GOVERNMENT CODE DEVELOPMENT AGREEMENTS; ALL YOU NEED TO KNOW FOR SUCCESSFUL DEVELOPMENT

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Karen Tiedeman
Gabrielle Janssens

PURPOSE OF DEVELOPMENT AGREEMENTS

- Land use tool that freezes rules, regulations, and policies to those in effect at time of execution of agreement, unless otherwise provided, that govern:
  - permitted uses of land,
  - density,
  - design,
  - construction standards
- Addresses California common law late vesting doctrine

VESTED RIGHTS

- Avco Rule-
  - Developer can obtain vested rights to develop even if permits have expired or land uses have changed if:
    - Developer has performed substantial work and incurred substantial liabilities
    - In good faith reliance on permit issued by the government
      - Permit needs to contain all final discretionary approvals and approve a specific project
      - Substantial work and substantial liabilities must include hard cost toward completing physical construction

GOVERNMENT CODE REQUIREMENTS

- Government Code Section 65864 et. seq:
- Parties – must have a legal or equitable interest in the property
- Term – must specify term
- Permitted use of property
- Density and intensity of use
- Maximum height and size of buildings
- Reservations or dedications for public purposes

GOVERNMENT CODE REQUIREMENTS

- Approval – legislative act approved by ordinance
  - Subject to referendum
- Annual review to demonstrate compliance
- City adoption of procedures and requirements

BENEFITS OF DEVELOPMENT AGREEMENT-DEVELOPER

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- Developer Benefits
  - Vested Rights
  - Limit on new fees and increased fees
  - Extended term of permits
  - CEQA Certainty
  - Limit of public participation and input for subsequent approvals

BENEFITS OF DEVELOPMENT AGREEMENT-CITY

- Benefits of Development Agreement for Cities
  - Flexibility to shape development projects
  - Fees are negotiated not subject to Mitigation Fee Act
  - Public Improvements and Dedications
  - Community Benefits

LIFE OF A DEVELOPMENT AGREEMENT

A Case Study

goldfarb lipman attorneys

CASE STUDY

- City receives development application for multi-phased development project in 2006 consisting of
  - 1000 residential units
  - 500,000 square feet of retail development
  - 500,000 square feet of research and development space
  - Property to be developed is former military property requiring substantial infrastructure improvements as well as hazardous materials clean remediation.
  - Specific Plan adopted based on New Urbanism principles

CASE STUDY

- Development Agreement vested developer's rights to develop property in accordance with:
  - Specific Plan
  - Tentative Map
  - Design Approval
  - Development Agreement
    - Term – 12 years subject to force majeure

CASE STUDY

- Project Description
  - References Project to be built consistent with Specific Plan
  - No specific project description
  - Development Timing – vested right in developer to develop project in order and at such rate and at such time as developer deems appropriate (*Pardee* Case)

CASE STUDY

- Development Agreement –Fees
  - Limited Impact Fees to those listed in Agreement with set annual increase
  - Limited processing fees to an aggregate maximum total amount

CASE STUDY

- Subsequent Project Approvals
  - City can deny subsequent approvals only if “materially inconsistent with the Project Approvals”

CASE STUDY

- Standard Force Majeure Clause-
  - Standard force majeure clause
  - Economic force majeure

What could go wrong?

FORCE MAJEURE

- 2008 Economic recession
- 2012 Redevelopment Dissolution – project was receiving redevelopment funds to pay for some improvements
  - Combined delay of 8 years
  - After initial phase of development resident complaints about parking loaded on alleys, limited parking on narrow streets. Specific Plan locked city into development principles that became outdated

PROJECT DESCRIPTION

- Reliance on Specific Plan to describe project
  - Specific Plan included sample images of large improved parks but did not require that parks include the improvements shown or set minimum size for parks and open space
    - Developer proposed as a revision to the project smaller parks and open space with minimal improvements.
    - City had no recourse under Development Agreement or Project Approvals since proposed parks minimally complied with Specific Plan

FEES

- Development Agreement limited fees including processing fees to a set aggregate maximum amount
  - With passage of time inflation resulted in fees collected for processing of applications being less than applicable fee schedule at time of applications
  - Need to impose new impact fee to address infrastructure needs – required significant concessions on part of City as part of renegotiation including loss of some community benefits

SUBSEQUENT PROJECT APPROVALS

- City can only deny subsequent project approvals that are materially inconsistent with Project Approvals
  - Changes to design and amount of retail space included in "Town Center" portion of original project changed significantly eliminating many pedestrian amenities.
  - City and Developer disagreed about what constituted "materially inconsistent".

DEVELOPMENT TIMING

- Development Agreement did not contain specific phasing for project but as part of approval hearings Developer showed phasing and buildout plan
  - Developer proposed development out of original sequence resulting in central development amenities being developed last rather than first
  - Neighborhood retail developed much later than expected resulting in complaints to City from early residents of lack of neighborhood amenities

Lessons Learned

CONCLUSION

- Consider length of term
- Consider unforeseen changes in community and allow for flexibility
- Limit force majeure occurrences
- Consider details of project description to make sure meet project goals and objectives
- Consider timing of build out to ensure sequence meets City goals

QUESTIONS?