Florida State University Journal of Land Use and Environmental Law

Volume 1
Number 3 *Fall 1985*

Article 6

April 2018

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Recommended Citation

Kessler, Robert M. (2018) "The Development Agreement and its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for its Application," *Florida State University Journal of Land Use and Environmental Law*: Vol. 1 : No. 3 , Article 6.
Available at: https://ir.law.fsu.edu/jluel/vol1/iss3/6

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Winner, 1985 American Planning Association Planning and Law Division Writing Competition

THE DEVELOPMENT AGREEMENT AND ITS USE IN RESOLVING LARGE SCALE, MULTI-PARTY DEVELOPMENT PROBLEMS: A LOOK AT THE TOOL AND SUGGESTIONS FOR ITS APPLICATION

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Increased government control and monitoring of the land development process, from local zoning and subdivision regulation to federal environmental controls, has caused the development of land to become a costly and time-consuming endeavor for both private and public parties. Naturally, the larger the area being developed, the more likely it is that a greater number of parties and permits will be involved. In the past, development progressed through the necessary changes step by step with the understanding that the applicable rules could be changed at any time. The recognition that this process is often inefficient and wasteful, and that public-private bargaining is not likely to be any more corrupt than other governmental processes,[1] has led some local governments to adopt and use development agreements. With these agreements, the municipality agrees to freeze any applicable zoning, subdivision, and/or other regulations. In return, the developer agrees to proceed in a timely fashion, to acquire all necessary permits, and to provide specified infrastructure or dedicate open space as needed.[2]

Although development agreements have traditionally been used for localized developments involving two or three parties, it is conceivable that they might also be used as a tool in resolving multi-interest, large-scale development disputes. In such a situation, however, in addition to legal problems with development agreements per se, which relate primarily to whether local governments have the authority to bind themselves and future administrations

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The author is indebted to David J. Brower for his guidance in preparing this article.

1. Kmiec, *Deregulating Land Use: An Alternative Free Enterprise System*, 130 U. PA. L. REV. 28, at 99 (1981).

2. League of California Cities, *Development Agreements* 1.1. (1980).

to the terms of the agreement, problems of dispute resolution and governmental powers accompany multi-party agreements. Thus, whether development agreements can be useful in these kinds of situations depends on whether all of these problems are surmountable without losing the benefits—efficiency, predictability, and the value of cooperation itself—which accompany their use.

This paper looks at currently used forms of development agreements and the problems and potential inherent in their extended use. Part I describes the various forms of development agreements, gives some examples of how they have been used, and makes some suggestions as to what they should include. Part II discusses and attempts to resolve some of the legal issues inherent in the development agreement concept. In Part III, a proposal for extending the use of development agreements is introduced and analyzed. Finally, Part IV provides a summary of the other three sections and attempts to reach some conclusions and make some recommendations.

I. DEVELOPMENT AGREEMENTS: EVOLUTION AND EMBODIMENT

The development agreement is currently used in both the United States (primarily in California) and Great Britain.[3] In Great Britain the "planning agreement" has developed as a mechanism with which a local planning authority can obtain "planning gain" in the form of landowner and developer concessions and agreements, which it could not otherwise require. In California, development agreement enabling legislation was a response to the "late vesting rule," under which a developer could not be assured of his right to proceed with a development, regardless of how much money he had invested in a project, until the "final discretionary approval,"[4] usually the building permit, had been obtained.[5] In many other states, the courts and legislatures have been more prodeveloper, and have allowed earlier vesting; thus, the need for development agreements is seen as less urgent. Consequently, no other states have enacted legislation specifically enabling their use.

3. Town and Country Planning Act, 1971, § 52.

4. Billings v. California Coastal Comm'n, 183 Cal. App. 3d 729, 735-36, 163 Cal. Rptr. 288, 291-92 (Ct. App. 1980).

5. Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal. 3d 785, 793, 553 P.2d 546, 551, 132 Cal. Rptr. 386, 391 (1976), *appeal dismissed and cert. denied*, 429 U.S. 1083 (1977).

A. *Vested rights and equitable estoppel*

The vested rights doctrine and the related remedy of equitable estoppel, under which a municipality can be estopped from later asserting the non-binding nature of a permit or approval if the applicant has relied in good faith on the government's go ahead,[6] is a matter of state law and thus varies from state to state. The "prodeveloper" states tend to vest the developer's rights early, permitting the developer to rely upon subsequent government approvals; in the "antideveloper" states, rights vest late, creating uncertainty for the developer as to subsequent approvals.

Examples of the late vesting doctrine and how development agreements might be used to temper its impact can be found in cases from both California and Hawaii. In *Avco Community Developers, Inc. v. South Coast Regional Commission*,[7] the passage of the California Coastal Zone Conservation Act,[8] which required that an additional permit be obtained prior to the developer's acquisition of a building permit, precluded the developer from proceeding. The developer, who had already spent over two million dollars, had obtained a zoning change, had obtained tentative and final subdivision map approval, and was installing infrastructure for the subdivision, argued that he had a vested right in the property and sued to stop the municipality from denying him this right. The court, however, held that he had no vested right until he obtained a building permit, regardless of the amount he had invested.[9]

In *Kauai County v. Pacific Standard Life Insurance Co.*,[10] the Supreme Court of Hawaii found that a developer was not entitled to equitable estoppel, and thus not entitled to rely on governmental assurances, until he had complied with all requisite discretionary governmental action for the project. Here, the developer had

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6. *See* Life of the Land, Inc. v. City Council of the City and County of Honolulu, 61 Hawaii 390, 453, 606 P.2d 866, 902 (1980):

> The doctrine of equitable estoppel is based on a change of position on the part of land developer by substantial expenditure of money in connection with his project in reliance, not solely on existing zoning laws or on good faith expectancy that his development will be permitted, but on official assurance on which he has a right to rely that his project has met zoning requirements, that necessary approvals will be forthcoming in due course, and he may safely proceed with the project.

7. 17 Cal. 3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *appeal dismissed and cert. denied*, 429 U.S. 1083 (1977).

8. CAL. PUB. RES. CODE §§ 27000-27650 (repealed), now California Coastal Act, CAL. PUB. RES. CODE §§ 30000-30800 (West 1954).

9. 17 Cal. 3d at 793, 533 P.2d at 551, 132 Cal. Rptr. at 391.

10. 65 Hawaii 318, 653 P.2d 766 (1982), *appeal dismissed*, 460 U.S. 1077 (1983).

expended substantial time and money on a resort; however, a voter referendum to repeal resort zoning for the developer's property was deemed a delegated discretionary legislative act, and thus barred the developer's recovery.

An earlier Hawaii case, however, suggests that Hawaii may not be quite as antideveloper as California. In *Life of the Land, Inc. v. City and County of Honolulu*,[11] the Supreme Court of Hawaii estopped the city from denying development permission after having granted a variance. The court found that there had been sufficient "official assurances" on which the developer could rely and that a building permit, which had not yet been granted, was not a "discretionary" function but instead "purely ministerial."[12]

Most other states tend to follow this early vesting view suggested by *Life of the Land*. But while the "rules are *stated* substantially the same everywhere," the courts in these states *apply* them more favorably to developers, "not presum[ing] purity on the part of the government."[13] These courts, according to one author, "require that a project be tested against only one set of ordinances"; they recognize that the use of multiple permits by a city is often a way of circumventing vested rights, and that meeting a municipality's permitting requirement is the "reality of the development business."[14] Thus, in some states, once one type of permit is approved, and the developer justifiably relies on that approval, the municipality can be estopped from disapproving the development.

Several states have statutory provisions for vesting the developer's rights; they may provide, for example, that once a preliminary subdivision plat is approved, no changes in the subdivision regulations can affect that approval.[15] The newer statutes protect the developer not only from changes in subdivision ordinances, but also from rezoning.[16] Pennsylvania, for example, provides a developer with a five year grace period after approval of a plat during which no change in zoning, subdivision regulations, or other plans or ordinances will apply to the approved development.[17]

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11. 61 Hawaii 390, 606 P.2d 866 (1980).
12. *Id.* at 454, 606 P.2d at 903.
13. Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 Sw. U. L. Rev. 545, at 547-48 (1979).
14. *Id.* at 558.
15. *Id.* at 554-55.
16. *Id.*
17. Pa. Stat. Ann. tit. 53, § 10508(4) (Purdon 1974 & Supp. 1984-85); *see also* N.J. Stat. Ann. § 40:55D-49a (West Supp. 1985); Mass. Ann. Laws, ch. 40A, § 6 (West 1958 & Supp. 1985).

These early vesting statutes and precedents indicate why development agreements are not more prominent in these states—the primary advantages of development agreements for developers are *already* incorporated into state law.

A recent case in Pennsylvania, however, suggests that its broad early vesting statute can provide even greater protection to developers if there is a binding agreement between the parties. In *In re Appeal of FPA Corporation*,[18] the court upheld an agreement incorporated into a court order in a prior case despite the agreement's expansion of the statutory protection. The agreement stipulated that "no subsequent changes in zoning, planned residential development, subdivision, land development, or other ordinances" shall impair the developer's right to develop, "without regard to the number of years that are required to develop the subject property."[19] The agreement was held enforceable six years later, despite the fact that the three-year (now five-year) statutory grace period had elapsed.[20] Thus, development agreements may be useful to extend or vary the statutory grace period.[21]

Development agreements may be useful in early vesting jurisdictions for other purposes as well. A common problem in statutes other than Pennsylvania's is that the developer is protected only against changes in certain types of ordinances, such as subsequent subdivision amendments, but not against all legislative or regulatory changes.[22] This allows municipalities, if they so desire, to circumvent the statute's reach. A development agreement, on the other hand, could specifically extend to all such changes, thereby preventing circumvention. Development agreements may be useful to municipalities in that they also can be used to get the developer to proceed with the development according to an agreed-upon schedule or to make concessions the developer would normally find unnecessary. Often developers will agree to build roads or playgrounds, or dedicate land, the benefit of which the municipality would not otherwise enjoy.

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18. 86 Pa. Commw. 442, 485 A.2d 523 (Pa. Commw. Ct. 1984).

19. *Id.* at 444, 485 A.2d at 524.

20. *Id.*

21. *Cf.* Florida Dep't of Natural Resources v. Sunset Realty Corp., 474 So. 2d 363 (Fla. 1st DCA 1985) (where statute mandated agency review every five years of coastal construction setback line, agency could not, by agreement with developer, waive period and provide for 15-20 year period of review).

22. Hagman, *supra* note 13, at 570-72, 589-90.

B. Types and Uses of Development Agreements

There is evidence in several states which indicates that development agreements have been or may be used in them. Several cases refer to the existence of "development contracts" between a local government and a developer,[23] but most do not describe the agreements.

Most states have legislation enabling local governments to enter into contracts,[24] but only one state, California, has enabling legislation specifically giving local governments the power to enter into development agreements which stipulate that subsequent ordinances will not be enforced against the developer.[25] Several other states have considered legislation either enabling development agreements[26] or limiting the scope of development agreements,[27] and several have legislation allowing annexation agreements which arguably could be applied to other types of development agreements as well.[28] Because California is the only state with specific development agreement legislation, its provisions will provide the basis of this discussion.

The California development agreement statute was enacted in 1979 in response to developer pressure to do something about the late vesting preference of the California courts and is generally intended to "provide greater certainty in the land development approval process without seriously jeopardizing a public agency's controls."[29] In other words, the statute lets developers know what the rules are before they start committing resources and delving into the approval process.[30]

The statute's provisions are extensive. After legislative findings and declarations which cite "certainty" and efficiency as the stat-

23. *See, e.g.*, Esping v. Pesicka, 92 Wash. 2d 515, 598 P.2d 1363 (Wash. 1979).

24. *E.g.*, HAWAII REV. STAT. § 62-34(17) (1976); MO. ANN. STAT. § 100.170 (West Supp. 1985).

25. CAL. GOV'T CODE §§ 65864-65869.5 (West 1954).

26. Callies, "Developers' Agreements and Planning Gain," in ABBOT, CALLIES, & HOLLIMAN, DEVELOPMENT AGREEMENTS AND VESTED RIGHTS: A SECOND LOOK 135-36 (1983).

27. *Id.*.

28. *E.g.*, ILL. REV. STAT. ANN., ch. 24, §§ 11-15.1-1 through 11-15.1-5 (Supp. 1984-85), which states that agreements may provide for, with relation to the subject land, "the continuation in effect, or amendment, or continuation in effect as amended, of any ordinance relating to subdivision controls, zoning, official plan, and building; housing and related restrictions," provided that if a public hearing is required for amendment, it is held prior to execution of the agreement.

29. League of California Cities, *supra* note 2, at 1.1.

30. *Id.* at 1.1.

ute's purpose,[31] it gives cities and counties the authority to enter into development agreements and the directive to establish procedures and requirements for doing so, upon an applicant's request, by resolution or ordinance.[32] It requires that the municipality annually review compliance with the agreement, and permits the municipality to terminate or modify the agreement upon a finding of noncompliance.[33] The statute then sets forth what must and may be included in the agreement itself. The agreement *must* indicate the time during which the city's regulations are to be frozen, the uses permitted in the development, the density or intensity of use, the size of any buildings allowed, and any agreed-upon provisions for the dedication or reservation of land for public purposes.[34] In addition, the agreement *may* include other terms and conditions, such as the time schedule for the developer and the additional public services and facilities to be provided by the developer and refinanced by the municipality.[35]

Several statutory sections set forth the statute's enforcement and limitations on enforcement. Sections 65865.4 and 65866, read together, provide that unless the agreement is cancelled or amended, it is enforceable according to the law in force at the time of execution of the agreement notwithstanding any subsequent changes in planning, zoning, subdivision, or building regulations of the city or county party.[36] Section 65866 provides that the agreement shall not prevent the city from enforcing *new* rules, regulations, or policies or from denying or approving any subsequent development project application based upon those new rules.[37] Other state or federal laws may limit the enforceability of the statute. If the development is in an area where a local coastal program is required to be prepared and certified, the agreement will not apply unless the coastal program has been certified before the date of execution or the California Coastal Commission approves the agreement.[38] Similarly, if state regulations or those of nonparty local governments or agencies preclude compliance with the agreement, the agreement must either be suspended or modified to

31. CAL. GOV'T. CODE § 65864 (West 1954).
32. *Id.* at § 65865.
33. *Id.* at § 65865.1.
34. *Id.* at § 65865.2.
35. *Id.*
36. *Id.* at §§ 65865.4 and 65866.
37. *Id.* at § 65866.
38. *Id.* at § 65869.

comply.[39]

The statute also contains several procedural requirements. Briefly, these call for published notice and a public hearing upon application for a development agreement,[40] approval by ordinance of a development agreement once it is found to be consistent with the municipality's plans,[41] designation of a development agreement as a legislative act which is subject to referendum,[42] amendment or cancellation of the agreement by mutual consent,[43] and recording of the agreement in the county records.[44] Once a municipality has decided to enact a development agreement ordinance, it needs to establish a procedure for processing development agreement applications. The procedure is to be similar to other complex land use approval procedures, beginning with informal negotiations, going through commission, council, and attorney review, and ending with final approval.[45]

Although development agreements can legally be used for any development, the additional expense and paperwork involved make their use less attractive in ordinary, single-phase developments. Their use is more likely in large multi-phase developments, in parcels with many public service problems, and in situations in which a city is trying to induce a particular landowner to dedicate land or participate in the construction of new facilities.[46] On the other hand, if a developer is not prepared to act in accordance with a specific time schedule or if land use standards have not recently been reviewed or are likely to change soon, a development agreement should not be entered into.[47] One possibility, if the parties are contemplating eventually entering into a "full-fledged" development agreement but are not ready to firmly commit, is to use a "short form" agreement temporarily "freez[ing] the rules while the developer contemplates applications for other approvals"; such an agreement would terminate after a stated time period or when all approvals have been given.[48]

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39. *Id.* at § 65869.5.
40. *Id.* at § 65867.
41. *Id.* at § 65867.5.
42. *Id.*
43. *Id.* at § 65868.
44. *Id.* at § 65868.5.
45. League of California Cities,*supra* note 2, at 1.3. *See* introduction for procedural recommendations.
46. *Id.* at 1.2.
47. *Id.* at 1.3.
48. *Id.* at 3.16.

Once the procedure is established and there is consensus on the fundamental terms of the development agreement, the document itself must be prepared. Checklists and model documents are available, which ensure that no statutorily prescribed or otherwise necessary provisions are overlooked.[49] Some of these provisions, however, deserve separate mention. First, there should be some provision for subsequent discretionary actions by the contracting agency, including the conditions, terms, restrictions, and requirements on which such actions will be based. Related sections should cover the developer's duty to obtain other approvals and the extent to which cooperation should be expected from or given by other agencies.[50] A second type of provision is a statement of the grounds, such as nontimely compliance or state government action, which induce termination or modification of the agreement, and additional events constituting default. An important final inclusion is to incorporate by reference into the development agreement all related documents which bear on the agreement; this category would include everything from security agreements which provide for infrastructure improvements[51] to complete maps and plans for the development.

The California statute has been criticized primarily on two grounds. First, the statute is said to be ambiguous as to whether all rules and regulations of the contracting government may be frozen.[52] Second, it does not give the contracting municipalities the power to bind other government entities. Cities and counties can include a freeze on regulation by the other, but neither can assure that actions by special districts, school districts, regional authorities, or state or federal agencies will not preclude the development.[53] Regulation by the city or county is part of the problem, but the "fragmentation of permitting by numerous specialized governments . . . is the major problem."[54]

Whether a city or county can bind itself, let alone whether it can bind other governmental entities, is a serious legal problem with development agreements generally; the problem is discussed fully in Part II. With regard to California in particular, an alternative

49. *Id.* at 3.13.

50. *Id.* at 3.14.

51. *Id.* at 3.34.

52. Hagman, *supra* note 13, at 570-72, 589-90.

53. Hagman, *Development Agreements*, 3 ZON. & PLAN L. REPORT 65, at 67 (1980) [hereinafter cited as *Development Agreements*].

54. Hagman, *supra* note 13, at 590.

legislative proposal has suggested an open-ended provision that the agreement be permitted to bind "all government agencies, including federal ones, to the extent they [are] willing to be bound."[55] Although this type of provision might be useful to establish policy, the actual authority for a local governmental unit to bind a state or federal agency seems dubious even with such a provision.

Great Britain's "planning agreements," though they are not identical to California's, cause some of the same problems. Unlike in America, there is no "vesting" problem in Great Britain since landowners never technically have a "right" to develop.[56] Instead, development is a privilege for which a developer must always get permission.[57] Thus, in Great Britain, development agreements have evolved not as an attempt to protect developers from late vesting, but rather as an effort to allow local governments to benefit even more from the development permitting system. The use of planning agreements enables local governments to derive "planning gain," in the form of dedications, infrastructure provisions, and other public benefits[58] which they would not otherwise be authorized to require as a condition to planning and permission.[59] In addition developers, although they do not technically get the benefit of early as opposed to late vesting, do get the analogous authority to proceed with their development under the existing regulations.

The Town and Country Planning Act of 1971 added the "planning agreement," or "section 52 agreement," to the multi-tiered, comprehensive British planning system.[60] Section 52 gives the local planning authority (the district or county council) the authority to enter into an agreement "with any person interested in land in their area" to regulate or restrict the development or use of land, either for an agreed time period or permanently.[61] The agreement may also contain other incidental provisions as appear necessary or expedient to the planning authority.[62] Such an agreement in effect creates a covenant running with the land, making it enforceable by the local authority against subsequent owners in interest, "as if the

55. Hagman, *supra* note 53, at 67.
56. Callies, *supra* note 26, at 153.
57. *Id.*
58. *Id.* at 139-141; Purton, *Local Aid to Development*, 17 REAL PROP. PROB. & TR.J. 472, at 478 (1982).
59. Evans, *Practical Aspects of Section 52 Agreements*, 128 SOLIC. J. 181, at 181 (1984).
60. *Id.*; Town and Country Planning Act, 1971, § 52.
61. Town and Country Planning Act, 1971, § 52(1).
62. *Id.*

local planning authority were possessed of adjacent land and as if the agreement had been . . . for the benefit of such land."[63] Like the California enabling statute, section 52 provides that the agreement shall not be construed as impairing the local authority's exercise of its Planning Act powers in accordance with the development plan or as requiring the exercise of other powers.[64] Unlike the California statute, however, section 52 does not provide for a local enabling resolution, for what *must* be included in the agreement, or for proper procedures for the certification or amendment of the agreement.

A comparison of the California and British models suggests that some of the same problems are inherent in both types of development agreements. In both the United States and Great Britain the primary issue is whether local government powers may be contracted—or "fettered"—away by agreement. One British commentator believes that no statutory powers, other than those created by the 1971 Town and Country Planning Act, may be "fettered" away by local authorities.[65] This problem in the United States is discussed in greater depth in Part II, *infra*. Another similarity is the power of American cities or British planning authorities to exempt any or all of the local government's statutory powers from being frozen by the agreement.[66] Of course, the more inclusive such an exemption becomes, the more likely it is that the developer will not enter into the agreement.[67]

C. *Practical Suggestions for Development Agreements*

Although the form and substance of the development agreement will necessarily be dictated by the details of the development and the requirements of the jurisdiction, several observations from the California and British experiences suggest some general considerations in addition to those discussed above. Suggestions in this part apply to development agreements generally and are limited to provisions regarding substance and implementation.[68]

The first problem in any situation is to determine whether to use a development agreement at all. Development agreements initially

63. *Id.* at § 52(2).
64. *Id.* at § 53(3).
65. Callies, *supra* note 26, at 145.
66. *Id.*
67. *Id.*
68. *See* part II, *infra*, for suggestions as to how to avoid legal invalidation of development agreements.

were used only in unusual or complicated developments for which they were deemed worth the additional time and expense. With the benefit of greater experience they have since been used in abbreviated form in smaller projects to deal with specific problems, such as impending changes in zoning.[69] In addition, their use has been proposed as a solution for large-scale, multi-party development problems.[70] Thus, the possibility of using a development agreement, in either a full or modified form, should at least be considered during the initial discussions regarding every development application or proposal.

In drafting a development agreement, it is advisable to draft the restrictions and obligations in language and terms recognizable to both lawyers and planners.[71] This will minimize unnecessary disputes over interpretation. The first substantive problem in drafting a development agreement is determining its term. Section 52 agreements are enforced as restrictive covenants and are presumed to extend into perpetuity unless the term is stated otherwise. This raises the risk that an agreement's durability will outlast its usefulness and relevance.[72] From the viewpoint of the public sector, the "general consensus [in California] was that rarely should a local agency be prepared to commit itself to policies for more than a three-year period."[73] On the other hand, any period less than one year does not provide enough protection for the developer.[74] Thus, it has been recommended that the ideal term for a development agreement is from one to three years.[75] Two related recommendations to assure that the agreement continues to strictly serve its purpose, are to make sure from the outset that the provisions of the agreement are limited to the purposes sought and to review periodically the developer's progress to make sure that the purposes are being accomplished.[76]

The next problem is to decide which parties are necessary to make the agreement enforceable. Since this is always an important consideration, the interests of all potential parties should be examined before an agreement is formulated. On the public side, if

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69. *See* part III, *infra*.
70. League of California Cities, *supra* note 2, at 3.15.
71. Evans, *supra* note 59, at 183.
72. Ward, *Planning Agreements: For Better or Worse*, 134 New L.J. 905 (1984).
73. League of California Cities, *supra* note 2, at 1.4.
74. *Id.*
75. *Id.*
76. Ward, *supra* note 72.

the agreement imposes obligations upon the developer for the benefit of some public agency other than the initial contracting entity, it is probably best to have the developer enter into a separate agreement with the second agency. If this is not feasible, either because the agency does not have the authority to enter into an agreement or for any other reason, a covenant should be included in the original agreement requiring the developer to complete the obligation to the satisfaction of the third party beneficiary.[77] The drawback of this second option is that although this sort of covenant is enforceable by the contracting entity, the third party beneficiary cannot enforce it on its own, since it has no privity of contract with the developer.[78] On the private side, it is essential that all legal owners of the land join in the agreement since the restrictions run with the land.[79] All other interested parties such as reversioners of land interests, mortagees, and trustees, should join in the agreement if possible.[80] If these parties are unwilling to join in the agreement itself, at least their consent to the developer's entering into the agreement should be obtained.[81]

Another set of suggestions relates to the scope of the agreement. The agreement should make clear which provisions are conditional on what occurrences. For instance, it should clearly state that the covenants and the agreement itself are conditional upon the granting and implementation of necessary planning approval, and that approvals are subject *only* to the statutory requirements and the conditions set forth in the agreement.[82] If the likelihood of receiving a necessary approval from a third party is uncertain, the agreement should not be executed until such approval is acquired; at the very least, its continued validity should be made conditional on such acquisition.[83] Similarly, the parties should anticipate the possibility that the agreement will be held invalid and provide in the agreement itself for the consequences of such an occurrence.[84] Finally, the agreement should provide means for resolution of disputes between the parties.

77. Evans, *supra*, note 59.
78. *Id.*
79. *Id.* at 182.
80. *Id.*
81. *Id.*
82. Ward, *supra* note 72, at 906.
83. Callies, *supra* note 26, at 169-170.
84. League of California Cities, *supra* note 2, at 2.6.

II. Legal Problems Raised by Development Agreements

A. Contracting Away of Police Power

Courts have long held that the power of local government to contract gives the officers of a municipal corporation the power to bind the city by contract beyond their own term of office.[85] Otherwise, many contracts for the continued provision of services and the purchase of equipment and supplies would be useless. This contracting of future powers, however, is not always valid. In determining a contract's validity the courts traditionally have considered whether the function being contracted away is "governmental" or "proprietary" in nature,[86] and have looked less favorably upon the contracting-away of governmental functions. In addition, courts have held that municipal activities are not exempt from the antitrust laws and are subject to invalidation if the municipality contracts with a private party to exclude its competitors from the city.[87] In one case, a city was found to be subject to (i.e., not exempt from) the antitrust laws when it agreed to discourage competition with a downtown developer and denied several applications for rezoning in furtherance of this agreement.[88]

Although the possibility of antitrust liability should be kept in mind, the more important issue is whether a municipality may agree not to enforce zoning, subdivision, and other police power regulations in the future. The agreement to "buy" certain amenities such as street improvements and recreational space from developers is arguably analogous to the purchase of other goods and services; therefore, this aspect of a development agreement is likely to be enforceable.[89] The possibly illegal consideration given for these purchases, however, might make a contract unenforceable; the city might not have the authority to waive enforcement of its amended ordinances and regulations. Under the reserved powers doctrine, a government may not agree not to exercise its police powers in the future.[90] If a government does so agree, however, a

85. *E.g.*, Blood v. Manchester Electric Light Co., 68 N.H. 340, 39 A. 335 (1895) (contract for streetlighting).

86. *See, e.g.*, Gardner v. City of Dallas, 81 F.2d 425 (4th Cir. 1936), *cert. denied*, 298 U.S. 668 (1936); State ex rel. Tubbs v. City of Spokane, 53 Wash. 2d 35, 330 P.2d 718 (1958); State ex rel. White v. City of Cleveland, 125 Ohio St. 230, 181 N.E. 24 (1932).

87. *E.g.*, Community Communications Co., Inc. v. City of Boulder, 455 U.S. 40 (1982).

88. Mason City Center Assocs. v. City of Mason City, 468 F. Supp. 737 (N.D. Iowa 1979), *aff'd in part, rev'd on other grounds*, 671 F.2d 1146 (8th Cir. 1982).

89. *Development Agreements*, *supra* note 53, at 77.

90. *Id.* at 74.

competing constitutional clause requires that the state not "pass any . . . law impairing the obligation of contracts."[91] This clause has been applied to government contracts in the past.[92] Thus, it arguably prohibits the rescission of a development agreement on the ground that a new city ordinance or subsequent inconsistent legislation, such as a zoning amendment, has impaired the contractual obligation of the development agreement.[93] One author has concisely stated the problem as follows: "On the one hand, government must keep its word [under the contracts clause]. On the other hand a government cannot contract away the power to govern [reserved powers]. Where do development agreements fall in the balancing of these two provisions?"[94]

Although there are no court cases at this time answering this question with regard to development agreements, three United States Supreme Court cases establish a test for determining whether a state action may "impair" a contract. This test is instructive in determining whether the enactment of a subsequent inconsistent ordinance or an act otherwise infringing upon the terms of a development agreement will be a valid justification for a city's failure to honor the agreement. The case establishing the test and most factually similar to the development agreement situation is *United States Trust Co. v. State of New Jersey*.[95] Before *United States Trust*, the rule was relatively clear that a state's police powers could not be contracted away, but that its taxing and spending powers could be.[96] In that case, however, the Supreme Court invalidated a statute that repealed a covenant between Port Authority bondholders and the states of New York and New Jersey, which covenant limited the uses of the bond revenues. Instead of emphasizing the police power/finance power distinction, the Supreme Court asked whether the power given up was "an essential attribute of sovereignty." The Court found that even though the bond covenant related to the police power, it was characterized as finance-related, and thus did not result in contracting

91. U.S. CONST. art. I, § 10.

92. *See* United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), *reh'g denied*, 431 U.S. 975 (1977).

93. Even though the California statute says that a development agreement is legislative, CAL. GOV'T CODE § 65867.5 (West 1954), if the agreement creates rights of a contractual nature, it will be treated as a contract. *United States Trust*, 431 U.S. at 17, n.14.

94. *Development Agreements, supra* note 53, at 77.

95. 431 U.S. 1 (1977), *reh'g denied*, 431 U.S. 975 (1977).

96. League of California Cities, *supra* note 2, at 2.4.

away "an essential attribute of sovereignty."[97] Therefore, the contracts clause barred the state from impairing a contract by repealing the covenant.

Even if the contract itself is valid, and thus ordinarily not "impairable," some government action might override its enforceability. Two recent cases, *Allied Structural Steel Co. v. Spannaus*[98] and *Energy Reserves Group, Inc. v. Kansas Power and Light Co.*,[99] refined the *United States Trust* analytical framework. As set forth in *Energy Reserves*, the "threshold inquiry is 'whether the state law has, in fact, operated as a substantial impairment of the contractual relationship.' "[100] If it is found to be a substantial impairment, the next question is whether there is a "significant and legitimate" public purpose behind the regulation; if there is such a purpose, the impairment is justified.[101] In its supporting language, the Court pointed out that past regulation of the complaining party's industry is relevant, and that "[t]he requirement of a legitimate public purpose [before allowing impairment] guarantees that the State is exercising its police power"[102] and not acting merely to rescind the contract. This seems to indicate clearly that a subsequent zoning ordinance, an exercise of the police power,[103] would be a "significant and legitimate" enough public purpose to justify any impairment.

In *Energy Reserves*, however, the test was stated to be much stricter where the state itself is one of the contracting parties: "in almost every case, the Court has held a governmental unit to its contractual obligations *when it enters financial or other markets*."[104] Without the last phrase, this sentence suggests that all government contracts are binding; however, as a whole it suggests that government contracts in a traditionally governmental context might be less "unimpairable." Thus, it appears from *Energy Reserves* that the governmental/proprietary and police power/financial power distinctions are still operative.

Although the Supreme Court has hinted at some answers, no outcome can be certain. The courts are more willing to justify the

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97. *United States Trust*, 431 U.S. at 23; *see* Kmiec, *supra* note 1, at 106-107.

98. 438 U.S. 234 (1978), *reh'g denied*, 439 U.S. 866 (1978).

99. 459 U.S. 400 (1983).

100. *Id.* at 411, *quoting, Allied Structural Steel*, 438 U.S. at 244.

101. *Energy Reserves*, 459 U.S. at 412.

102. *Id.* at 411, 412.

103. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (zoning is within a city's police powers).

104. *Energy Reserves*, 459 U.S. at 412, n. 14 (emphasis added).

impairment of contracts where the impairment is caused by traditional governmental police power action in a regulated industry. This would suggest that a municipality may rely on subsequent legislation in order to avoid a development agreement. However, the courts also are more willing to hold a governmental unit to an impaired contract than they are to hold two private parties bound; this suggests that the development agreement could be binding. Though not certain it is at least plausible that under the language of the contracts clause this same analysis would apply whether the agreement is impaired by a local or a state legislative act.

Looking beyond the constitutional analysis, additional arguments might be made for rescinding the agreement. If a municipality determines that the provision of services required by the agreement has become prohibitively expensive or otherwise undesirable, it can argue changed circumstances. The courts, however, have not looked favorably on such an argument, and are unlikely to so in the future unless the agreement in question has an express escape provision allowing alternative performance in the case of specific changed circumstances.[105] Another argument would be that although the city has the power to contract under the United States Constitution, the state has not given it the power to enter into development agreements. Since, under "Dillon's Rule," a municipality has only the powers granted it by the state,[106] such an agreement would be unauthorized and invalid.

On the other hand, other factors suggest that a development agreement can bind a governmental unit despite subsequent inconsistent government action. In addition to arguing that the agreement is purely finance-related under *United States Trust*,[107] a developer could argue, under an estoppel theory, that the development agreement and its enabling statute justify his reliance on the validity of the agreement.[108] Some have contended, however, that a developer's knowledge that development agreements *might* not be enforceable should be sufficient to deny recovery on the estoppel theory, since a necessary element of estoppel recovery is that the party claiming it is ignorant of the true facts.[109]

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105. League of California Cities, *supra* note 2, at 2.7-2.8.

106. Village of Sherman v. Village of Williamsville, 106 Ill. App. 3d 174, 435 N.E.2d 548 (App. Ct. 1982); *See also* Simons v. Canty, 195 Conn. 524, 488 A.2d 1267 (Conn. 1985); Lake Worth Utilities Auth. v. City of Lake Worth, 468 So. 2d 215 (Fla. 1985).

107. *See supra* notes 95-97 and accompanying text.

108. *See Development Agreements, supra* note 53, at 77.

109. *Id.*

Another argument for upholding development agreements despite the reserved powers doctrine is that development agreements do not contract away the police power but instead constitute its reasonable exercise.[110] Although development agreements under this theory would still be subject to modification by "a subsequent exercise of the police power [that is] essential to the preservation of public health and safety,"[111] several comparable agreements have been upheld in California in the annexation,[112] subdivision improvement,[113] and redevelopment and housing authority contexts.[114] Although these agreements may be distinguishable from development agreements in that they do not prospectively provide for nonenforcement of subsequent legislation, the language in several of these cases suggests that, at least in California, such contracting-away would be upheld.

In *Morrison Homes Corp. v. City of Pleasanton,*[115] the court upheld a series of annexation agreements, calling them "just, reasonable, fair, and equitable" at the time of execution and thus not void or voidable merely "because some of their executory features might have extended beyond" the current city council members' terms.[116] In *Carruth v. City of Madera,*[117] the court concluded that an agreement meeting the *Morrison* criteria "is binding upon the municipality and may not be summarily cancelled by a successor council."[118]

The California view may not be widely held, however. In a Florida case, the Supreme Court of Florida upheld an agreement resembling a land development agreement between a city and a railroad, but said that "[o]bviously, the city cannot by this contract bind a future council in respect to the exercise of the police power or bargain away this prerogative of government."[119] Similarly, the appellate court in a British case held that a planning authority

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110. Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44, at 53 (1981).

111. League of California Cities, *supra* note 2, at 2.2.

112. *E.g., Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (Ct. App. 1976);* see Holliman, *supra* note 110, at 54-56.

113. *E.g.*, Carruth v. City of Madera, 233 Cal. App. 2d 688, 43 Cal. Rptr. 855 (Ct. App. 1965).

114. *See* Holliman, *supra* note 110, at 56-58.

115. 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (Ct. App. 1976).

116. *Id.* at 734-35.

117. 233 Cal. App. 2d 688, 43 Cal. Rptr. 855 (Ct. App. 1965).

118. *Id.* at 695, 43 Cal. Rptr. at 860, *quoting* Denio v. City of Huntington Beach, 22 Cal. 2d 580, 590, 140 P.2d 392 (1943).

119. Herr v. City of St. Petersburg, 114 So. 2d 171, at 175 (Fla. 1959).

could not, with a section 52 agreement, bind itself in advance as to how it would perform its public duties.[120]

Several provisions can be included in a development agreement to help ensure that the municipality will not give up too much control, so as to invalidate the agreement. These include provisions:

1. for limiting the agreement to a specific duration indicating that the municipality is not completely ceding control;
2. for monitoring the developer's adherence to the agreement and authorizing termination for nonadherence;
3. requiring that all discretionary approvals be obtained;
4. reciting some statutory authorization for entering into the agreement (e.g., development agreement enabling, annexation agreement enabling, or other contract power enabling statutes);
5. reciting the specific public benefits expected (to satisfy any want of consideration); and
6. requiring conformity to subsequent local regulations that are not inconsistent with the terms of the agreement.[121]

B. *Other Problems*

Although California is the only state that has enacted a statute specifically enabling local governments to enter into development agreements, there are some indications in the cases and the literature that they are also used elsewhere.[122] It does not, therefore, appear absolutely necessary that there be enabling legislation for the valid use of development agreements. It is possible that the power to enter into development agreements could be subsumed by other contracting and planning powers. However, the looming presence of the rule that municipalities exercise only those powers *expressly* granted to them by the state suggests that enabling legislation might be necessary. Since there apparently has been no litigation testing the validity of development agreements without enabling legislation, their validity cannot be presumed.

Whether or not such legislation is absolutely necessary, its enactment will make the courts more sympathetic to the use of development agreements. If it is a matter of state policy to allow development agreements, the courts are more likely to defer to the

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120. Windsor and Maidenhead Royal Borough Council v. Brandrose Invs. Ltd., (1983) 1 W.L.R. 509, *cited in* Hamilton, *Planning Agreements I*, 127 SOLIC. J. 568, at 569-70 (1983).

121. Stone & Sierra, "The Public/Private Written Agreements: Case Law," in materials from *ULI-ABA National Institute: Managing Development Through Public/Private Negotiations*, at 10-11, 16, 23.

122. *E.g.*, Esping v. Pesicka, 92 Wash. 2d 515, 598 P.2d 1363 (Wash. 1979).

legislature's discretion and uphold the agreements against constitutional challenges. With enabling legislation in place, development agreements will also be likely to withstand challenges based on the proposition that local governments have only those powers expressly granted to them by the state. Finally, a statewide set of guidelines for development agreements, such as California's statute provides, will give local governments a base to work from in devising and drafting agreements. If problems with one municipality's agreements are challenged in court, another municipality whose agreements are based on the same statute may then benefit from precedent in drafting subsequent agreements.

Another problem area is whether the execution of a development agreement is properly labeled as a "legislative," "administrative," or "adjudicative" act. Although the California legislature denominates development agreements to be legislative acts,[123] a court could label them otherwise. Similarly, in other states where no enabling legislation has prelabeled development agreements, the court could conceivably designate them as falling into any one of the three categories. A legislative act is characterized by broader, policy-oriented measures, affecting the population generally;[124] passage of a zoning ordinance or amendment, for instance, is considered a legislative act.[125] Thus, although a development agreement does not usually directly involve the broader population, it is arguably legislative to the extent it relates to zoning. An administrative act is one that implements public policy;[126] to the extent that development agreements, like other forms of municipal contracts, are deemed implementary, they will be considered administrative acts. Finally, an adjudicatory act is one that determines the government's treatment of a more particularized party in a more particularized context; the approval process for a planned development, for instance, is adjudicatory.[127] Thus, to the extent that execution of a development agreement substantively approaches approval of a planned development, it could be treated as adjudicatory.

The difference in labeling is not purely semantic; rather, each label carries with it certain consequences. Courts tend to give def-

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123. CAL. GOV'T. CODE § 65867.5 (West 1954).

124. Stone & Sierra, *supra* note 121, at 25.

125. *See* League of California Cities, *supra* note 2, at 2.14.

126. Stone & Sierra, *supra* note 121, at 25.

127. *E.g.*, Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (Ct. App. 1977).

erence to legislative discretion, so long as it is within the bounds of the law. Voters, however, can in many places recall legislation through the use of initiatives or referenda.[128] Further, a legislative act, if properly designated as such, is not subject to the protection of the contracts clause.[129] Thus, if a development agreement is deemed legislative, subsequent impairment by state or local governments is less likely to be successfully challenged. An administrative act, on the other hand, is subject to contracts clause protection.[130] Finally, if the agreement is deemed adjudicative, it is subject to stricter judicial scrutiny, especially as to whether the due process rights of affected parties have been observed.[131] Due process requires that a certain degree of advance notice of the impending action be given and that a hearing for the affected parties take place before any action is taken. While the California statute provides for notice and hearing, it might not achieve the constitutional due process threshold requirement for adjudicative actions.

While it is uncertain which label should and will be put on development agreements, and while different labels might be attached depending on the particular agreement and circumstances in dispute, several provisions might be included in the agreement either to influence the courts in their designation or to assure the validity of the agreement. It cannot hurt to assume that constitutional due process requirements must be met regardless of the label put on the agreement. Thus, local and state enabling legislation, and the agreement itself, should clearly specify constitutionally sufficient notice and hearing requirements, which are to be met prior to any approvals or permits required by the development agreement.[132] To assure that the agreement is not treated as a legislative act or, if it is, that it be upheld as such, general policy determinations such as planning and zoning goals should be formulated before execution of the agreement.[133] Finally, to assure that the agreement is valid if labeled as administrative, all contractual formalities, especially the provision for adequate consideration, should be honored.[134]

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128. Stone & Sierra, *supra* note 121, at 24-25.
129. *Id.* at 25.
130. *Id.*
131. *Id.*
132. *Id.* at 26, 30.
133. *Id.*
134. *Id.*

III. Adaptation of the Development Agreement for Use in Large-Scale Multi-Party Situations

The situations in which development agreements have been used have ranged from small one-time developments to larger multiphase developments. Different forms of development agreements have been used depending upon the particular development problems. There are few existing examples, however, of the use of development agreements in situations that involve several local, state, and federal governmental agencies, as well as several landowners and developers, and possibly public interest groups. Although development agreements per se are arguably valid exercises of local government powers, determining their usefulness in and adaptability to this more complicated context requires the analysis of several additional legal and logistical issues.

A. *The Problem*

It occurs quite often that either a large, isolated, environmentally contiguous area or a defined urban district prime for redevelopment falls prey to the apparently conflicting interests of its several landowners, the several government agencies with jurisdiction over it, and the environmentally-conscious or community-conscious public interest groups that are concerned with the area's future. In the past, these groups have often acted in a confrontational manner, each using its available financial, legal, or political tools to work toward its own single-minded goal. Such confrontations often have resulted in a stalemate or a solution beneficial to no one. More recently, however, a trend has begun which favors a more negotiation and compromise-oriented approach to such problems.

A region in the San Francisco Bay area provides one example of such a situation. In 1965, a proposal for excavation of San Bruno Mountain, "the last major parcel of privately held open space on the San Francisco peninsula," "triggered the formation of . . . the Committee to Save San Bruno Mountain, which has been intensively involved in the conservation of the Mountain since that time."[135] In 1975, the owner of the mountain proposed the construction of a large multi-use development with 8500 residential units and two million square feet of office and commercial space.

135. Marsh & Thornton, San Bruno Habitat Conservation Plan 1, 5 (June 8, 1983) (unpublished manuscript), to be published in BROWER & CAROL, RESOLVING LAND USE CONFLICTS: CASE STUDIES IN SPECIAL AREA MANAGEMENT (1986).

When the Committee learned of the proposal "[a]n intensive political battle ensued."[136] In 1976, the environmental groups claimed a victory when San Mateo county amended its general plan allowing construction of only 2235 residential units on only limited parts of the mountain. Litigation followed and resulted in a settlement whereby the landowner donated and sold "almost the entire main ridge line," 1711 acres in all, to the county.[137]

In 1979, the landowners donated and sold additional acreage to California for a state park. In the same year, the United States Fish and Wildlife Service notified the owners that several species of butterflies which made the mountain their home were on the endangered species list and therefore that it intended to establish a "critical habitat" covering most of the area planned for development. After all these events, it was clear that all the parties, plus three cities and three major developers, were interested in the future of San Bruno Mountain. Though more litigation appeared imminent, they decided to work together toward a compromise development solution. Their mission: to "provide for protection of the wildlife and plant resources of the Mountain while permitting the implementation of the local government's plan for urban development."[138]

The collaborative process, being a first-time experience for almost everyone involved, was both enlightening and frustrating. After the local parties agreed to work together toward a solution, the Fish and Wildlife Service had to be convinced to delay its listing until after a plan was agreed upon. Although reluctant at first, the Service consulted with the congressional subcommittee from which it received its powers and finally agreed to the delay. The next step was to establish a steering committee with representatives of most of the interested parties. The committee agreed upon certain ground rules which would govern both its formal deliberations and the members' informal activities relating to the committee's mission. It was agreed that all decisions would be made by consensus, that the desired solution would be a "principled solution" within the letter and the spirit of endangered species legislation, and that no committee member would do unauthorized outside "lobbying" with regard to the committee's activities. It was then decided that before drafting a plan and an implementing agreement, the com-

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136. *Id.* at 5-6.
137. *Id.* at 6.
138. *Id.* at 1-2.

mittee would hire a consultant who would perform a scientific study of the habitat, inform the members as to his findings, and sit on the committee for development of the plan.[139]

The product of the committee's efforts was a detailed habitat conservation plan which was implemented by a "detailed agreement providing for the long-term preservation of the habitat of the endangered butterflies [and other species] and the implementation of the [c]ounty's plan for urban uses within the Area."[140] The obligations of both the public and private parties were "contractually defined at a level of detail which is unprecedented."[141] A by-product of the committee's activities was an amendment to the Endangered Species Act[142] to permit local development of a habitat conservation plan before the Service takes action. A final matter in adopting the plan was to complete all environmental documentation. A joint state and federal environmental impact statement was prepared and, with the full cooperation of all the necessary agencies, was adopted within one year after engaging the consultant to prepare it.[143]

Since the San Bruno Mountain effort was so successful, thus making the federal government more likely to cooperate, similar solutions are being attempted in other areas. One such effort is in northern Key Largo, Florida, where an area inhabited by several endangered species has been made attractive to developers due to a water supply that has recently become available.[144]

B. *Potential Impediments to Expanded Use of Development Agreements*

Several solutions might be useful for acquisition of land involved in multi-party development contexts, such as municipal condemnation, regional management by a quasi-governmental agency,[145] the use of a conservancy organization as an intermediary,[146] or a "free-enterprise" system of land use control.[147] Each of these possible

139. *Id.* at 17-18.

140. *Id.* at 2.

141. *Id.*

142. 16 U.S.C. §§ 1531-1543 (1982).

143. Marsh & Thornton, supranote 135, at 31-32.

144. Interview with David J. Brower, Assistant Director of the Center for Urban and Regional Studies, Chapel Hill, North Carolina (March 1, 1985).

145. Brower & Carol, *supra* note 135, intro. An example of such an agency is the New Jersey Pinelands Commission.

146. *Id.*

147. *See generally* Kmiec, *supra* note 1.

solutions, however, has its own problems. Also, the development agreement, though conceivably adaptable into a tool which alone or in conjunction with other methods could be used as a catalyst toward collaborative solutions, has its problems. In addition to the legal issues raised by the development agreement concept itself, the expansion of its use raises several difficult, but not insurmountable, problems:

1. whether agreements by state and federal agencies with other governmental agencies or with private parties are authorized;
2. whether such agreements are binding on state and federal agencies; and
3. how the negotiation process is best organized, managed, and timed when so many parties are involved.

At the root of all of these problems is the fact that most states, let alone the federal government, do not have a comprehensive system of land use controls.[148] Within any given development area, "[l]ocal, regional and state agencies, many of them new and many of them charged to protect a specialized aspect of the public weal . . . may exercise substantial control. Each agency has a kind of veto power."[149] Without any organized process to manage the overlapping control of these entities, a maze of regulatory requirements can frustrate even developments most favorable to the public.

The first step in organizing such a process is to ensure that public parties are authorized to execute binding agreements with other public and private parties. There is no debate as to whether private parties such as citizens' groups and developers can agree among themselves to develop land in a certain way within governmental constraints.[150] The issue with regard to agreements between local government and private parties has already been discussed. Remaining issues include whether local governments and their agencies can enter into agreements with one another, and whether state and federal governments and their agencies can enter into agreements with private parties and/or with other governmental units.

Although most states now have enabling legislation or constitu-

148. *But see* FLA. STAT. chapters 163, 253, 259, and 403 (1983), and text accompanying notes 165-67, *infra*.

149. *Development Agreements*, *supra* note 53, at 66.

150. *See, e.g.*, Malcolm D. Rivkin, The Significance of Negotiation to the Development Industry: A Framework, and Some Examples of Citizen Involvement, in materials from *ALI-ABA National Institute: Managing Development Through Public/Private Negotiations*, at 5-6 (White Flint Mall, Montgomery County, Md.).

tional provisions[151] authorizing intergovernmental cooperation for designated government functions, the statutes and provisions vary as to the purposes of such cooperation. For example, the Illinois constitution broadly authorizes local governments to contract with other local governments, with the state, with other states and their localities, with the United States, and, unless prohibited, with individuals, associations, or corporations.[152] This provision has been interpreted liberally as a repeal of "Dillon's Rule," which in many places applies to limit the powers of government to those expressly granted by the state legislature.[153]

In other states, the authority for intergovernmental agreements varies widely. The authority can be of a general nature, such as one designed to encourage cooperation[154] or which allows the exercise of *any* governmental functions,[155] or it can be more specific, such as an authority which permits agreements for municipal services[156] or for specified planning powers.[157] In those states that permit intergovernmental agreements in relation to planning powers specifically or to governmental powers generally, development agreements would not appear to present any problem. However, in those states with more limited authorizations, it would be difficult to pigeonhole a development agreement into the permitted categories. An additional problem may be that although most legislation permits interstate as well as intrastate agreements, congressional consent may be necessary for interstate agreements. If such is the case, Congress may either consent to each individual contract or consent in advance, as it has done in the Coastal Zone Management Act[158] and the Clean Air Act.[159]

If it is questionable whether intergovernmental agreements or development agreements with private parties are permissible, it would be advisable to have each local government enter into separate agreements with the private parties.[160] Thus, the same result

151. *E.g.*, ILL. CONST. art. VII, § 10(a).

152. *Id.*

153. *See* Village of Sherman v. Village of Williamsville, 106 Ill. App. 3d 174, 435 N.E.2d 548 (App. Ct. 1982); Simons v. Canty, 195 Conn. 524, 488 A.2d 1267 (Conn. 1985); Lake Worth Utilities Auth. v. City of Lake Worth, 468 So. 2d 215 (Fla. 1985).

154. N.J. STAT. ANN. § 40:27-2 (1937 & Supp. 1984-85).

155. *E.g.*, PA. STAT. ANN. tit. 53, § 483 (Purdon 1972); N.H. REV. STAT. ANN. § 53A:1-4 (Supp. 1983).

156. MICH. COMP. LAWS. ANN. § 124.287 (West Supp. 1985).

157. *E.g.*, FLA. STAT. § 163.3167 (1983).

158. 16 U.S.C. §§ 1451-1464 (1983).

159. 42 U.S.C. §§ 7401-7642 (1983).

160. *See* Callies, *supra*, note 26, at 168, 195, which describes a California development

could be effectuated through a more circuitous method. If there is little doubt as to permissibility, such agreements should, in addition to the covenants, specify their duration, the organization of any entity created, the purposes of such entity and of the agreement, and the permissible acts of governments in relation to the development problem.[161]

There is less concrete information available regarding a state's contractual powers. However, given that state powers are limited only by the United States Constitution,[162] it would appear that state bodies and agencies have at least as much power as the local governments within them. State actions are not generally subject to antitrust liability as local government actions might be;[163] thus, the most important limitations would be due process, the contracts clause, and any state constitutional prohibitions. Since compliance with these provisions can probably be met, only the state's own reluctance to participate in a development agreement would prevent it from doing so.

The Florida Intergovernmental Cooperation Act[164] is one of the few statutes that addresses a state agency's contract powers in relation to other public agencies. It authorizes "[a] public agency . . . [to] exercise jointly with any other public agency of the state, of any other state, or of the United States Government any power, privilege, or authority which such agencies share in common and which each might exercise separately."[165] The Act *mandates* that such joint exercise be made by contract, which may provide for: the purpose of the agreement; its duration; the powers (including contract-making), organization, and financing of any entity created by the agreement; the acquisition, management, and disposition of property; claims for federal or state aid; adjudication of disputes; and "[a]ny other necessary and proper matters agreed upon."[166] Again, in the absence of such a statute, it would appear that limitations on the state will be no more severe than on local

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agreement, one which was actually two separate agreements — one between the city and the developer and one between the county and the developer.

161. Advisory Commission on Intergovernmental Relations, State Legislative Program #2, Local Government Modernization, Interlocal Contracting and Joint Enterprise 2.204 § 4 (1975).

162. All powers not reserved to the federal government in the Constitution, or prohibited by the Constitution, are reserved for the states. U.S. CONST. art. X.

163. Parker v. Brown, 317 U.S. 341 (1943).

164. FLA. STAT. § 163.01 (1983).

165. *Id.* at § 163.01(4).

166. *Id.* at § 163.01(5).

governments.

Similarly, due process and legislative constraints would appear to be the primary limitations on the federal government. It would seem that any federal statutory or otherwise regulatory impediments to the creation or validity of contracts can be removed just as they were created: by statute. One such example was the amendment in 1982 of the Endangered Species Act to provide greater flexibility in managing critical habitats,[167] partially in response to the San Bruno Mountain controversy.[168] This legislation was designed "to encourage 'creative partnerships' between the public and private sectors in devising habitat conservation plans."[169] Other examples of agreements between the federal government and local and regional governments are found in HUD programs, under which local governments may agree to lawful zoning changes in exchange for funding,[170] and agreements for the management of federal lands.

As for agreements between the federal government and private parties, one commentator feels that if such agreements are to be legitimized, federal regulatory "laws must evolve to provide greater assurances to the private sector that the term of any consensual agreement will be adhered to by the regulatory agency and will not be nullified by subsequent regulatory agency decisions."[171]

Because it is possible that some of these public-private or public-public contracts will be invalid or nonbinding, the success of a multi-party development agreement cannot be guaranteed. Nevertheless, the possibility that all such contracts will be valid makes the use of a development agreement at least something that should be considered with regard to the laws of the jurisdiction in question. If it is decided that a development agreement will be used, the best precaution would be to establish one planning document setting forth all the agreed-upon objectives and methods of implementation. It should be accompanied by a series of short agreements between each pair of parties incorporating the plan by reference, agreeing to abide by the plan, and agreeing not to impair any other party's rights and powers pursuant to the plan. Although this

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167. Brower & Carol, *supra* note 135; 16 U.S.C. § 1539 (1982). The Endangered Species Act, in addition to permitting locally drafted conservation plans, also allows the "Secretary" to enter into cooperative agreements with states. 16 U.S.C. § 1535.

168. *See supra* text accompanying notes 135-43.

169. Brower & Carol, *supra* note 135.

170. *See, e.g.*, Schmoll v. Housing Authority, 321 S.W.2d 494 (Mo. 1959).

171. Marsh & Thornton, *supra* note 135, at 61.

creates a great deal of paperwork, the invalidation of any one party's contracts will not necessarily impair the entire agreement. All such agreements also should list individually the regulations which are to be frozen and should contain severability clauses, so that if one part of a party's agreement, such as the freezing of a particular regulation or statute, is declared invalid, the remainder of the agreement will stand.

If it is infeasible to join state or federal agencies in the agreement, Professor Hagman has proposed the possibility that "a statute be written which would vest the rights to a project against all governments."[172] He suggests that:

> land use controls on any one parcel should be exercised by only one general purpose local government and that all other local, state, and federal agencies should be compelled to act through such a general purpose government. The scheme is sometimes called one-stop shopping and my views are on the radical end of a continuum of supporters for the idea. As a matter of power, a state could not pass a statute vesting a right to proceed in the face of changed federal law. The federal government, however, could agree to be so bound. A state could bind itself and all of its agencies and subagencies to respect a right vested in a particular development.[173]

Perhaps the most difficult part of devising a multi-party development agreement once it has been chosen as a tool is negotiating the agreement. In order to ensure that development agreements are recognized as legitimate by regulatory and legal institutions, and in order to ensure that any timing problems are prevented, bureaucratic formalism may be required. "[T]he process for the development of these plans must become more formalized and integrated into the environmental regulatory process."[174] Although little has been written about the negotiation process with relation to development agreements or similar public-private collaborative development efforts, the observations of Lindell Marsh, one of the participants in the San Bruno Mountain controversy, are instructive.

The first "necessary element of the process" is to "define the elements of the conflict."[175] Identification of the real issue(s) at

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172. Hagman, *supra* note 13, at 572.
173. *Id.*
174. Marsh & Thornton, *supra* note 135, at 61.
175. *Id.* at 36.

hand will enable the parties to concentrate on "the minimum solution."[176] The second step is to select the representatives of each party in interest; it is vital at this stage to contact all potentially interested parties and require the representation of even the "less central agencies."[177] In addition, the broader community should be kept informed of the committee's objectives and proceedings.[178] The next step is selecting a forum, in light of a multitude of agency characteristics; location, broadness of jurisdiction, which agency would be the "lead agency" for environmental statements, and which has had prior experience with similar problems and processes.[179] The final preliminary step is to establish leadership within each constituency and overall; the overall leader should not get too embroiled in the day-to-day affairs of the committee but rather should serve as a liaison with the public and as a mediator within the group.[180]

Once the negotiation process begins, Marsh makes further managerial recommendations. To keep parties at the table, they should be reminded of the unpleasantness of past conflicts, that their process is precedent-setting, and that the alternative — litigation — is much more costly and time-consuming. In administering the process, it is easy to become confused and frustrated by delay caused by "the number of distinct regulatory requirements and the number of parties involved."[181] Thus, it is important to: hire competent technicians to complete the necessary studies and keep the members informed; consider hiring an administrative consultant to manage the process and a nonpartisan mediator or attorney to resolve internal disputes over legal issues; and establish protocols regarding voting within the group, *ex parte* communication by members of the group, and other ground rules. Finally, in managing the constituencies, it is necessary to consider their distinct perspectives and goals; the groups will all have different constraints, biases, and degrees of internal consensus as to goals.[182]

Additional suggestions as to the structure of the agreements themselves have already been discussed in relation to development

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176. Buckley, "Negotiating Public/Private Written Agreements: Techniques in Practice," in materials from ULI-ABA National Institute: Managing Development Through Public/Private Negotiations, at 1 (emphasis omitted).

177. Marsh & Thornton, *supra* note 135, at 37.

178. *Id.* at 38.

179. *Id.*at 39.

180. *Id.* at 39-41.

181. *Id.* at 46.

182. *Id.* at 42-56.

agreements generally. Introduction of a larger number of parties and more complicated regulatory requirements only serves to increase the need for accuracy and detail in determining and describing which party is to act how or do what when. As the number of interested parties and required permits increases, so does the necessity for a clear pre-negotiation agenda, a clear statement of each party's obligations, and an understanding of the consequences of default or of legislative or regulatory change.

IV. CONCLUSION

Although the development agreement was devised to help eliminate uncertainty for developers, its validity as a tool in both small-scale and large-scale settings is shrouded in uncertainty. Because it might illegally contract away police powers or be ultra vires without enabling legislation, the development agreement's validity is far from certain. Nevertheless, its death knell should not be rung. Although use of the development agreement in large-scale disputes is still in its infancy, its potential usefulness in creating certainty and efficiency far outweighs its possible demise.

Although enabling legislation may or may not be necessary for the valid use by local governments of development agreements, such agreements as allowed by current legislation in California are only part of the solution to large-scale disputes. In these situations, it also is necessary that state and federal agencies be bound not to exercise their legislative and regulatory powers in frustration of the development as planned. This can be accomplished either by amendment to substantive legislation to provide that, in support of collaborative efforts, noninterference will be the rule; by enforceable consensual agreements; or by legislation (of more dubious validity) allowing local governments to promise that state and federal agencies will not frustrate collaborative efforts.