<u>Development Agreement Considerations</u>

Utah Land Use Institute
Bargaining for Development
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A. Standard Contract Requirements

1. The Parties
    a. Owner of record is a required party if the development agreement is to be recorded/ "run with the land"
    b. Distinguish owner's rights and obligations from developer's rights and obligations
    c. Address municipal rights and obligations
    d. Address assignability of owner's and developer's rights and responsibilities
    e. *Practice tip:* include objective assignment standards
2. Consideration
    a. Parties must exchange mutual promises to contract because a <u>unilateral gift</u> is not enforceable
    b. *Example:* annexation process, up-zone process, financial incentives, or extra-statutory vested rights in exchange for a limitation on zoned density, enhanced design, or extraordinary amenities or dedications
    c. Remember, performance of an existing duty is not "consideration"
3. Term of agreement (required)
4. Legality
    a. Mental capacity/authority of signatories
    b. Statue of Frauds
    c. No ultra-vires land use regulation
5. Notary—required for recordation

B. Regulatory Overview Considerations

1. Land Use Regulation by Ordinance—aka "zoning"
    a. Range of permitted uses
    b. Maximum intensity of uses
    c. Extra or non-standard:
        i. parking ratios
        ii. design regulations
        iii. public and private infrastructure obligations/standards
        iv. landscaping requirements
        v. amenities commitments
        vi. lighting standards
        vii. sign standards
    d. Unique approval processes

2. Additional Land Use Constraints/Commitments by Agreement--within parameters allowed by what is/will be ordained land use regulation:
    a. Distinguish owner's rights and obligations from developer's rights and obligations
    b. Address mutuality of rights and obligations
        i. Specific Maximum Densities (ratios and caps on specific use types)

        ii. Phasing:
            A. Timing of discrete project components, construction/operation of amenities, infrastructure, dedications, delivery of desired uses (usually commercial or amenities)
            B. Economic benefits analysis is helpful to understand a rational phasing plan
        iii. Affordable housing obligation
        iv. Detail of agreed public/private amenities in exchange for increased density
        v. Obligation/source of funds to maintain public amenities
        vi. Expected planning granularity
    c. Address environmental/geotechnical/construction mitigation issues with specificity
    d. Extra-statutory vested rights—specify which types of development rights are vested by the contracted development approvals
    e. Costs of extraordinary oversight
    f. Costs of defense/obligation to defend/indemnify
    g. Address assignability of owner's and developer's rights and responsibilities (*Practice tip:* include objective assignment standards)

C. Infrastructure Cost Considerations

1. Define commitment/timing to update IFFP/IFA if system infrastructure costs will be reimbursed by impact fees
2. Address potential for independent infrastructure demand generation plan
3. Address required infrastructure upsizing costs
4. To help contain long term costs, developers should include as much detail as possible—pipe size, tank size, road profiles, etc.
5. Address each public infrastructure component
    a. Is service district annexation required?
    b. MS4 permit issues (duty to maintain, public access if unmaintained)
    c. Project infrastructure maintenance responsibility
6. Address how infrastructure is expected to be financed:
    a. Developer financed
    b. Impact fees
    c. PID (involves several additional agreements and forming new taxing district)
    d. Tax participation agreement (Reinvestment Agency process)
    e. Pioneering Agreement (typically 10 to 15-year term reimbursement agreement)
    f. Real estate reinvestment fee (CC&Rs)
    g. Private activity bonds

D. General Terms and Conditions

1. Agreement to run with the land
2. Venue
3. Choice of laws
4. Mutuality in drafting
5. Relationship of the parties (no joint venture, no agency)
6. Notice of Default/Opportunity to Cure parameters
7. Integration clause— limit scope (often numerous additional agreements between the parties)
8. Severability (careful here)
9. No waiver deemed from failure to pursue rights
10. Resolution options—mediation, arbitration, litigation
11. Force majeure
12. "Time is of the essence" provision
13. Affidavit of authority
14. Termination provisions
15. Attorneys' fee