments
- Fee adjustments
Drafting Checklist

1. **Description of Entitlements.** Anything stated has the potential to be vested.

2. **Vested Rights.** Define broadly or narrowly. Density and land use, phasing, right to public financing and/or tax credits.

3. **Description of Required Subsequent Approvals.** Reserve plenary authority to review and act upon subsequent applications.

4. **Applicable Land Use Regulations.** Frozen on date of approval or as amended over time. If frozen, attach copy of land regulations as exhibit for convenience.

5. **Duration.** Give attention to duration of vested rights versus duration of obligations, specify terms that may survive the duration of the DA.

6. **Developer Obligations.** Tie to default provisions, phasing of approvals; consider issues related to assignment.

7. **Municipal Obligations.** Consider specific performance issues related to legislative acts, provision of municipal services for annexed properties, agreements to agree to reimbursement agreements.
Drafting Checklist

11. **Indemnification.** Developer obligation to defend legal challenges, assignment of rights and obligations in connection with initiative and referenda. Municipality should not agree to “defend” the latter, as it must administer the procedure; instead, developer has right to defend and may agree to reimburse municipality’s election costs.
Legal Challenges

- **Breach of Contract**: Generally contract laws apply. Geralnes B.V. v. City of Greenwood Village, 583 F.Supp. 830 (D.Colo.1984) (Rule 106 did not apply in zoning case where plaintiff’s claims were for breach of contract rather than challenge to zoning action)

- **106 Action**: Review Approval/Amendment to DA (arbitrary and capricious standard)

- **Rule 57 Declaratory Judgment Action**

- **Tort Claims**: Intentional interference with business relations v. governmental immunity

- **Section 1983 Claims**

- **Statute of Limitations**: Contract versus Liquidated Damages

- **Initiative and Referendum**: If adopted by ordinance and/or grants vested rights

Town of Mammoth Lakes

THE TOWN
THE RISE, FALL, AND REDEVELOPMENT OF MAMMOTH LAKES
Town of Mammoth Lakes v. Mammoth Lakes Land Acquisition

Town entered into a development agreement for condo-hotel development with improvements to Mammoth Lakes airport in 1990’s. Later, Town desired airport expansion to accommodate commercial jets that conflicted with development. Town delayed development for 12 years. Developer sued for anticipatory breach of development agreement. Court found Town breached agreement and awarded $43 million in damages.
Town of Mammoth Lakes v. Mammoth Lakes Land Acquisition

Town sought bankruptcy protection. Settlement resulted in Town obligation to pay developer $29.5 million over 23 years, development agreement was cancelled, and Town received back the original property conveyed by the Development Agreement.

How do development agreement negotiations occur?
Ideally:
- Comprehensive Plan, Capital Improvement Plans, and Land Use Regulations provide guidance for development agreement terms for both public and private developer.

Reality:
- Current economic and political conditions often drive the desire to “make a deal”.
Best Practice:
- Process is a blend of having and using comprehensive public documents that provide guidance, procedures and authority and responding to economic and market opportunities to enable a quality development project.

Development Application Process
- Request by Developer or by government for development agreement
- Identification of issues appropriate for development agreement at staff review level
Attorney drafting, review and negotiations
Development Application Process
- *Public Process*: Identification of Issues and Conditions through Planning Commission and Council
- Depending on Complexity, this can involve multiple rounds

Financing
- Use of Title 32 Developer Metro Districts
- URA or DDA
- Tax Rebates or Credits
Defined Term or Perpetual?
- Which obligations can be completed or will have a defined term?

Defined Term:
- Vested rights, tax credits, construction of public infrastructure.
Perpetual:

- Open Space, special fees, maintenance obligations.

Questions and Answers

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