DEVELOPMENT AGREEMENTS: AN OVERVIEW

DAVID L. CALLIES* & ERIN DUNG**

I. WHY DEVELOPMENT AGREEMENTS?

Developers and local governments face two difficult problems in the land development approval process. Local governments are unable to exact dedications of land or fees of the "impact" or "in-lieu" variety without establishing a clear connection or nexus between the proposed development and the dedication or fee.[1] The developer is unable to "vest" or guarantee a right to proceed with a project until that project is commenced.[2]

The development agreement offers a solution to both landowner/developers and local governments. Often authorized by statute to help avoid reserved power and Contract Clause problems discussed below, a well-structured agreement can be drafted to deal with a

---

* Kudo Chair in Law, Emeritus, William S. Richardson School of Law, BA, DePauw University, JD, University of Michigan, LLM (Planning Law), Nottingham University, Life Member, Clare Hall, Cambridge University, Fellow, American Institute of Certified Planners. This Article is derived from a paper presented on March 25th at the spring meeting of the American College of Real Estate Lawyers.

** Class of 2023, Editor, University of Hawaii Law Review.

1. For more detailed treatment of this subject, see DAVID L. CALLIES ET AL., DEVELOPMENT BY AGREEMENT: A TOOL KIT FOR LAND DEVELOPERS AND LOCAL GOVERNMENTS (2012) [hereinafter CALLIES ET AL., DEVELOPMENT BY AGREEMENT]; DAVID L. CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS AND THE PROVISION OF PUBLIC FACILITIES (2003); David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RSRV. L. REV. 663 (2001); Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1017–20 (1987) (describing the "rational nexus" test adopted by a majority of jurisdictions to assess the reasonableness of provisions requiring exactions of property in development agreements, and the expansion of the doctrine governing exactions to address the use of "impact fees"); Lyle S. Hosada, *Development Agreement Legislation in Hawaii: An Answer to the Vested Rights Uncertainty*, 7 U. HAW. L. REV. 173 (1985); TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *DOLAN* AND *LUCAS* chs. 4, 9–11 (David L. Callies ed., 1996).

2. *See* John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?*, 3 WASH. U. J.L. & POL'Y 603, 607–08 (2000) (noting that many states require action such as construction or expenditure of funds in reliance on a development permit for the permit to be valid).

variety of common issues which arise in the land development process between landowners/developers and local governments.[3]

II. The Basic Problem: Bargaining Away the Police Power and Reserved Power

The first issue is whether the local government has bargained away its police power by entering into an agreement under which it promises not to change its land use regulations during the life of the agreement. Specific statutory authorization is helpful so as to make clear that these agreements effectuate a public purpose recognized by the state. Thirteen states have so far adopted legislation enabling local governments to enter into development agreements with landowner/developers.[4]

A. "Freezing" and the "Contracting Away" Issue

It is black letter law that local governments may not contract away the police power,[5] particularly in the context of zoning decisions.[6]

3. *See generally* ROCKY MOUNTAIN LAND USE INST., DEVELOPMENT AGREEMENTS: ANALYSES, COLORADO CASE STUDIES, COMMENTARY (Erin J. Johnson & Edward H. Ziegler eds., 1993); URB. LAND INST., DEVELOPMENT AGREEMENTS: PRACTICE, POLICY AND PROSPECTS (Douglas R. Porter & Lindell L. Marsh, eds., 1989); DAVID J. LARSEN, INST. FOR LOC. SELF GOV'T, DEVELOPMENT AGREEMENTS MANUAL: COLLABORATION IN PURSUIT OF COMMUNITY INTERESTS (2002). For commentary on the British experience with development agreements, see David L. Callies & Malcolm Grant, *Paying for Growth and Planning Gain: An Anglo American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221 (1991). See Appendix XVI for a checklist on drafting agreements, and Appendices XI, XIV and XV for sample development and annexation agreements, all in CALLIES ET AL., DEVELOPMENT BY AGREEMENT, *supra* note 1.

4. *See* ARIZ. REV. STAT. ANN. § 9-500.05 (2021); CAL. GOV'T CODE § 65864 (West 2022); COLO. REV. STAT. §§ 24-68-101 to -106 (2021); FLA. STAT. § 163.3220 (2021); LA. STAT. ANN. § 33:4780.22 (2021); NEV. REV. STAT. § 278.0201 (2021); N.J. REV. STAT. § 40:55D-45.2 (2021); OR. REV. STAT. § 94.504 (2021); VA. CODE ANN. § 15.2-2303.1 (2021) (applying only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1,000 acres); WASH. REV. CODE § 36.70B.170 (2021).

5. *See* Carlino v. Witpain Invs., 453 A.2d 1385, 1388 (Pa. 1982) (noting that "individuals cannot, by contract, abridge police powers which protect the general welfare and public interest").

6. *See* Cederberg v. City of Rockford, 291 N.E.2d 249, 251–52 (Ill. App. Ct. 1972) (voiding restrictive covenant and rezoning ordinance because the law "condemns the practice of regulating zoning through agreements or contracts between the zoning authorities and property owners"); Hous. Petroleum Co. v. Auto. Prod. Credit Ass'n, 87 A.2d 319, 322 (N.J. 1952)

Stated another way, government cannot bind itself to not exercise its police powers. It is thus usually considered to be against public policy to permit the bargaining of zoning and subdivision regulations for agreements and stipulations on the part of developers to do or refrain from doing certain things. Because land use and development regulations represent exercises of police power, a development agreement binding a local government not to exercise these regulatory powers arguably violates the reserved powers doctrine[7] and is, therefore, ultra vires.

Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures.[8] However, an analysis of the cases indicates that what the courts generally inveigh against is such bargaining away forever, or at least for a very long time. The source of the doctrine, *Corporation of the Brick Presbyterian Church v. Mayor of New York*,[9] involved the municipal abrogation of a lease executed over fifty years before. While a few later cases do involve invalidation of municipal action just a few years old,[10] the majority deals with behavior further back in time. The dominant view is that development agreements, drafted to reserve some governmental

---

("Contracts thus have no place in a zoning plan and a contract between a municipality and a property owner should not enter into the enactment or enforcement of zoning regulations."); V. F. Zahodiakin Eng'g Corp. v. Zoning Bd. of Adjustment, 86 A.2d 127, 131 (N.J. 1952) ("Zoning is an exercise of the police power to serve the common good and general welfare. It is elementary that the legislative function may not be surrendered or curtailed by bargain or its exercise controlled by the considerations which enter into the law of contracts.").

7. *See, e.g.*, Robert M. Kessler, *The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems: A Look at the Tool and Suggestions for Its Application*, 1 J. LAND USE & ENV'T L. 451, 464–69 (1985) (discussing the reserved powers doctrine and the inability of local governments to contract away police powers); Bruce M. Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29, 37–45 (1981) (discussing the history and current viability of the reserved powers doctrine in the context of development agreements).

8. *See* Stone v. Mississippi, 101 U.S. 814, 818 (1880) (noting that "no legislature can curtail the power of its successors to make such laws as the may deem proper in matters of police"); Corp. of the Brick Presbyterian Church v. Mayor of N.Y., 5 Cow. 538, 542 (N.Y. Sup. Ct. 1826) (noting that local governments have "no power to limit their legislative discretion by covenant"); Kramer, *supra* note 7, at 37–39.

9. 5 Cow. at 538–42.

10. *See, e.g.*, Hartnett v. Austin, 93 So.2d 86, 89–90 (Fla. 1956) (en banc) (affirming the lower court's permanent injunction of a proposed revision of a zoning ordinance that had not yet taken effect); *V.F. Zahodiakin*, 86 A.2d at 131–32 (affirming the lower court's invalidation of a decision made earlier by the local board of adjustment that purported to grant a "variance" from zoning requirements).

control over the agreement, do not contract away the police power, but rather constitute a valid present exercise of that power. Good analogous authority exists for the premise.[11]

A subsidiary question under the reserved powers doctrine is whether a city council, in exercising its power to contract, can make a contract that binds its successors. In *Carruth v. City of Madera*,[12] the city contended that obligations under an annexation agreement executed by a predecessor council were invalid because they deprived the successor city council of the power to determine city policy and act in the public interest. The court, however, held that the city was bound, and that a contract was made by the council or other governing body of a municipality and was fair, just, and reasonable at the time of its execution.[13] The court concluded that the contract was neither void nor voidable merely because some of its executory features may operate to bind a successor council.[14]

One of the clearest rejections of the application of reserved power and bargaining away the police power comes from the wide-ranging Nebraska Supreme Court opinion upholding development agreements in *Giger v. City of Omaha*.[15] The objectors to the agreement claimed that development agreements were a form of contract zoning.[16] However, the Nebraska Supreme Court preferred to characterize such agreements as a form of conditional zoning that actually increased the city's police power, rather than lessened it, by permitting more restrictive zoning (attaching conditions through agreement) than a simple *Euclidean* rezoning to a district in which a variety of uses would be permitted of right.[17]

---

11. *See, e.g.*, Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 202 (Cal. Ct. App. 1976) (holding that the effect of the general rule is to void only a contract which amounts to a city's "surrender" or "abnegation" of its *control* of a properly municipal function, and that the city's reservations of control over the land subject to an annexation agreement, as well as the "just, reasonable, fair and equitable" nature of the agreement, rendered the agreement valid and enforceable against the city).

12. 43 Cal. Rptr. 855 (Cal. Ct. App. 1965).

13. *Id.* at 860–62.

14. *Id.* at 860–61; *see also* Denio v. City of Huntington Beach, 140 P.2d 392, 397 (Cal. 1943) (holding that a "fair, just and reasonable contract entered into by a governing body of a municipality "is neither void nor voidable merely because some of executory features may extend beyond the terms of office of the members of [the governing] body"), *overruled by* Fracasse v. Brent, 494 P.2d 9 (Cal. 1972).

15. 442 N.W.2d 182 (Neb. 1989).

16. *Id.* at 189.

17. *Id.* at 192 ("In sum, we find that there is not clear and satisfactory evidence to support

Similarly, a recent California appeals court squarely upheld a development agreement that was challenged directly on "surrender of police power" grounds, holding that a "zoning freeze in the Agreement is not . . . a surrender or abnegation [of the police power]."[18] In *Santa Margarita Area Residents Together v. San Luis Obispo County Board of Supervisors (SMART)*, an area residents' association contended that because San Luis Obispo County had entered into a development agreement for a project before the project was ready for construction, freezing zoning for a five-year period, the county improperly contracted away its zoning authority.[19] In holding for the county, the court noted that land use regulation is an established function of local government, providing the authority for a local government to enter into contracts to carry out the function.[20] The county's development agreement required that the project be developed in accordance with the county's general plan, did not permit construction until the county had approved detailed building plans, retained the county's discretionary authority in the future, and allowed a zoning freeze of limited duration only.[21] The court found that the zoning freeze in the county's development agreement was not a surrender of the police power, but instead "advance[d] the public interest by preserving future options."[22]

In *Stephens v. City of Vista*, the Stephenses purchased property in 1973 to develop an apartment complex of approximately 140 to 150 units.[23] Subsequently, the City of Vista lowered the access street to the property, frustrating the Stephens' contemplated use, and downzoned the property.[24] The Stephenses sued.[25] The city and the Stephenses eventually entered into a settlement agreement providing for a specific plan and zoning that permitted construction of a maximum of 140

---

the appellants' contention that the city has bargained away its police power. The evidence clearly shows that the city's police powers are not abridged in any manner and that the agreement is expressly subject to the remedies available to the city under the Omaha Municipal Code. Further, we find that the agreement actually enhances the city's regulatory control over the development rather than limiting it.").

18. Santa Margarita Area Residents Together v. San Luis Obispo Cnty. Bd. of Supervisors (*SMART*), 100 Cal. Rptr. 2d 740, 748 (Cal. Ct. App. 2000).

19. *Id.*

20. *Id.* at 748–49.

21. *Id.* at 747–48.

22. *Id.* at 748.

23. 994 F.2d 650, 652 (9th Cir. 1993).

24. *Id.*

25. *Id.*

units.[26] After rezoning the property, the city denied a site development plan, in part because it wanted the Stephenses to reduce the density.[27] The Stephenses then renewed their lawsuit against the city.[28]

The city argued that the settlement agreement unlawfully contracted away its police power.[29] The court disagreed.[30] The court first noted that when the city entered into the settlement agreement, it understood it was obligated to approve 140 units.[31] Further, relying on *Morrison Homes Corp. v. City of Pleasanton*,[32] which upheld the validity of an annexation agreement, the court held that while generally a local government cannot contract away its legislative and governmental functions, this rule only applies to void a contract which amounts to a "surrender" of the local government's control of a municipal function.[33] Therefore, the city could contract for a guaranteed density and exercise its discretion in the site development process without surrendering control of all of its land use authority.[34] The court awarded $727,500 in damages for breaching the agreement based on the difference between the value of the property with an entitlement of 140 units and the value of the property with a developable density of 55 units (the current zoning).[35] Similarly, a development agreement that obligates a local government to permit a certain density and type of development should be enforceable by the developer.

Finally, in *Povey v. City of Mosier*, property owners sought to void the development agreement between the city and their predecessors in interest obligating the successors to construct and dedicate roads to the city if they developed the parcels.[36] The owners argued the agreement was void because it failed to comply with the requirements of Oregon's development agreement statutes (Or. Rev. Stat. 94.504–94.528 (2007)).[37] The court, however, held the development

---

26. *Id.*
27. *Id.* at 653.
28. *Id.*
29. *Id.* at 654.
30. *Id.* at 655.
31. *Id.* at 655–56.
32. 130 Cal. Rptr. 196 (Cal. Ct. App. 1976).
33. *Stephens*, 994 F.2d at 655.
34. *See id.* at 656–57.
35. *Id.* at 657.
36. 188 P.3d 321, 322 (Or. Ct. App. 2008).
37. *Id.*

agreement was a valid "nonstatutory agreement enforceable according to its terms" because development agreements give local governments a new planning mechanism and are wholly voluntary and optional.[38] Moreover, the court concluded the legislative intent in creating development agreements was to give local governments and developers security in knowing that the agreement cannot be attacked "as an unlawful attempt to bind future lawmaking body."[39]

In sum, the current application of the reserved powers clause to abrogate government/private contracts has been rare, and courts have attempted to find other grounds to uphold those contracts which are fair, just, reasonable, and advantageous to the local government.[40] It is unlikely that courts will fall back on the reserved powers clause to invalidate development agreements passed pursuant to state statute, especially if the agreements have a fixed termination date and that date is not decades away.[41]

B. The Contracts Clause and Reserved Powers

It is also arguable that the Contracts Clause of the U.S. Constitution provides protection for development (and annexation) agreements in the face of a reserved power challenge: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts."[42] Although statutorily defined as either a legislative or administrative act, a development agreement will be treated as a contract "when the language and circumstances evince a legislative intent to create private rights of a contractual nature enforceable against the State."[43]

Once the parties enter into a development agreement, strict application of the Contracts Clause would prohibit government from

38. *Id.* 322–23.

39. *Id.* at 324.

40. *See, e.g.*, Carruth v. City of Madera, 43 Cal. Rptr. 855, 860–61 (Cal. Ct. App. 1965) (holding contract entered into by city can be enforced, even if it extends beyond the legislative term, if the contract is fair, just reasonable, and advantageous to the city); *see also* Kramer, *supra* note 7, at 41 (discussing *Carruth*).

41. *See, e.g.*, 65 ILL. COMP. STAT. 5/11-15.1-1 (1993) (restricting the term of any annexation agreement to twenty years).

42. U.S. CONST. art. I, § 10, cl. 1.

43. U.S. Trust Co. v. New Jersey, 431 U.S. 1, 17 n.14 (1977). For a full discussion, see Wegner, *supra* note 1, at 995–1003 (making the case that although writers have simply assumed that development agreements are contractual in nature, it would be more correct to characterize development agreements as possessing a hybrid contractual-regulatory nature).

passing any law or regulation that would subsequently impair the resulting contractual obligations. Further, any such act would be unconstitutional, notwithstanding the fact that the new regulation may be required by a genuine health, safety, or welfare crisis. Certainly this result would not be tolerated, and therefore one must conclude that if a development agreement, subject to the Contract Clause, irrevocably binds government to not exercise its police power in promotion of the public interest, then the agreement violates the reserved powers doctrine and is ultra vires.

The limitation of the Contract Clause is, however, neither literal nor absolute.[44] The Supreme Court has held that the Contracts Clause limitation cannot operate to eclipse or eliminate "'essential attributes of sovereign power' . . . necessarily reserved by the States to safeguard the welfare of their citizens."[45] The test in *United States Trust Co.*, as refined in *Allied Structural Steel Co. v. Spannus*,[46] ultimately requires a balancing of the exercise of the police power against the impairment resulting from the exercise of such police power. The decisions suggest that any exercise of the police power that impairs any obligations under a development agreement would be subject to strict scrutiny, and, therefore, must be justifiable as an act "reasonable and necessary to serve an important public purpose."[47] Just what constitutes an "important public purpose" sufficient to justify the impairment of contract obligations is a factual determination. In *United States Trust Co.*, bondholders' security interests outweighed the state's interest in pollution control, rapid transit, and resource conservation.[48] Similarly, in *Allied Structural Steel*, the state's interest in protecting its citizens' pensions failed to prevail over a private company's rights in its own pension plan.[49]

---

44. *See* Eric Sigg, *California's Development Agreement Statute*, 15 SW. U. L. REV. 695, 720–22 (1985) (discussing tension between the Contracts Clause and the "reserved powers" doctrine, as well as describing various tests to determine whether a particular contract surrenders an essential attribute of a state's sovereignty).

45. *U.S. Trust Co.*, 431 U.S. at 21 (quoting Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 435 (1934)).

46. 438 U.S. 234 (1978).

47. *U.S. Trust Co.*, 431 U.S. at 25.

48. *Id.* at 28–32.

49. *Allied Structural Steel Co.*, 438 U.S. 234 at 244–51. For a thorough discussion of the *United States Trust Co.—Allied Structural Steel Co.* test, see *Anthony v. Kualoa Ranch, Inc.*, 736 P.2d 55 (Haw. 1987), in which the Hawaii Supreme Court applied the Contracts Clause doctrine to strike down a state statute requiring landlords to pay for leasehold improvements, at the tenant's option, as an unconstitutional impairment of contractual rights. *See also*

III. Limits on Conditions and Exactions in Development Agreements

While every governmental action must be invested with a public purpose, there are few conditions, exactions, or dedications that a local government may not legitimately bargain for in negotiating such agreements. Thus, local governments may require landowners and developers to make reasonable contributions toward whatever services and other resources the government will need to provide as a result of an annexation or development.[50] But this is so under existing law on development conditions and exactions entirely apart from such agreements.[51] The question is whether the local government may go further, since the development agreement is in theory a voluntary agreement which neither government nor landowner is compelled to either negotiate or execute. So long as the agreement is in fact voluntary, the

---

Quality Refrigerated Serv., Inc. v. City of Spencer, 908 F. Supp. 1471 (N.D. Iowa 1995) (granting city's motion to dismiss, in part because plaintiff failed to state a cause of action under the Contract Clause of the U.S. Constitution where it failed to show that city zoning ordinance substantially impaired a contractual relationship, or that legitimate government interests would not justify such an impairment if it existed); William G. Holliman, Jr., *Development Agreements and Vested Rights in California*, 13 URB. LAW. 44, 52 (1981) (concluding that "*United States Trust* and *Allied Structural Steel* suggest that any subsequent exercise of the police power which impairs the obligations under a development agreement would be subjected to a strict scrutiny test for reasonableness and necessity"); Kramer, *supra* note 7, at 35 (concluding that "[s]ubsequent legislative action seeking to amend, modify, or repeal [a] development agreement would undoubtedly impair the obligation of the contract and if less onerous alternatives were available to the legislature to achieve the same policy goals they would have to be taken"); Sigg, *supra* note 44, at 720–22 (concluding "it would appear that impairment by a city or country of its own development agreement would have to survive the heightened scrutiny of a 'reasonable and necessary to serve important state purposes' test"). For an exhaustive discussion of the reserved powers doctrine and its applicability to local government contracts (and its Contract Clause limitations), see Janice C. Griffith, *Local Government Contracts: Escaping from the Governmental/Proprietary Maze*, 75 IOWA L. REV. 277 (1990).

50. *See, e.g.*, Vill. of Orland Park v. First Fed. Sav. & Loan Ass'n, 481 N.E.2d 946, 950 (Ill. App. Ct. 1985) ("Additional positive effects of such agreements include controls over health sanitation, fire prevention and police protection, which are vital to governing communities.").

51. *See* David L. Callies, ZONING AND LAND USE CONTROLS ch. 9 (Eric Damian Kelly ed., 2001); *see also* Dolan v. City of Tigard, 512 U.S. 374, 391 (1994) (holding that the Takings Clause of the Fifth Amendment requires that "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development"); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 834–35 (1987) ("We have long recognized that land-use regulation does not effect a taking if it substantially advances legitimate state interests and does not deny an owner economically viable use of his land. . . . [A] broad range of governmental purposes and regulations satisfies these requirements.") (internal quotations omitted).

answer is almost certainly yes.[52] Whether or not development agreements successfully avoid or survive nexus and proportionality challenges may depend, however, upon how willing the courts are to accept the underlying "voluntary" rationale.

The argument has been made that exactions agreed to under a voluntary development agreement must bear a rational nexus to the needs created by the development.[53] The argument goes like this: the "rational nexus" and "substantial advancement" standards of *Nollan* are not limited to just those instances where the municipality requires an exaction from an uncooperative landowner, but also apply to voluntary permit conditions. The type and extent of exactions permissible under development agreements would not differ from the type and extent available under other traditional exaction mechanisms such as impact fees. The rationale is that requiring the *Nollan* standard to be satisfied serves to prevent governmental abuse of the mechanism, as it is "difficult to tell whether a landowner's acceptance of a condition is truly voluntary or is instead a submission to government coercion."[54] Thus:

> A municipality could use . . . regulations to exact land or fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.[55]

---

52. *See* City of Annapolis v. Waterman, 745 A.2d 1000, 1025 (Md. 2000) (stating conditions agreed to by the subdivider as part of an earlier subdivision agreement were not an unconstitutional taking of the subdivider's property). For a contrary view which would impose the same strict nexus and proportionality requirements upon such agreements as upon "freestanding" local government development dedications, exactions, and other conditions, *see generally* Sam D. Starritt & John H. McClanahan, *Land-Use Planning and Takings: The Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West After* Dolan v. City of Tigard, *114 S. Ct. 2309 (1994)*, 30 LAND & WATER L. REV. 415 (1995).

53. *See* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission*, 483 U.S. 825 (1987)*, 22 URB. LAW. 23, 27 (1990) ("In applying this standard, courts considered . . . the cost of existing public facilities and their manner of financing, the extent to which existing development has already contributed to the cost of these facilities, and the extent to which the proposed project will contribute to the cost of the existing facilities in the future.").

54. *Id.* at 46.

55. Collis v. City of Bloomington, 246 N.W.2d 19, 26 (Minn. 1976) (upholding a statute authorizing municipalities to require dedication of land or payment of fees as condition of subdivision approval as constitutional since enabling legislation and implementing ordinance limited the amount of land to be dedicated to a "reasonable" percentage of the property).

Thus, for example, the Hawaii development agreement statute provides that, "Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period."[56] According to one commentator:

> [T]he government can require the developer to provide public benefits unrelated to the proposed project in exchange for the municipality granting her the right to develop. . . . [T]he statute leads municipalities to believe that the granting of development rights confers a governmental benefit on the developer. This is not the case. *Nollan* clearly holds that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.'"[57]

However, while it is true that the right to develop on one's own land is not a governmental benefit, the right to develop is not the bargaining chip being tendered by the government in a development agreement. The authorities cited in support of the above-quoted argument concern exactions imposed as required conditions to development. In the case of a development agreement, the municipality is not granting the landowner the right to develop nor imposing conditions on such development, but instead is promising to protect the developer's investment by not enforcing any subsequent land use regulation that may burden the project. Since the developer does not require any such guarantee to exercise his right or privilege to build, and may certainly choose to avail himself of such a guarantee and to negotiate for it, it could be argued that the development agreement does indeed convey a "governmental benefit" upon the developer, since "[i]t is well established that there is no federal Constitutional right to be free from changes in land use laws."[58] The municipality should therefore be free to negotiate its best terms in exchange for the benefit conferred, regardless of nexus. Because development agreements are adopted as a result of negotiations between a local

56. HAW. REV. STAT. § 46-121 (1993).
57. Crew, *supra* note 53, at 49 (quoting Nollan v. Cal. Coastal Comm'n, 483 U.S. 826, 833 (1987)).
58. Lakeview Dev. Corp. v. City of S. Lake Tahoe, 915 F.2d 1290, 1295 (9th Cir. 1990).

government and a developer, they are not subject to the *Dolan* or *Nollan* decisions.[59]

Thus, in *Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc.*, the court held that a valid development rights and responsibilities agreement ("DRRA") "is not required to confer an enhanced public benefit upon a local governing body."[60] The court stated that development agreements provide a benefit for both developers and local governments by establishing what rules and regulations will govern for developers, as well as "greater certainty in the comprehensive planning process" and "an opportunity to ensure the provision of necessary public facilities" for local governments.[61]

In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, the court held that the developer, who had failed to establish entitlement to vested rights to develop an oil business on property leased from the city, could have protected itself from subsequent regulatory changes by asking that the city enter into a development agreement.[62] The court noted that it was likely that the city would have demanded additional consideration for either a risk-adjustment provision in the existing lease or a separate development agreement, and that having at least implicitly decided to forego such protection against future regulatory changes, the developer must accept the consequences of its judgment to do so.[63]

A trial court held that developers' rights vested at the time of signing the development agreement, and thus a city could not use wording within the agreement to allow it to raise sewer connection fees.[64] Developers and the city entered into a fifteen-year written agreement allowing for the development of a residential subdivision, allowing that the city may charge any "new taxes, assessments or development impact fees on the implementation of the Project" only if those same charges are levied on all other similar developments

59. *See* Leroy Land Dev. Corp. v. Tahoe Reg'l Plan. Agency, 939 F.2d 696 (9th Cir. 1991) (holding the settlement agreement was not subject to *Nollan*); *see also* Callies & Tappendorf, *supra* note 1.

60. Lillian C. Blentlinger, LLC v. Cleanwater Linganore, Inc., 173 A.3d 549, 569 (Md. 2017).

61. *Id.* at 571.

62. 103 Cal. Rptr. 2d 447 (Cal. Ct. App. 2001).

63. *Id.* at 558.

64. Referred to in the subsequent appeal in *Operating Engineers Funds, Inc. v. City of Thousand Oaks*, No. B137879, 2002 WL 44253 (Cal. Ct. App. Jan. 14, 2002) (holding that because the plaintiffs did not succeed in each of its claims, they could not qualify for attorney fees).

within the city.[65] Six years after the parties signed the contract, the city raised the monthly wastewater connection fees and initial capital surcharge for each residential unit during the period covered by the contract, and the developers sued for breach of contract because their development rights had vested at the time of the initial agreement.[66] A trial court agreed, but said that plaintiffs could not challenge the increased costs for potential future homeowners.[67]

Moreover, in *North Murrieta Cmty., LLC v. City of Murrieta*, the court held that development agreements are enforceable contracts and that vesting tentative maps do not create separate rights.[68] The court rejected the developer's argument that the vesting tentative map provided a separate source for their rights.[69] Therefore, the court concluded that the city was allowed to impose new development mitigation fees to improve transportation for the health, safety, and welfare of residential and non-residential users due to the increased traffic from the development project as negotiated in the development agreement.[70] The development agreement validly changed the developer's rights and allowed the city to impose new mitigation fees under the agreement's terms.[71]

In *City of North Las Vegas v. Pardee Construction Company of Nevada*, a developer lost an appeal to define a cost-based fee as an impact fee in order to invalidate it through the parties' development agreement, which only prohibited impact fees.[72] Here, the municipality regulated water issues on a regional level. To respond to Nevada's growth spurt, the region passed a capital improvements plan to supplement the existing, overstrained water supply system.[73] The city had to join the regional water authority because its own water supply did not allow for any more growth.[74] Upon joining, the city

---

65. *Id.* at *1.
66. *Id.*
67. *Id.* at *2. Moreover, most courts hold that, absent specific language so providing, homeowners residing on the subject property lack standing to sue for enforcement of the agreement. *See, e.g.*, Doyle v. Vill. of Tinley Park, 115 N.E.3d 1069 (Ill. App. Ct. 2018).
68. North Murrieta Cmty., LLC v. City of Murrieta, 263 Cal.Rptr.3d 589, 598–99 (Cal. Ct. App. 2020).
69. *Id.* at 597–98.
70. *Id.* at 598.
71. *Id.* at 595 n.2.
72. 21 P.3d 8 (Nev. 2001).
73. *Id.* at 9.
74. *Id.*

was required to pay for the connection to the new system through citywide assessments and water delivery, connection, and commodity fees.[75] To meet these payments, the city passed the costs on to the consumers at a direct rate—not making any profit.[76] Plaintiffs contended that these new charges were really impact fees and violated the terms of their development agreement.[77] Because the city does not make a profit, but bases the charges on those charges it must pay to the regional authority, with no money going toward capital improvements, the court found that the charge was simply cost-based and within the parameters of the development agreement.[78]

Courts regularly label sewer systems as a typical government function, but consider general water and storm water systems to be proprietary. Thus, on balance, a development agreement often provides that the subdivision developer install the water and sewer lines needed both within the subdivision and to connect the subdivision to existing lines. Sometimes the development agreement also requires payments for upgrades to the city's water facilities to manage the greater flow requirements of the new development. In return for the improvements, the city agrees to maintain the pipe infrastructure within and connected to the subdivision.

IV. Statutory Authority: Important for Development Agreements

Courts that condemn zoning by agreement inveigh against the abridgment of powers protecting the general welfare and the "bartering . . . [of] legislative discretion for emoluments that had no bearing on the merits of the requested amendment."[79] This makes statutory authority important, if not critical. Indeed, an Iowa court held that a city's promise to later widen a street and construct a sidewalk amounted to an illegal contract to perform a governmental function in the future.[80] This it could not do without statutory

75. *Id.*
76. *Id.* at 10.
77. *Id.*
78. *Id.* at 11.
79. Hedrich v. Vill. of Niles, 250 N.E.2d 791, 796 (Ill. App. Ct. 1969). *But see* Povey v. City of Mosier, 188 P.3d 321–22 (Or. Ct. App. 2008), discussed *supra* at notes 36–39 and accompanying text.
80. *See* Marco Dev. Corp. v. City of Cedar Falls, 473 N.W.2d 41, 44 (Iowa 1991) (holding

authority.[81] The court opined that the same reasoning would also apply to the city's exercise of its police power.[82]

A. Protection of General Welfare

The first issue—protection of general welfare—is probably disposed of by strong public purpose-serving language. California,[83] Florida,[84]

---

that the same limitation that prohibits a legislature from binding successive legislative bodies applies to a legislature's grant to a city, through a home-rule amendment to the state constitution, of "the power to contract for the exercise of its governmental or legislative authority").

81. *Id.*

82. *Id.*

83. The California Code provides:

The Legislature finds and declares that:

(a) The lack of certainty in the approval of development projects can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning which would make maximum efficient utilization of resources at the least economic cost to the public.

(b) Assurance to the applicant for a development project that upon approval of the project, the applicant may proceed with the project in accordance with existing policies, rules and regulations, and subject to conditions of approval, will strengthen the public planning process, encourage private participation in comprehensive planning, and reduce the economic costs of development.

(c) The lack of public facilities, including, but limited to, streets, sewerage, transportation, drinking water, school, and utility facilities, is a serious impediment to the development of new housing. Whenever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities.

CAL. GOV'T CODE § 65864 (West 1997). See Appendix VII for the full text of the California statute.

84. The Florida code provides:

(2) The Legislature finds and declares that:

(a) The lack of certainty in the approval of development can result in a waste of economic and land resources, discourage sound capital improvement planning and financing, escalate the cost of housing and development, and discourage commitment to comprehensive planning.

(b) Assurance to a developer that upon receipt of his or her development permit or brownfield designation he or she may proceed in accordance with existing laws and policies, subject to the conditions of a development agreement, strengthens the public planning process, encourages sound capital improvement planning and financing, assists in assuring there are adequate capital facilities for the development, encourages private participation in comprehensive planning, and reduces the economic costs of development.

(3) In conformity with, in furtherance of, and to implement the Local Government Comprehensive Planning and Land Development Regulation Act and the Florida State Comprehensive Planning Act of 1972, it is the intent of the Legislature to encourage a stronger commitment to comprehensive

and Hawaii[85] all have such language in their development agreement statutes.

---

and capital facilities planning, ensure the provision of adequate public facilities for development, encourage the efficient use of resources, and reduce the economic cost of development.

(4) This intent is effected by authorizing local governments to enter into development agreements with developers, subject to the procedures and requirements of ss. 163.3220–163.3243.

FLA. STAT. § 163.3220 (2000).

85. The Hawaii code provides:

> Findings and purpose. The legislature finds that with land use laws taking on refinements that make the development of land complex, time consuming, and requiring advance financial commitments, the development approval process involves the expenditure of considerable sums of money. Generally speaking, the larger the project contemplated, the greater the expenses and the more time involved in complying with the conditions precedent to filing for a building permit.
>
> The lack of certainty in the development approval process can result in a waste of resources, escalate the cost of housing and other development to the consumer, and discourage investment in and commitment to comprehensive planning. Predictability would encourage maximum efficient utilization of resources at the least economic cost to the public.
>
> Public benefits derived from development agreements may include, but are not limited to, affordable housing, design standards, and on- and off-site infrastructure and other improvements. Such benefits may be negotiated for in return for the vesting of development rights for a specific period.
>
> Under appropriate circumstances, development agreements could strengthen the public planning process, encourage private and public participation in the comprehensive planning process, reduce the economic cost of development, allow for the orderly planning of public facilities and services and the allocation of cost. As an administrative act, development agreements will provide assurances to the applicant for a particular development project, that upon approval of the project, the applicant may proceed with the project in accordance with all applicable statutes, ordinances, resolutions, rules, and policies in existence at the time the development agreement is executed and that the project will not be restricted or prohibited by the county's subsequent enactment or adoption of laws, ordinances, resolutions, rules, or policies.
>
> Development agreements will encourage the vesting of property rights by protecting such rights from the effect of subsequently enacted county legislation which may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements are intended to provide a reasonable certainty as to the lawful requirements that must be met in protecting vested property rights, while maintaining the authority and duty of government to enact and enforce laws which promote the public safety, health, and general welfare of the citizens of our State. The purpose of this part is to provide a means by which an individual may be assured at a specific point in time that having met or having agreed to meet all of the terms and conditions of the development agreement, the individual's rights to develop a property in a certain manner shall be vested.

HAW. REV. STAT. § 46-121 (1993). See Appendix VII for the full text of the Hawaii statute.

B. Requirements

As to the bartering away of unrelated (to land use) emoluments, a well-drafted statute generally limits such agreements to specific land use matters, with a catch-all for related matters. Florida's development agreement statute contains such language.[86] What the statutes contemplate is the tradeoff of zoning for development-generated public infrastructure needs (whether or not, it should be added, such public infrastructure needs are generated by the instant development). This is confirmed by cases upholding cooperative and annexation agreements;[87] low-rent housing for zoning;[88] annexation,

---

86. The Florida code provides:

> (1) A development agreement shall include the following:
> (a) A legal description of the land subject to the agreement, and the names of its legal and equitable owners;
> (b) The duration of the agreement;
> (c) The development uses permitted on the land, including population densities, and building intensities and height;
> (d) A description of public facilities that will service the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development;
> (e) A description of any reservation or dedication of land for public purposes;
> (f) A description of all local development permits approved or needed to be approved for the development of the land;
> (g) A finding that the development permitted or proposed is consistent with the local government's comprehensive plan and land development regulations;
> (h) A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and
> (i) A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.
> (2) A development agreement may provide that the entire development or any phase thereof be commenced or completed within a specific period of time.

FLA. STAT. § 163.3227 (2000).

87. *See* Hous. Redevelopment Auth. v. Jorgensen, 328 N.W.2d 740, 742–43 (Minn. 1983) (holding that a cooperation agreement entered into between the city and the housing and redevelopment authority required the city to issue conditional permits for development of low-income housing project).

88. *See* Hous. Auth. v. City of L.A., 243 P.2d 515, 524 (Cal. 1952) (holding that the city was bound by cooperative agreement with housing authority that approved development and construction of low-rent housing project).

zoning, and sewer connections for annexation and annexation fees;[89] and redevelopment agreements.[90]

The Hawaii, Florida, Nevada, and California statutes contain minimum standards for describing the basic character of a proposed development subject to a development agreement.[91] These include the size and shape of buildings. In a decision that clearly signals the extent of flexibility possible in California, a California court of appeals upheld a development agreement containing no such precise standards.[92] According to the court, it was sufficient that the zoning ordinance contained height and use limitations in the zone where the proposed project was to be constructed.[93]

This clearly indicates the importance of a well-drafted statute in advancing the legality of the development agreement, particularly in the face of a reserved powers/bargaining away of the police power challenge. Indeed, there is only one state supreme court case upholding a development agreement against this and other challenges without the benefit of such a statute.[94] It is therefore worth examining what other basic provisions a typical development agreement statute contains. Thirteen states[95] presently have such statutes. The most detailed comes from Hawaii, and so the citations that follow are primarily to that statute. However, California remains the state in which the vast majority of development agreements appear to be negotiated and in effect.

---

89. *See* Morrison Homes Corp. v. City of Pleasanton, 130 Cal. Rptr. 196, 201–03 (Cal. Ct. App. 1976) (holding that the annexation agreements entered into between the city and the developer required the city to provide sewage service to planned development were binding and enforceable against the city); Meegan v. Vill. of Tinley Park, 288 N.E.2d 423, 425–26 (Ill. 1972) (dismissing the developer's mandamus action for issuance of building permit to build a gasoline station pursuant to annexation agreement within a reasonable time after expiration of annexation agreement's statutory five-year period of validity).

90. *See* Mayor of Balt. v. Crane, 352 A.2d 786, 791–92 (Md. 1976) (holding that where the developer conveyed a strip of property to the city for highway purposes under the zoning ordinance that allowed developer's proposed development to contain the same density of dwelling units as if the land had not been conveyed, the developer acquired vested contractual rights that were enforceable against the city).

91. *See* HAW. REV. STAT. § 46-121 (1993); FLA. STAT. § 163.3220 (2000); NEV REV. STAT. §§ 278.02591, 278.02598 (2021); CAL. GOV'T CODE § 65864 (West 1997).

92. *See SMART*, 100 Cal. Rptr. 2d 740, 743 (Cal. Ct. App. 2000) (upholding a development agreement that froze zoning on the proposed development property in exchange for the developer's commitment to submit a specific construction plan in compliance with county land use requirements).

93. *Id.* at 747.

94. *See* Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989).

95. *See supra* note 3.

V. A STATUTORY CHECKLIST

A. Enabling Ordinance

A preliminary issue is whether an enabling statute is sufficient to grant local government the authority to enter into development agreements. There is some authority for requiring a local government to pass an enabling ordinance setting out the details of development agreement procedures and requirements. Thus, the Hawaii[96] and Florida[97] statutes appear to require that local governments desiring to negotiate development agreements first pass a local resolution or ordinance to that effect. In Hawaii, the state legislature has delegated the authority to the county to enter into development agreements, provided, however, that the county first passes an enabling ordinance establishing the procedures that the county executive branch must follow.

---

96. The Hawaii code provides:

> General authorization. Any county by ordinance may authorize the executive branch of the county to enter into a development agreement with any person having a legal or equitable interest in real property, for the development of such property in accordance with this part; provided that such an ordinance shall:
>
> (1) Establish procedures and requirements for the consideration of development agreements upon application by or on behalf of persons having a legal or equitable interest in the property, in accordance with this part;
>
> (2) Designate a county executive agency to administer the agreements after such agreements become effective.
>
> (3) Include provisions to require the designated agency to conduct a review of compliance with the terms and conditions of the development agreement, on a periodic basis as established by the development agreement; and
>
> (4) Include provisions establishing reasonable time periods for the review and appeal of modifications of the development agreement.
>
> Negotiating development agreements. The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.
>
> The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. §§ 46-123 to -124 (1993).

97. *See* FLA. STAT. § 163.3223 (2000) ("Any local government may, *by ordinance*, establish procedures and requirements, as provided in ss. 163.320–163.3243, to consider and enter into a development agreement with any person having a legal or equitable interest in real property located within its jurisdiction.") (emphasis added).

While the language of the Hawaii statute does not clearly require such an ordinance, all four of Hawaii's four counties have drafted them. According to attorneys in California, those California local governments that have executed development agreements have also passed such ordinances. Indeed, recent amendments to the California statute—by making it mandatory that local governments pass such ordinance at the request of landowners to ensure that there is a process available for negotiating such agreements—appear to make it clear that such ordinances are a prerequisite.

B. Approval and Adoption

Although one governmental body may enter into the negotiation stage of the development agreement, another may be authorized to approve the final product. In Hawaii, for example, the mayor is the designated negotiator, with the final agreement presented to the county legislative body (city council) for approval. If approved, the city council must then adopt the development agreement by resolution.[98] In California, a development agreement must be approved by ordinance.

A development agreement may also be entered into early in the planning process.[99] In *SMART,* an association comprised of area residents contended that a development agreement entered into by San Luis Obispo County was invalid because the project in contention had not been approved for actual construction.[100] In rejecting this contention and holding for the county, the court stated that the development agreement statute should be liberally construed to permit "local government to make commitments to developers at the

---

98. The Hawaii code provides:

> Negotiating development agreements. The mayor or the designated agency appointed to administer development agreements may make such arrangements as may be necessary or proper to enter into development agreements, including negotiating and drafting individual development agreements; provided that the county has adopted an ordinance pursuant to section 46-123.
>
> The final draft of each individual development agreement shall be presented to the county legislative body for approval or modification prior to execution. To be binding on the county, a development agreement must be approved by the county legislative body and executed by the mayor on behalf of the county. County legislative approval shall be by resolution adopted by a majority of the membership of the county legislative body.

HAW. REV. STAT. § 46-124 (1993).

99. *SMART*, 100 Cal. Rptr. 2d 740 (Cal Ct. App. 2000).

100. *Id.* at 745.

time the developer makes a substantial investment in the project."[101] The court found that the agreement entered into by the county conformed to the statute because, by focusing on the planning state of the project, the agreement met rather than evaded the purpose of the statute.[102] The county's agreement maximized the public's role in final development, increased control over the inclusion of public facilities and benefits, and permitted the county to monitor the planning of the project to assure compliance with its existing land use regulations.[103]

C. Conformance to Plans and Other Reviews

Development agreements must often comply with local government plans as a condition of enforceability, either by statute or because of the rubric that the zoning bargained for must accord with comprehensive plans. The Hawaii[104] and California[105]development agreement statutes both so require. In California, the development agreement must be consistent with the general plan and any applicable specific plans.[106] A fully negotiated development agreement is a "project" under the California Environmental Quality Act ("CEQA"), California Public Resources Code § 21000 *et seq.*, and as such is subject to environmental review. This is true even when the development agreement is not directly approved by the local government but is instead submitted to the voters for approval.[107]

If, prior to incorporation of a new city or annexation to an existing city, a county has entered into a development agreement with the developer, the development agreement remains valid for the duration

---

101. *Id.* at 746.

102. *Id.* at 745.

103. *Id.*

104. *See* HAW. REV. STAT. § 46-129 (1993) ("No development agreement shall be entered into unless the county legislative body finds that the provisions of the proposed development agreement are consistent with the county's general plan and any applicable development plan, effective as of the effective date of the development agreement.").

105. *See* CAL. GOV'T CODE § 65867.5 (West 1997) ("A development agreement is a legislative act which shall be approved by ordinance and is subject by referendum. A development agreement shall not be approved unless the legislative body finds that the provisions of the agreement are consistent with the general plan and any applicable specific plan.").

106. *Id.* § 65867.5(c).

107. *See* Citizens for Responsible Gov't v. City of Albany, 66 Cal. Rptr. 2d 102 (Cal. Ct. App. 1997).

of the agreement, or for eight years from the effective date of the incorporation or annexation, whichever is earlier, or for up to fifteen years upon agreement between the developer and the city.[108] This statute applies to incorporations where the development agreement was applied for prior to circulation of the incorporation petition and entered into between the county and the developer prior to the date of the incorporation election.[109] The statute also allows the incorporating or annexing city to modify or suspend the provisions of the development agreement if it finds an adverse impact on public health or safety in the jurisdiction.[110]

The importance of the plan is demonstrated by the Idaho Supreme Court in *Sprenger, Grubb & Associates, Inc. v. City of Hailey*.[111] There, the court upheld a rezoning over the objections of the developers of property subject to what the court called a development agreement, on the ground that the applicable plan was sufficiently broad in that it supported the contested downzoning.[112] Largely to the same effect is a recent California court of appeals decision where the existence of, and need to conform to, applicable plans, was critical in upholding a development agreement in the face of a broad and direct challenge to such agreements generally.[113]

D. The Legislative/Administrative Issue

One of the thorniest problems in land use regulation is whether the amendment or changing of such a regulation is legislative or quasi-judicial/administrative.[114] Legislative decisions like zoning amendments are subject to initiative and referendum, whereas quasi-judicial decisions, like the granting of a special use permit, are not in many jurisdictions. Legislative decisions like rezonings are, when appealed, usually heard *de novo* whereas quasi-judicial decisions, like

---

108. CAL. GOV'T CODE § 65865.3 (West 1997).

109. *Id.*

110. *Id.*

111. 903 P.2d 741 (Idaho 1995).

112. *Id.* at 750 ("The Council's conclusion that the 'downzoning' . . . is consistent with Hailey's comprehensive plan is not clearly erroneous, and is affirmed.").

113. *See* SMART, 100 Cal. Rptr. 2d 740 (Cal. Ct. App. 2000).

114. *See, e.g.*, Town v. Land Use Comm'n, 524 P.2d 84, 90–91 (Haw. 1974) (holding a reclassification of land by a state land use commission to be quasi-judicial); Fasano v. Bd. of Cnty. Comm'rs, 507 P.2d 23, 26 (Or. 1973) (holding a rezoning to be the same, despite the general rule that such "rezonings" are generally held to be legislative in character).

the granting of a special use permit, are decided on the record made before the permitting agency, usually under a state's administrative procedure code.[115] What about the development agreement? On this issue, California and Hawaii appear to differ—in the former, it is a legislative act,[116] whereas it is an administrative act in the latter.[117]

As with zoning, what follows from the statutory declarations—legislative in California, administrative in Hawaii—is more than a matter of form. Legislative decisions are subject to referendum.[118] Administrative ones may not be.[119] Given the common use of the referendum in both California and—until relatively recently—Hawaii to address land use issues, development agreements in Hawaii, at least, are likely to be "referendum-proof," as well as protected against government change, during the life of a development agreement. However, California limits the opportunity to repeal a development agreement to thirty days from the date the local government approved the agreement.[120] Thereafter, both the agreement and the proposed land development are immune from subsequent changes by referendum.[121] Moreover, in *Midway Orchards*, a California court held a development agreement was invalid because the general plan amendment relied on for consistency was timely submitted to a referendum[122]:

---

115. *See* JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING CONTROL LAW §§ 531, 533, 538 (1998); *see also* David L. Callies et al., *Ballot Box Zoning: Initiative, Referendum and the Law*, 39 WASH. U.J. URB. & CONTEMP. L. 53 (1991).

116. *See* SMART, 100 Cal. Rptr. 2d at 744.

117. *See* HAW. REV. STAT. § 46-131 (1993) ("Each development agreement shall be deemed an administrative act of the government body made party to the agreement.").

118. *See* CAL. GOV'T CODE § 65867.5 (West 1997) ("A development agreement is a legislative act . . . and is subject to the referendum.").

119. *See* DAVID L. CALLIES & ROBERT H. FREILICH, CASES AND MATERIALS ON LAND USE 309 (1986); DONALD G. HAGMAN & JULIAN CONRAD JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 3.12 (1986). *But see* City of Cuyahoga Falls v. Buckeye Cmty. Found., 538 U.S. 188 (2003).

120. *See* Midway Orchards v. Cnty. of Butte, 269 Cal. Rptr. 796, 804–06 (Cal. Ct. App. 1990) (holding that where development agreements are approved by a legislative act of resolution that does not include a referendum mechanism, the constitutional right to referendum requires a thirty-day delay in effectiveness of the agreement to allow for a referendum procedure).

121. *See* Daniel J. Curtin, Jr., *Protecting Developers' Permits to Build: Development Agreement in Practice in California and Other States*, 18 ZONING & PLAN. L. REP. 85 (1995) ("A development agreement is . . . subject to repeal by referendum. However, the opportunity for such repeal expires 30 days after the city's adoption of . . . the agreement, and thereafter the project is immune to subsequent changes in zoning ordinances and land use regulations . . . inconsistent with those . . . in the agreement.").

122. *Midway Orchards*, 269 Cal. Rptr. at 798.

> The development agreement was therefore unlawfully approved and executed. A contract entered into by a local government without legal authority is "wholly void," ultra vires and unenforceable. Such a "contract" can create no vested rights. Therefore, Midway can claim no right to develop its property based on a development agreement void from the beginning.[123]

When a development agreement is construed to be a legislative act, a local government's decision not to enter into a development agreement need not be supported by findings.[124]

Similarly, in *Center for Community Action & Environmental Justice v. City of Moreno Valley*, a California court emphasized that a "development agreement is a 'legislative act' that is 'subject to referendum'" that is "exclusively delegated to the local legislative body for approval."[125] Therefore, the court held that the city's adoption of an initiative to approve a development agreement was invalid because an initiative excludes the crucial step of negotiation and allowing changes before adoption, which a referendum includes.[126] Thus, an initiative is incompatible with the California development agreement statute.[127]

The California development agreement statute does not require mutuality of consideration. As a practical matter, however, it is usually present since the developer obtains a "freeze" on applicable land use regulations while the public often obtains increased control over the development, certain assurances that the project will go forward, and perhaps other concessions from the developer that could not be obtained through the standard land use exaction process.

E. Public Hearing

Another issue arising frequently is whether a public hearing is required before a development agreement can be entered into, and,

---

123. *Id.* at 807 (internal citations omitted); *see also* 216 Sutter Bay Assocs. v. Cnty. of Sutter, 68 Cal. Rptr. 2d 492 (Cal. Ct. App. 1997) (holding that an interim urgency zoning ordinance and a parallel "ordinary" urgency ordinance, adopted by a newly elected board of supervisors within the thirty-day "referendum period," successfully stopped a development agreement adopted by the preceding, lame-duck board).

124. Native Sun/Lyon Cmtys. v. City of Escondido, 19 Cal. Rptr. 2d. 344 (Cal. Ct. App. 1993).

125. Ctr. for Cmty. Action & Env't Just. v. City of Moreno Valley, 237 Cal. Rptr. 3d 296, 298, 302 (Cal. Ct. App. 2018).

126. *Id.* at 309.

127. *Id.*

if so, what proceedings are required. Both Hawaii[128] and California[129] explicitly require that a public hearing be held prior to adoption of the development agreement.

However, in California because the approval of a development agreement is a legislative act, no procedural due process rights attach.[130] In *San Francisco Tomorrow v. City and County of San Francisco*, tenants of residential units argued that the development agreement to redevelop the complex was an "entitlement" subject to due process protections to be approved.[131] The court held that it was impracticable to give everyone a voice in the adoption of the development agreement encompassing 152 acres and affecting renters of more than 1,500 units due to the immense area and numerous people being affected.[132] Moreover, the court reiterated that "it has long been held that no procedural due process rights attach" to legislative acts.[133]

F. Binding of State and Federal Agencies

Hawaii and California diverge on another key point: the binding inclusion of state or federal agencies. Hawaii seeks to bind them;[134] California does not.[135] California initially appears to limit agreements

---

128. *See* HAW. REV. STAT. § 46-128 (1993) ("No development agreement shall be held by the planning agency and by the legislative body.").

129. The California code provides:

> A public hearing on an application for a development agreement shall be held by the planning agency and by the legislative body. Notice of intention to consider adoption of a development agreement shall be given as provided in Section 65090 and 65091 in addition to any other notice required by law for other actions to be considered concurrently with the development agreement.

CAL. GOV'T CODE § 65867 (West 1997).

130. S.F. Tomorrow v. City and Cnty. of S.F., 176 Cal. Rptr. 3d 430, 453 (Cal. Ct. App. 2014).

131. *Id.* at 452.

132. *Id.*

133. *Id.* at 453.

134. The Hawaii code provides:

> In addition to the county and principal, any federal, state, or local government agency or body may be included as a party to the development agreement. If more than one government body is made party to an agreement, the agreement shall specify which agency shall be responsible for the overall administration of the agreement.

HAW. REV. STAT. § 46-126(d) (1993).

135. The California code provides:

> A development agreement shall not be applicable to any development project located in an area for which a local coastal program is required to be prepared and certified pursuant to the requirements of Division 20 (commencing with

to cities and counties, though it contemplates coastal commissions as parties under certain circumstances.[136] Hawaii, on the other hand, appears determined to permit state and federal agencies to participate in development agreements and, if they participate, be bound.[137]

G. Amendment or Cancellation of the Agreement

Generally, mutual consent of both parties is needed to amend or cancel the agreement.[138] In Hawaii, if the proposed amendment would substantially alter the original agreement, a public hearing must be held.[139] In California, a local government may terminate or modify a development agreement if it finds and determines, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with its terms or conditions.[140]

H. Breach

There are essentially two kinds of breaches that commonly occur during the period of an agreement: change in land use rules by local government, and failure to provide a bargained-for facility, dedication, or hook-up by either party.

1. When Local Government Changes the Land Development Rules

Recall that the overriding concern of the landowner in negotiating development agreements is the vesting of development rights or the freezing of land development regulations during the term of the

---

> Section 30000) of the Public Resources Code, unless: (1) the required local coastal program has been certified as required by such provisions prior to the date on which the development agreement is entered into, or (2) in the event that the required local coastal program has not been certified, the California Coastal Commission approves such development agreement by formal commission action.

CAL. GOV'T CODE § 65869 (1997).

136. *See id.*

137. *See* § 46-126(d).

138. *See* CAL. GOV'T CODE § 65868 (West 1997) ("A development agreement may be amended, or canceled, in whole or in part, by mutual consent of the parties to the agreement or their successors in interest."); HAW. REV. STAT. § 46-130 (1993) ("A development agreement may be amended or canceled, in whole or in part, by mutual consent of the parties to the agreement, or their successors in interest.").

139. *See* HAW. REV. STAT. § 46-130 ("[I]f the county determines that a proposed amendment would substantially alter the original development agreement, a public hearing on the amendment shall be held by the county legislative body before it consents to the proposed amendment.").

140. CAL. GOV'T CODE § 65865.1 (West 1997).

agreement. Whether these regulations are changed just prior to the execution of the agreement, and whether the landowner may need further permits which are not subject to a particular agreement, raise different, but related, questions. Here, we deal only with the effect on the landowner and the agreement should the local government change development regulations during term of the agreement. Development agreement statutes usually contemplate such a freeze.[141]

Thus, the California Supreme Court, in *City of West Hollywood v. Beverly Towers*,[142] made it abundantly clear in a footnote that landowner protection from development regulation changes is a major factor in executing development agreements:

> Development agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvement, and construction are those in effect when the agreement is executed.[143]

The purpose of a development agreement, said the court, was "to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations."[144]

---

141. For example, the California code provides:

> Unless otherwise provided by the development agreement, rules, regulations, and official policies governing permitted uses of the land, governing density, and governing design, improvement, and construction standards and specifications, applicable to development of the property subject to a development agreement, shall be those rules, regulations, and official policies in force at the time of execution of the agreement. A development agreement shall not prevent a city, county, or city and county, in subsequent actions applicable to the property, from applying new rules, regulations, and policies which do not conflict with those rules, regulations, and policies applicable to the property as set forth herein, nor shall a development agreement prevent a city, county, or city and county from denying or conditionally approving any subsequent development project application on the basis of such existing or new rules, regulations, and policies.

CAL. GOV'T CODE § 65866 (West 1997).

142. 805 P.2d 329 (Cal. 1991). Timing is also important. *See* Ranucci v. City of Palmettto, 317 So. 3d 270 (Fla. Dist. Ct. App. 2021) (holding the City could not start a legal proceedings thirteen years after an alleged breach).

143. *Beverly Towers*, 805 P.2d at 334 n.6*; see also* Curtin, *supra* note 121, at 131 (discussing various tests for determining when a developer's rights have vested and local government is estopped "from enacting or applying subsequent zoning changes to prevent the completion of the project or substantially reduce the return upon the developer's investment").

144. *Beverly Towers*, 805 P.2d at 334–35.

The few courts that have dealt with local government changes in land use regulations have no difficulty in finding them inapplicable to the property subject to the agreement, provided the agreement itself is binding. Thus, in *Meegan v. Village of Tinley Park*, the Illinois Supreme Court held that the original zoning of the subject property was valid during the term of an agreement and any change by the Village was void during that time.[145] Indeed, since the Village's attempted zoning change was void, said the court, there was no breach by the Village.[146]

Moreover, in *Oakland Bulk & Oversized Terminal, LLC v. City of Oakland*, the Ninth Circuit held that Oakland breached a development agreement by enacting an ordinance prohibiting bulk shipping facilities from shipping coal.[147] The court reasoned that the development agreement "did not limit the types of bulk goods that could be shipped through the terminal" and Oakland knew coal was a potential commodity when entering into the agreement.[148] Therefore, the agreement froze all existing regulations and by enacting the ordinance preventing the shipment of coal, a breach occurred.[149]

On the other hand, careful drafting is necessary to avoid the later application of land development regulations of a different sort than those contemplated in the agreement. Thus, in the California case of *Pardee Construction Co. v. City of Camarillo*, the court held applicable to the subject property a transportation impact fee on the ground that it was different from the land development regulations listed in the agreement as frozen.[150] While this seems to require a certain amount of prescience from the landowner at first blush, a local government can hardly be estopped from exercising its police power in enforcing a new breed of land development regulations that were not contemplated years before by either party, under the exercise of its police power. *Country Meadows West Partnership v. Village of Germantown* represents an entirely different perspective where the

145. 288 N.E.2d 423, 425–26 (Ill. 1972).

146. *Id.* at 426; *cf.* Cummings v. City of Waterloo, 683 N.E.2d 1222, 1230 (Ill. App. Ct. 1997) (holding the city's amendment to its zoning ordinance that was contrary to the provisions of an annexation agreement was unenforceable against property subject to the annexation agreement).

147. Oakland Bulk & Oversized Terminal, LLC v. City of Oakland, 960 F.3d 603, 607 (9th Cir. 2020).

148. *Id.* at 608.

149. *Id.* at 619.

150. 690 P.2d 701 (Cal. 1984).

court struck down the Village's imposition of a new impact fee against a subdivider, holding that because of a subdivision agreement between the Village and the subdivider, the latter was not obligated to pay the impact fee.[151]

Most development agreement statutes either contain a limitation on the duration of such agreements,[152] or provide that the agreement must recite one.[153]

2. Nonperformance of a Bargained-for Act: Dedications, Contributions, and Hook-Ups

Equally common is the failure of a landowner or local government to live up to the other terms of the agreement, generally by failing to provide a public facility or money therefor, or by refusing to provide utility services to the subject property.[154] Under such circumstances, courts have been strict in forcing the parties to live up to their bargains, even when unusual difficulties would appear to render such performance nearly impossible. Thus, in the California case of *Morrison Homes Corp. v. City of Pleasanton*, the court of appeals directed the local government to provide sewer connections to the landowner's property, as agreed in the agreement, even though a superior governmental entity, a state regional water quality control board, ordered the local government not to do so.[155] After deciding that the agreement did not amount to the city's illegally contracting away its police power, the court stated: "The onset of materially

---

151. 614 N.W.2d 498 (Wis. Ct. App. 2000).

152. *See, e.g.*, 65 ILL. COMP. STAT. 5/11-15.1-1 (1993) ("The agreement shall be valid and binding for a period of not to exceed 20 years from the date of its execution."); 65 ILL. COMP. STAT. 5/11-15.1-5 ("Any annexation agreement executed prior to October 1, 1973 . . . is hereby declared valid and enforceable as to such provisions for the effective period of such agreement, or for 20 years from the date of execution thereof, whichever is shorter.").

153. *See, e.g.*, CAL. GOV'T CODE § 65865.2 (West 1997) ("A development agreement shall specify the duration of the agreement."); HAW. REV. STAT. § 46-126 (1993) ("A development agreement shall . . . (4) Provide a termination date.").

154. For other items bargained for and litigated, see *Van Cleave v. Vill. of Seneca*, 519 N.E.2d 63, 64 (Ill. App. Ct. 1988) (disputing exemptions from real estate taxes), and *O'Malley v. Vill. of Ford Heights*, 633 N.E.2d 848, 849 (Ill. App. Ct. 1994) (disputing an exemption from environmental ordinances, which did not survive legal challenge).

155. 130 Cal. Rptr. 196 (Cal. Ct. App. 1976). *But cf.* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 492 (1987) (upholding a governmental refusal to perform a development agreement when a health and safety issue is involved); Goldblatt v. Town of Hempstead, 369 U.S. 590, 593–94 (1962) (reaching the same holding as in *DeBenedictis*).

changed conditions is not a ground for voiding a municipal contract which was valid when made, nor is the contracting city's failure to have foreseen them."[156]

Furthermore, in the Washington case of *Columbia Park Golf Course, Inc. v. City of Kennewick*, the court held that the city breached a development option agreement ("DOA") for a recreational vehicle ("RV") park by entering into another DOA with a different developer for a multipurpose community center and blocking the development of the RV park.[157] The court concluded that the original DOA acknowledged a substitution for a driving range with a RV park and granted the operator exclusive rights to develop the RV park.[158] Moreover, the city and council granted a shoreline permit allowing the operator to remove and replace the existing driving range with an RV park.[159] Therefore, there was sufficient evidence establishing that the city approved the operator's DOA with the right to operate an RV park.[160] The court noted that "[d]amages for breach of an agreement to negotiate may be . . . the same as the damages for breach of a final contract[,]" under certain circumstances.[161] Thus, under these circumstances the operator was entitled to recover damages because the city breached the DOA by blocking the development of the RV park with the intention of entering into a different DOA.[162]

Finally, municipalities cannot justify breaching a development agreement by nonperformance by relying on objections from other administrations.[163] In *Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes*, the developer sued a town for anticipatory breach of the development agreement because the town refused to continue with the hotel/condominium project unless the Federal Aviation Administration's ("FAA") objections were resolved.[164] The court held that the FAA's objection did not excuse the town's performance of the development agreement because development agreements

---

156. *Morrison Homes Corp.*, 130 Cal. Rptr. at 202.
157. Columbia Park Golf Course, Inc. v. City of Kennewick, 248 P.3d 1067, 1070–77 (Wash. Ct. App. 2011).
158. *Id.* at 1075.
159. *Id.* at 1072–73.
160. *Id.* at 1078–79.
161. *Id.* at 1077.
162. *See id.*
163. Mammoth Lakes Land Acquisition, LLC v. Town of Mammoth Lakes, 120 Cal. Rptr. 3d 797 (Cal. Ct. App. 2010).
164. *Id.* at 802.

freeze promises between the municipality and the developer.[165] Furthermore, the town withheld the knowledge that the FAA had reservations concerning the development agreement and thus, the developer did not consent to the FAA's approval for grant assurances.[166] Therefore, the town officials' refusal to cooperate without resolving the FAA's objections constituted a repudiation of the contract by demonstrating the town's intent to not be bound by the development agreement.[167] The court awarded the developer damages for lost profits.[168]

I. Bankruptcy and Surety

What occurs following a bankruptcy of a signatory is complicated, but generally subject to federal bankruptcy laws. The same is true with respect to sureties and suretyship.[169]

Conclusion

In sum, the development agreement is an excellent tool to manage large land developments from the perspective of both landowner and government. The landowner-developer gains assurance of applicable land planning and development regulations as they exist at the time the agreement is executed, and for a fixed negotiated period of time—in other words, vested rights to proceed with the project as approved at that time. Local—and sometimes state—government gets a lot of say about how such large projects should look and the sequence of development. Most important, government can bargain for land development conditions and community benefits beyond those to which it is entitled by simply exercising its police power, limited as it is by the requirements of nexus and proportionality to the needs generated by the proposed land development project. While issues of police power bargaining and reserved powers are often raised, nearly every court of record that has dealt with development agreements has approved them, particularly if negotiated within the framework of a statute.

165. *Id.* at 805.
166. *Id.* at 819.
167. *Id.* at 822, 824.
168. *Id.* at 829.
169. *See, e.g.*, *In re* Banning Lewis Ranch Co., 532 B.R. 335 (Bankr. D. Colo. 2015); City of Elgin v. Arch Ins. Co., 53 N.E.3d 31 (Ill. App. Ct. 2016).