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Negotiating for the Public Good (Development Agreements and Dispute Resolution)

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Exhibit A - Checklist: Development Agreements

Exhibit B – Decisional Errors – Why We Make Them and How To Address Them

Exhibit C - Mediation Techniques –What Works and What Doesn’t

NEGOTIATING FOR THE PUBLIC GOOD **(Development Agreements and Dispute Resolution)**

Developers and cities often negotiate agreements and disputes in the context of land use regulations applicable to a particular real estate project. Their starting points are inherently different; developers coming from a private, capitalist perspective and cities coming from a public, governmental perspective. This difference interferes with effective negotiation and dispute resolution.

This article proposes that the parties must first work to *understand* and *accept* their divergent viewpoints, then negotiate cooperatively to a fair result.

I. UNDERSTANDING THE OTHER SIDE

To be effective in a Public/Private negotiation relating to a real estate project, it is important to recognize that the “world view” of local government is fundamentally different from that of a typical private landowner/developer. In a private sector real estate transaction, all parties are profit motivated and represent the economic interests of private owners. Not so in a governmental negotiation over land use issues. Although the landowner may have a profit orientation, the local government is focused on public policy and benefit. The local government is working for the “public” and is engaged in the effort to cause development which is “in the best interests of the public”. The attorney for the local government may be on staff, underpaid, overworked and not necessarily a real estate law or business specialist. The attorney for the private party may be inexperienced in, nor fully understand, public law, particularly land use law.

Recognizing these differences will help the parties and their attorneys understand how their counterparties handle a land use negotiation. Much frustration can be avoided if all parties put themselves in the position of their counterparties to understand their view of the world.

The landowner view of the world:

- Need it done NOW.
- It's all about maximizing financial return.
- Let's be practical.
- Everyone for themselves.
- Push for the most.
- I care only about THIS deal.
- Risk taker.
- I'm the good guy.

The local government view of the world:

- Better to delay and let there be more process.
- Money isn't everything; the “Public Interest” is.
- CYA (cover your aspects).
- Don't try to take advantage of us.
- Let's be fair.
- I can't set a bad precedent.
- Risk adverse.
- I'm the good guy.

When each side thinks they have the moral high ground (and wears the White Hat), while the other side is simply being difficult (and wears the Black Hat), efficient and successful negotiation is a challenge!

The typical Developer personality type is usually quite different from the typical government servant. Developers are typically more persistent and aggressive by nature.

Two situations test the ability of Public/Private parties to negotiate resolution of:

- Development Agreements
- Regulatory Disputes.

Although these negotiations seem quite different, in each situation, the parties likely both seek a reasonable, fair and beneficial result, without burning bridges. Because the real estate project is fixed in place, the parties usually won't be able to avoid future interaction, so there should be a recognition of mutual benefit and cooperative negotiation.

The authors believe there are common approaches beneficial to these negotiations.

II. DEVELOPMENT AGREEMENTS

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

Negotiation of a Development Agreement should commence with a joint desire to promote a new real estate project which, *but for* the benefits of the Development Agreement, would not be possible, or would not have the attributes desired by the parties. It should not be approached as a "Let's get all we can" competition, but a cooperative endeavor with shared benefits.

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)

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