

# MAKING SENSE OF DEVELOPMENT AGREEMENTS

APA Washington Annual Conference  
October 3, 2013



## Your Panelists

- **Scott Greenberg, AICP (Moderator)**  
City of Mercer Island
- **Michael Walter**  
Keating Bucklin & McCormack, Inc., P.S.
- **Rich Hill**  
McCullough Hill Leary, P.S.
- **Jack Pace**  
City of Tukwila

## What is a Development Agreement?

- Contract between a local jurisdiction and property owner
- Specifies standards, conditions, mitigation for development
- “Vests” to rules in agreement
- Benefit to local jurisdiction
- Can address phasing and timing of project, infrastructure, etc.
- Can facilitate enforcement of requirements

## Mercer Island

- 22,700 population
- 9,100 households
  - 75% single-family
  - 25% multi-family
- \$102K median HH income
- \$84.8K median home price



## Approved Modifications

Required:

- Affordable housing @ 60% median income
- SE 27<sup>th</sup> St.:
  - Min. 60% non-residential frontage
  - No street-level residential

Approved:

- Affordable housing @ 70% median income
- SE 27<sup>th</sup> St.:
  - Min. 30% non-residential frontage
  - Street-level residential OK



## Benefits to City



- Public plaza
- Public parking
- Rain garden

- \$10k traffic mitigation
- Compost collection

**For More Information**

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**MAKING SENSE OF DEVELOPMENT AGREEMENTS  
THE LAW AND ESSENTIALS**



**MICHAEL C. WALTER**  
Keating, Bucklin & McCormack, Inc., P.S.

**October 3, 2013 - Bellevue, WA**



### What is a development agreement?

- Land use contract between two parties
  - Parties = government and property owner (and developer)
- In writing
- Entered into voluntarily
- To:
  - Regulate development of one or more specific parcels of property
  - Fix the rules that will govern the development
- Usually authorized by statute and/or local ordinances or code
- Furthers public interest (health, welfare, safety, economic interest)


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### What are the purposes of development agreements?

- Certainty in development process
- Flexibility in development process contract between two parties
- Encourage development and re-development
- Set "ground rules" for large or multi-phase development
- Agree on scope and timing and phasing of project
- Establish mitigation requirements
- Establish vesting
- Tax benefits
- Promote public welfare by balancing public and private interests


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### Benefits for government (public)

- Certainty in development process
- Protection of environmental and historic features of land
- Some control over design, layout, style and aesthetics
- Generation of property and sales taxes
- Job creation
- Incentives for certain types of development
- Help further comprehensive plan and goals
- Promotion of general welfare by balancing public and private interests


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### Benefits for property owner/developer

- Certainty in development process
- Vesting and timing of development
- Helps with financing and lenders
- Creation of public infrastructure
- Offsetting and limiting development costs
- Easier marketing of property
- Potentially higher profits


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### History of development agreements in Washington

- Background origins:
  - Constitution and statutes granting broad authority of government to contract
  - Variances, waivers and CUPs
- Common Law: ~ 1960's and '70's
  - Contract rezones
  - Concomitant land use agreements
  - Land use contracts
- GMA in 1990 – e.g.: RCW 36.70A.090 ("innovative techniques" for planning)
- Regulatory Reform in 1995: RCW 36.7B.170 to .210


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## Special limits on development agreements

- Constitutional, statutory and local government limits on legislative decision-making by government officials
- RCW 36.70B.170-.210
- Local government ordinances and codes
- Appearance of Fairness doctrine
- Open Public Meetings Act
- The substantive laws applicable to each of the permits or approvals needed as part of the development agreement
- The procedural laws applicable to each of the permits or approvals needed as part of the development agreement

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## The law applicable to development agreements

- Overall: Constitutional, statutory and local government limits on legislative decision-making by government officials
- Three key sources:
  - RCW 36.70B.170 - .210
  - Local government ordinances and code requirements for DAs
  - Law of contracts
- The substantive and procedural laws applicable to each of the permits or approvals needed as part of the development agreement

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## The law: RCW 36.70B.170 - .210

- Overall: Constitutional, statutory and local government limits on legislative decision-making by government officials
- Three key sources:
  - RCW 36.70B.170 - .210
  - Local government ordinances and code requirements
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## The law: Local regulations

- ALWAYS – review local jurisdiction code before drafting the DA
- Typically found in the development code, zoning code, or administrative code chapters of the code. Samples:
  - Use of specific form or style or elements
  - City attorney must review and approve
  - Length of vesting or life of the DA
  - Limiting use to specific areas or zones of community
  - Only allowed for certain uses (i.e., large, multi-phase, commercial, etc.)
  - Decision-maker on associated permits and approvals
  - Financing limits or waivers
  - Limits on which regulations or processes can be varied in DA

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## The law: Contract law

- Basic rules of contract law apply to DAs
- General rules and limits:
  - Must be of lawful age (18)
  - Must be of sound mind, competent, able to read and write English
  - Must be in writing (contracts relating to real property)
  - Must be voluntary – no coercion, duress, etc.
  - Offer and acceptance; meeting of the minds on all essential elements
  - Bargained-for (negotiated)
  - Consideration by each side (giving up something for something)
- "One is bound by the contract which he voluntarily and knowingly signs"
- Cannot repudiate a valid contract unless (1) fraud, (2) deceit, (3) coercion, (4) *ultra vires* (beyond legal authority to enter into contract)

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## What DAs can be used for

- Vary, confirm or limit project elements (uses, densities, locations, etc.)
- I.D. or regulate impact fees, financial requirements, inspection or other fees
- Mitigation measures, conditions etc. under SEPA
- Design standards (heights, setbacks, landscaping, parking, etc.)
- Affordable housing
- Parks and open space
- Phasing of the development
- Address review procedures and standards for implementing decisions
- I.D. build-out period for project or areas or phases
- Vesting period of all or part of project

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### What DAs can be used for, *con't.*

- Obligate party to provide services, infrastructure or facilities
- Agree to future or contemporaneous annexation, or "no-protest" annexation
- Tax issues – abatement, rebates, re-investment tax areas, etc.
- Address public improvements, costs, build-out, etc.
- I.D. grants and use of grant monies
- Address fee waivers or limits
- Any of the development standards in RCW 36.70B.170(3)
- Any other "appropriate" standards or procedures applicable to the DA or any of the permits or approvals in the DA.

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### What DAs can't be used for

- Do anything contrary to what is authorized in RCW 36.70B.170 - .210
- Change the comprehensive plan designation of property (use GMA for this)
- Change the zoning for the property or abrogate zoning authority (follow proper state and local zoning laws for this)
- Agree to development regulations or changes which are not consistent with the comprehensive plan
- A use or activity not allowed by – or prohibited by – state law
- A use or activity not allowed by – or prohibited by – local government law
- Bypass public notice and open meetings requirements in state and local law
- Agreements not voluntarily entered into (or under duress, incapacity, etc.)
- Oral agreements or conditions (all must be in writing)
- Agreements without legislative authority of government

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### The mechanics of crafting and using DAs

- Step 1:** I.D. parcel(s), owners, lessees and jurisdiction; assemble "stakeholders"
- Step 2:** Stakeholders meet; discuss proposal, goals, policies; I.D. problems, issues, legal questions, etc. Assemble experts and consultants
- Step 3:** I.D. and assemble all key documents; get copies of statutes and ordinances and applicable regulations
- Step 4:** Involve attorneys and consultants to draft first DA; additional meetings etc. with stakeholders; continue assembly of important documents
- Step 5:** Edit, review, re-edit, fine-tune DA; get all stakeholders "on board with the DA"; involve third parties and solicit comment, etc.
- Step 6:** Throughout process: Meet with representatives of local government (not quorum of decision-makers!), get "feel" for issues, political concerns, issues; have DA drafts reviewed by financiers or lenders, etc.

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### The mechanics of crafting and using DAs

- Step 7:** Finalize DA; assemble all exhibits to go with it; prepare Q and A sheets to use for hearings and public information; prepare all witnesses to testify and answer questions
- Step 8:** Properly notice public hearing(s). Prepare witnesses for every hearing and/or meeting. Double-check all hearing notices and timeliness, etc.
- Step 9:** Present DA to government decision-makers at open public meeting(s). Answer questions. Revise DA as needed to address comments, concerns, etc. Get legislative body to vote – need majority or per code to approve
- Step 10:** Once agreed to by all parties and approved by legislative body of government, execute duplicate originals, with exhibits
- Step 11:** Have DA recorded with local auditor or assessor (or both, if necessary). Each party keeps one complete original
- Step 12:** Comply, comply, comply with the DA !!

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### Common terms and provisions of DAs

**RECITALS:**

- State and local law authority for the DA
- I.D. of the property, size location, zoning, comp. plan, etc.
- History of the formation of the DA
- Value benefits for both parties
- Acknowledge SEPA and process and decisions
- I.D. owners, tenants, easement holders, etc.
- Features of the property
- Meetings and negotiations re issues, etc.
- That DA is voluntary, bargained-for;
- Involvement of public and others in process

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### Common terms/provisions of DAs, *con't.*

- I.D. political, development, physical or environmental problems; how addressed in the DA
- Term (length) of the DA
- Key trigger dates for actions, permits, decisions
- Definitions of all key or unusual terms
- Impact fees
- Tax issues
- Annexation issues
- Impact on utilities, and how addressed or mitigated
- Parks and recreation facilities (location, layout, development timeline, etc.)

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### Common terms/provisions of DAs, *con't.*

- Affordable housing issues
- Specific areas or zones with unique development characteristics, timelines, challenges or issues
- Specific and clear explanation of how DA promotes public health, welfare, safety, economy, etc., and that DA does NOT merely benefit private interests
- How the DA is consistent with the comprehensive plan
- How the DA is consistent with applicable development regulations
- Process for review, public input and approval, and the DA has complied with all State and local requirements to ensure public participation and due process
- The development standards identified in RCW 36.70B.170(3)
- Reserving authority to government to impose new or different regulations to extent required by a "*serious threat to public health and safety*"

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### Watch out for the following . . .

- Failing to comply with State law requirements (RCW 36.70B.170 - .210)
- Failing to comply with local ordinances and codes (substance and procedure)
- Can't use DAs to re-zone land or bypass zoning laws
- Not having clear title to all of property before approving DA
- Not involving all stakeholders in the process (and early on)
- Failing to I.D. and resolve legal, political, physical, development, environmental problems before approval
- Entering into DA because of political or economic pressure, duress, etc.
- Failing to resolve up front all likely future conflicts, legal issues or pitfalls
- Not clearly defining all important and unusual terms
- Including too many or unnecessary long-term commitments or obligations
- Not retaining government rights to alter regulations or terms to address future "serious threat to public health and safety"

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### PARTING THOUGHTS . . .

***A problem development is a potential problem agreement, and a problem agreement is a problem for the parties and the public.***

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*Thank You!*

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## DEVELOPMENT AGREEMENT

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### City of Tukwila Experience

- ▶ Population
  - Night: 19,000
  - Day: 125,000 - 150,000
- ▶ Employment Sectors
  - Service, Manufacturing, Retail
  - Approx. 43,000 jobs



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### Development Agreement - TMC 18.86

- ▶ Discretionary - Legislative Act
- ▶ Review Process
  - Staff
    - Meet with staff
    - Pre-application
    - May need Executive Session
    - Review application / Staff report to Council Committee

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### Council Review

- ▶ Committee forward recommendation
- ▶ City Council Hearing
- ▶ City Council Adoption of Ordinance or Resolution

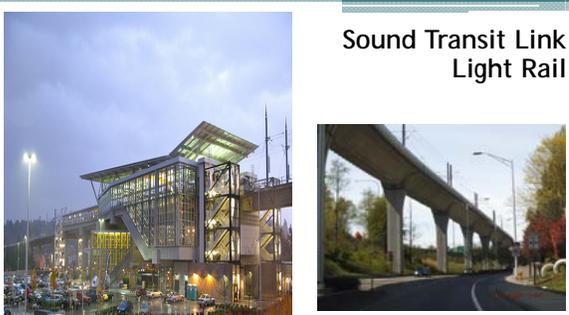
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### Appeals, Dispute Resolution & Minor Amendments

- ▶ City Council appeals to Superior Court
- ▶ Dispute Resolution
- ▶ Minor Amendments

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### Sound Transit Link Light Rail



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## Tukwila South




Tukwila South  
Project 03

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## Circuit City Site



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## Benefits to the Cities

- ▶ Resolve legal disputes
- ▶ Fostering public/private partnerships
- ▶ Encourage private-public partnership in planning/ financing of public facilities
- ▶ Extraction of public benefits without conflict with regulatory 'taking'
- ▶ Provides flexibility in testing new standards
- ▶ Consolidate numerous issues involved in complex project into a single controlling document
- ▶ Provides predictability for projects with large private or public investment
- ▶ Implementing city plans, goals, & policies

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## Lessons Learned

- Adopt an ordinance authorizing development agreements in your development code
- Involve all departments in discussions
  - How do you want to deal with minor changes?
  - How do you want to resolve disputes?
  - Who will monitor & implement the development agreement?
- Clear understanding of what the public benefits & costs are

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