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Development Agreements: Private Incentives Clash with Public Limits

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DEVELOPMENT AGREEMENTS: Private Incentives Clash with Public Limits

I. INTRODUCTION

With the continuous expansion of Texas metroplexes, Development Agreements are an important tool for local entities and developers to cooperate to facilitate and influence new development. The elimination of non-consent annexation by cities means that cities' only means of expansion is via consent annexation, which is typically only granted by the concurrent execution of a Development Agreement providing meaningful benefits to the landowner. The legal principles of Development Agreements are influenced by private real property law, contract law principles, and local government law. Due to the different points of view, and base legal principles, the public and private participants approach the negotiation and documentation of a Development Agreement from divergent perspectives. The authority, enforceability and regulation of Development Agreements continues to change and presents unique issues a private sector lawyer does not encounter in private sector contract negotiations.

Any uncertainty as to the legal enforceability of Development Agreements undermines the public purpose to guide and support development. The risk that later local government leadership may openly breach a Development Agreement, yet have legal immunity from suit and/or from liability turns the Development Agreement into a one-sided contract. Lawyers for both parties should work cooperatively to ensure that *every* Development Agreement is legally enforceable. Otherwise, Development Agreements will cease to be an effective tool for either local governments or developers.

Fortunately, recent legislation has removed most legal concerns with the validity and enforceability of Development Agreements with cities for land in their extraterritorial jurisdiction. However, Development Agreements with cities for land inside their boundaries remain less settled, but a pending Texas Supreme Court opinion may provide needed clarity. Development Agreements with Development Corporations created by cities are hampered by statutory immunity from damages for default, leaving declaratory and equitable relief as the sole remedies. Statutory waiver of immunity from suit for contracts for "goods and services" benefiting local governments does not apply to Counties. Practitioners need to be aware of these special limitations/protections for certain local governments which enter into Development Agreements.

This paper aims to address the important issues in structuring, negotiating, and drafting Development Agreements.¹

II. WHAT ARE DEVELOPMENT AGREEMENTS?

In this paper, a "Development Agreement" is any contractual agreement between a local government or related entity (county, city, town, village, development corporation or special

¹ The original version of this paper included significant contributions from Houston Attorney Jim Dougherty, editor of Texas Municipal Zoning Law, the Bible of Texas Zoning Law. WCG attorney Gaspar Gonzalez provided valuable research and editing for this paper.

district) and the owner of real property relating to development or redevelopment of that property. The scope could cover “land development” (various public entitlements such as planning, platting, zoning, engineering, and infrastructure), “vertical” improvements (construction of buildings, infrastructure, amenities and other structures, and reimbursements related thereto), or both. Vertical improvements could include not only new construction, but also renovation, remodeling or adaptive reuse of existing improvements.

The focus of this paper is on Development Agreements with cities, and the role of the private landowner/developer lawyer negotiating with the city.

Benefits often sought by landowners:

- Money (including reimbursements for development costs, usually public infrastructure, both outside and inside the new project)
- Land (or removal of encumbrances like public easements or rights of way)
- Public infrastructure (or related reimbursement) provided by the local government
- Regulatory relief (and certainty)

Benefits often sought by local governments:

- Economic development: jobs, diversification of job base, import/export traffic
- Increased tax base: property, sales, hotel and rent car taxes
- Community amenities: entertainment, shopping (particularly full service name brand grocer), work force housing, parks/green space, etc.
- Public infrastructure: installed and paid for by developer, including over-sizing for other future development (often reimbursed out of taxes generated by the project)
- Higher-quality development with performance standards
- Place making (downtown revitalization or creation)
- Other “goods and services” (discussed below)

Traditional land-use regulations—platting, zoning and building codes—restrict and control development – the “Stick” approach.

Development Agreements support, entice and encourage development, and often limit or relax traditional land-use regulations – the “Carrot” approach. A core principle is the concept that “but for” the incentives provided, the development would either not occur at all or would occur with a different form, quality or timing.

This is a new world for many local governments, profoundly different from the traditional model of local land-use regulation. One academic commentator has observed that a contract-based model “fundamentally alters the foundational principles of land use regulation.”² As more fully discussed in this paper, legal doctrines developed over the years for the traditional model of land-use regulation are difficult to reconcile with contract-based regulation—and this creates an atmosphere of uncertainty about the validity and enforceability of Development Agreements. That

² Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. LAW REV. 591, 595 (2011) (“Selmi”).

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"The Power of the City Limits and ETJ Authority and Development Agreements"