INTRODUCTION

WHAT ARE DEVELOPMENT AGREEMENTS?

Development agreements are contracts negotiated between project proponents and public agencies that govern the land uses that may be allowed in a particular project. Although subject to negotiation, allowable land uses must be consistent with the local planning policies formulated by the legislative body through its general plan, and consistent with any applicable specific plan.

Neither the applicant nor the public agency is required to enter into a development agreement. When they do, the allowable land uses and other terms and conditions of approval are negotiated between the parties, subject to the public agencies' ultimate approval. While a development agreement must advance the agencies' local planning policies, it may also contain provisions that vary from otherwise applicable zoning standards and land use requirements.

The development agreement is essentially a planning tool that allows public agencies greater latitude to advance local planning policies, sometimes in new and creative ways. While a development agreement may be viewed as an alternative to the traditional development approval process, in practice it is commonly used in conjunction with it. It is not uncommon, for example, to see a project proponent apply for approval of a conditional use permit, zone change and development agreement for the same project.

IN THIS MANUAL

As discussed in Chapter 2, both parties to the agreement receive benefits. In addition to the greater latitude afforded by the development agreement to advance local planning policies, the public agency has greater flexibility in imposing conditions and requirements on proposed projects, while the applicant is afforded greater assurance that once the project is

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1 See Cal. Gov't Code § 65864 and following.
2 See Cal. Gov't Code § 65867.5.
3 See Cal. Gov't Code § 66000(b).
approved, it can be built.\footnote{See Cal. Gov't Code § 65865.4.} There may be disadvantages associated with development agreements as well (see Chapter 2).

Because development agreements afford greater latitude, local agencies may want to take steps to ensure that local land use objectives are not diminished through the use of development agreements (see Chapter 3). Giving adequate thought to how the parties conduct negotiations can improve an agency’s chances of accomplishing its objectives, as well as ensuring that reasonable expectations of both parties are achieved (see Chapter 4). Finally, understanding the “nuts and bolts” of processing development agreements, and the terms and provisions that are typically included, will ensure that procedural requirements are met and legal interests protected (Chapter 5).

In short, this manual provides a practical overview of the development agreement process, including:

- The advantages and disadvantages of using development agreements;
- The role development agreements can play in achieving local agency land use planning objectives;
- Procedural issues related to development agreements;
- Substantive provisions in development agreements; and
- The art of negotiating development agreements.

This manual reflects the variety of experiences that California public agencies and project proponents have had with development agreements, and builds upon the groundbreaking work of the original Development Agreement Manual written by Daniel Curtin and published in 1980 (supplemented in 1985) by the League of California Cities.
Development agreements have three defining characteristics:

- They allow greater latitude than other methods of approval to advance local land use policies in sometimes new and creative ways;
- They allow public agencies greater flexibility in imposing conditions and requirements on proposed projects; and
- They afford project proponents greater assurance that once approved, their projects can be built.

Although these characteristics can be advantageous, they can also present challenges. The purpose of this chapter is to discuss potential advantages and disadvantages of development agreements, from the perspective of both the public agency and project proponent.

**ADVANCING LAND USE POLICIES**

Because development agreements are themselves ordinances, they may supersede existing land use regulations as long as they are consistent with the general plan and any applicable specific plan. As a result, they can afford the public agency and project proponent greater latitude concerning allowable land uses in a particular instance. However, there are potential advantages and disadvantages associated with having this flexibility.

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POTENTIAL DISADVANTAGES: MAY PROMOTE BAD PLANNING

The latitude afforded the parties through use of a development agreement may also have potential disadvantages. For example, the agency's staff and legislative body may become convinced that, in exchange for the significant sales tax revenue the agency is likely to receive from a particular project, or in consideration of the fact that the project proponent is willing to construct a new city park or other significant public amenity, the agency should agree to compromise its planning standards in a manner that could reduce the quality of life in the community. The pressure to compromise may be especially great in the case of a "friendly developer" who has a popular presence in the community.

From the project proponent's perspective, it is possible that the legislative body may decide to disallow uses that would otherwise be allowed, and which are appropriate from a conventional planning perspective.

The suggestions that appear in this manual are intended to help avoid misusing development agreements. They are based on the premise that from the outset, the planning policies and objectives that have been embraced by the community through adoption of the general plan, and those included in any applicable specific plan, should be an integral part of the discussions and negotiations between the parties to a development agreement.

By identifying applicable planning policies early on, and continuing to use them as yardsticks in determining what land uses are appropriate, the parties should be able to avoid unacceptable compromises when negotiating development agreements.

IMPOSING CONDITIONS

Development agreements provide public agencies greater flexibility in imposing requirements on proposed development, such as development conditions, exactions and fees, because constraints and uncertainties that affect a local agency's ability to unilaterally impose such requirements do not apply to mutually agreed upon development agreement provisions.6

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6 See Cal. Gov't Code § 66000(b) (excluding "fees collected under development agreements" from the type of fee covered under the Mitigation Fee Act).
POTENTIAL ADVANTAGES: MORE ENCOMPASSING DEVELOPER REQUIREMENTS MAY BE ENFORCED

Public agencies face the following types of legal constraints and uncertainties that directly affect their ability to regulate development. Such constraints and uncertainties may be overcome, however, through the use of development agreements.

**Voter Initiatives.** During the past several decades, public agencies have been subjected to a number of fiscal setbacks that have impeded their ability to meet the service and infrastructure needs of their communities. A number of voter initiatives have limited public agencies' revenue raising authority, and questions associated with these initiatives have created legal uncertainties.

**ERAF Shift.** In 1992, in reaction to a serious deficit, the state enacted legislation that annually shifts some of the financial responsibility for funding education, pursuant to Proposition 98, to local public agencies. Through the intervening years, the Educational Revenue Augmentation Fund (ERAF) has deprived local agencies of more than $30 billion.

Since the ERAF shift and passage of initiative measures limiting public agencies' general revenue sources, agencies have increasingly required project proponents to bear the costs to the community associated with development of their projects. Many agencies have adopted development impact fees, for example, that are designed to require project proponents to pay the costs of infrastructure, facilities and public services required to service their projects.

**STATUTORY AND CONSTITUTIONAL RESTRICTIONS**

**Mitigation Fee Act.** Commonly referred to as Assembly Bill (AB) 1600, the Mitigation Fee Act was enacted in 1987. It closely regulates the adoption, levy and collection of development fees, including project-specific fees, imposed by local agencies. The act requires the agency to identify the purpose and use of the fee, and to explain why there is a reasonable relationship between the fee and the development. Fees may not exceed the estimated reasonable cost of providing the service for which the fee is collected. These requirements, among other things, have restricted the reach of development impact fees.

7 See Cal. Gov't Code § 66000 and following.
School Facility Fees. Local public agencies historically have been responsible for financing schools. In 1998, however, Senate Bill (SB) 50 significantly changed the extent to which agencies can require developers to contribute to the cost of building new schools.\textsuperscript{16} SB 50 sets maximum amounts on such fees.\textsuperscript{11} It also prohibits agencies from imposing other conditions on development to ensure the existence of adequate school facilities.\textsuperscript{12}

Each of these constraints and uncertainties limits a local agency's ability to adequately condition new development in a manner that will cover the cost of associated infrastructure, facilities and public services.

Regulatory Takings. The term "regulatory takings" derives from the Takings Clause of the Fifth Amendment to the United States Constitution, which states: "... nor shall private property be taken for public use, without just compensation."\textsuperscript{14}

A "taking" is any confiscation of private property by a public agency. A "regulatory taking" is an indirect confiscation of private property through government regulation. If a court finds that a challenged regulation constitutes a taking, the public agency must compensate the owner of the property.

In recent years, takings litigation (and the threat of such litigation) has become a significant factor in land use decision-making. Increasingly, project proponents have invoked the Takings Clause in an effort to persuade public agencies to reduce their efforts to require developers to pay various costs associated with infrastructure and public services. Moreover, the courts have displayed a greater inclination to second-guess public officials' decisions—a departure from the traditional deference the courts have afforded decisions of local officials in the past.

The expanding scope of what constitutes a compensable taking is of concern to local agencies because of the potential for being assessed large monetary judgments in connection with the imposition of development requirements.

\textsuperscript{10} See Cal. Gov't Code § 65995(a).
\textsuperscript{11} See Cal. Gov't Code § 65995(b).
\textsuperscript{12} See Cal. Gov't Code § 65996(b).
\textsuperscript{13} An overview of SB 50 is available from the League of California Cities. To obtain a copy, League members may contact the League and request "Strauss Opinion on SB 50, January 1999."
\textsuperscript{14} To the same effect is article 1, section 19 of the California Constitution: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid . . . ."
AVOIDING CONSTRAINTS AND UNCERTAINTIES

A public agency can avoid the types of constraints and uncertainties described above by entering into development agreements, since the project proponents agree to fees and requirements. Once the agreement is executed, the project proponent has generally waived his or her right to challenge the fairness or appropriateness of a particular requirement.

For example, the local agency can ask that the project proponent agree to finance public facilities and improvements without the specter of a regulatory takings claim. Similarly, the local agency may ask the project proponent to construct a new school without fear that school facility-fee limitations will be invoked. The project proponent must agree to such requirements, of course, before they may become enforceable.

The local agency may also bargain for completion of facilities and improvements at an earlier stage in the development process. This can result in needed infrastructure and facilities being put in place prior to or concurrently with the development, reducing the development's impact on existing facilities or services. Similarly, the project proponent may agree to pay additional fees to protect the agency and existing residents from any budgetary impacts associated with the development.

For facilities and infrastructure that are funded by multiple projects, the development agreement process can provide a mechanism to ensure that each project proponent pays its fair share in a timely manner.

The project-specificity of the development agreement process offers the public agency the opportunity to design more tailored implementation programs for its planning policies and objectives as they relate to the proposed project. The process of negotiating the agreement can help the agency identify and address issues relating to the project before the agency provides final approval. The agency may also require that the agreement include provisions dealing with identifiable contingencies related to the proposed project.

Finally, the fact that the development agreement is recorded provides a convenient mechanism for binding future owners to the requirements and obligations created by the agreement.15

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15 See Cal. Gov't Code § 65868.5 ("... the burdens of the agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement").
FINANCIAL INCENTIVES MAY TRIGGER PREVAILING WAGE REQUIREMENT

Effective January 1, 2002, many development projects that involve loans, grants or other forms of assistance from local agencies are classified as “public works” projects. As such, they fall under state requirements for payment of “prevailing wages.” These requirements establish minimum wage levels for public works projects that vary by location. Application of prevailing wage requirements may lead to higher labor costs for development projects that receive certain forms of financial support or incentives from local agencies. Prevailing wages now may apply to otherwise private projects, where a public agency:

- Pays money or its equivalent to or on behalf of a developer;
- Performs construction work in execution of the project;
- Transfers assets at less than fair market value;
- Waives or forgives fees, costs, rents, insurance or bond premiums, loans, or interest rates;
- Makes available money to be repaid on a contingent basis;
- Grants credits applied against repayment obligations.

Reimbursing a developer for costs that would normally be borne by the public does not trigger the prevailing wage requirement, nor does a subsidy that is de minimis in the context of the project.

POTENTIAL DISADVANTAGES: UNREALISTIC EXPECTATIONS MAY MAKE PROJECT INFEASIBLE

From the project proponent’s viewpoint, local agencies may expect more encompassing project requirements than are financially feasible. The myriad of issues developers face, including land availability, financing, market considerations and federal, state and local regulatory requirements can make it difficult to propose financially feasible development projects.

Against this backdrop, some developers have abandoned development agreements altogether. This avoids the risk of discovering after months of negotiations that the local agency expects the developer to construct an

20 Id.
21 Id.
22 Id.
23 Id.
24 Id.
expensive public amenity, such as a school or park, in consideration of the benefits the developer will receive from a development agreement.

As further discussed in Chapter 4, one way of avoiding this type of problem is to discuss the parties’ expectations at the outset, as a prelude to beginning negotiations. That allows each party to assess early on whether a development agreement will meet each party’s needs.

**ASSURING PROJECT CAN BE BUILT**

One of the challenges project proponents face in the usual regulatory process is that the project must meet the regulatory standards in effect at each stage of the development process. This can result in a proposed project being subject to new regulations even after it has received final approval, and even if the new regulations preclude or prohibit construction of some or all of the project.

As a result, it can be difficult for a project proponent to know at the outset what criteria the project must meet. It is not until the proponent’s right to complete the project has “vested,” that he or she has the right to build the project without concern that new regulations may apply.

Unforeseen regulatory changes (including those adopted by the voters through the initiative process) can add time and expense to a proposed project. Moreover, a proponent of a large project must typically invest

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**WHEN DOES ONE ACQUIRE A “VESTED” RIGHT TO PROCEED WITH DEVELOPMENT, FREE FROM ADDITIONAL REGULATORY REQUIREMENTS?**

Ordinarily, a project proponent acquires a vested right to complete construction when the proponent has:

- Obtained all permits necessary for the proposed structure;
- Performed substantial work in good faith reliance upon those approvals; and
- Incurred substantial liabilities in good faith reliance upon those approvals. The proponent must, of course, complete the work in accordance with the terms of the permit.26

A project proponent cannot acquire a vested right under an invalid building permit, even if substantial expenditures have been made in good faith.26 The rights that vest through reliance on the building or other permit cannot be greater than those specifically granted by the permit itself.26 For example, perfection of a vested right for one phase of a multiphase project does not create a vested right to build subsequent phases.

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On the other hand, a project proponent who is a party to a development agreement receives “vested rights” to complete the project as approved. This occurs immediately upon execution of the agreement, by virtue of the fact that a development agreement “freezes” applicable local land use regulations with respect to the proposed project.27

**POTENTIAL ADVANTAGES: FEWER SURPRISES AFTER PROJECT APPROVAL**

From a project proponent’s perspective, the added certainty associated with receiving “vested rights” to construct a proposed project without concern that new regulations may apply can be invaluable. It may be especially important to a project proponent worried about a potential ballot measure or a change in the governing body majority that could adversely affect the project. While development agreements are subject to voter referenda,28 an opponent would have to file his or her submittal within 30 days after final approval of the development agreement in order to preserve the right to put the approval of the agreement on the ballot.29 Once the 30-day period is over, the project proponent can safely assume that the project will not be affected by future ballot measures.

There are limits to the degree of assurance that a public agency can offer. For example, additional conditions may be imposed on the project if further environmental analysis is needed under the California Environmental Quality Act (CEQA). Also, a development agreement cannot prevent the application of state or federal regulations, as further discussed below.30

Another advantage from the project proponent’s perspective is limiting the potential for regulatory change. This can be helpful when the proponent seeks financing. It can also be reassuring with respect to large projects that have significant upfront costs.

**POTENTIAL DISADVANTAGES: RULES OF ENGAGEMENT ARE LOCKED IN**

A development agreement can limit the public agency’s ability to respond to a changing regulatory environment, precisely because it locks in the

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28 See Cal. Gov’t Code § 65867.5.
30 See Cal. Gov’t Code § 65869.5.
regulatory requirements in effect at the time the agreement is approved. If
the agency's planning regulations are in need of review or updating, the
agency may be subject to criticism if the conditions imposed by the
agreement do not sufficiently protect the community's interests. In the
absence of a development agreement, and should the need arise, the
agency retains the prerogative to change the rules relating to the project,
even if that change makes the intended use unlawful.

A development agreement also places a premium on an agency being able
at the outset to identify all of the issues presented by a project. Since
changes to the agreement require mutual assent, it may be difficult to add
conditions or requirements later, should the agency identify the need to do
so after the agreement is entered into.

From the proponent's perspective, the project's obligations are also locked
in by the agreement. Some elements of market changes—including changes
in the project's economics—may not be reflected in the agreement. This
can put a premium on a project proponent's ability to anticipate areas of
potential change and then negotiate the flexibility to respond to those
changes (for example, by negotiating a range of future uses, based on what
the market will bear at the time of build out).

Another possible disadvantage is the degree of protection from regulatory
change, which is limited to local regulations. The development agreement
law specifically provides that a development agreement must be modified if
necessary to comply with subsequently enacted state or federal law.31 The
new state or federal law may prevent or preclude compliance with the
provisions of the development agreement. The issue for the project
proponent is whether some protection from regulatory change is better than
none at all.

31 See Cal. Gov't Code § 65869.5.
## Comparison of Tentative Maps, Vesting Tentative Maps and Development Agreements

Development agreements are one planning tool. This chart provides a side-by-side comparison of how development agreements compare with tentative subdivision maps and vesting tentative maps.

<table>
<thead>
<tr>
<th>Tentative Maps</th>
<th>Vesting Tentative Maps</th>
<th>Development Agreements</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Description</strong></td>
<td><strong>The point in time when a project proponent has the right to proceed without being subject to changes in land use regulations, typically when the last permit necessary for construction of a project (usually a building permit) has been issued and substantial expenditures have been incurred in reliance on the permit. The concept of vested rights is one of the reasons it is important that concerned citizens make their views known as early as possible in the land use decision making process.</strong></td>
<td><strong>A legislatively-approved contract between a jurisdiction and a person having legal or equitable interest in real property within the jurisdiction (California Government Code Section 65865 and following) that typically &quot;freezes&quot; certain rules, regulations, and policies applicable to a project for a specified period of time, usually in exchange for certain concessions by the project proponent.</strong></td>
</tr>
<tr>
<td><strong>Application of Conflicting Local Rules in Future</strong></td>
<td>Yes</td>
<td>Only if necessary to prevent situation dangerous to health and safety</td>
</tr>
<tr>
<td><strong>When Requirements Are Locked In/Not Subject to Change</strong></td>
<td>No vested right even at the final map stage Police power requirements can be changed at each stage of the permitting process Vested right conferred when building permits issued and substantial work completed in reliance on those permits</td>
<td>When application is &quot;complete&quot;</td>
</tr>
<tr>
<td><strong>Fees and Dedications</strong></td>
<td>Subject to statutory and constitutional restrictions</td>
<td>Subject to statutory and constitutional restrictions</td>
</tr>
<tr>
<td><strong>Phasing</strong></td>
<td>Allowed</td>
<td>Allowed</td>
</tr>
<tr>
<td><strong>Effect on Other Agencies' Regulatory Prerogatives</strong></td>
<td>Does not limit</td>
<td>Does not limit</td>
</tr>
<tr>
<td><strong>Local Agency Procedures</strong></td>
<td>Agency must adopt</td>
<td>Local agencies may adopt procedures; otherwise, Map Act governs</td>
</tr>
<tr>
<td><strong>Processing</strong></td>
<td>Mandatory — Local agencies must accept application and process it within statutory time frames</td>
<td>Mandatory — Local agencies must accept application and process it within statutory time frames</td>
</tr>
<tr>
<td><strong>Duration</strong></td>
<td>Specified by statute, which includes both automatic and discretionary extensions</td>
<td>Specified by statute, which includes both automatic and discretionary extensions</td>
</tr>
<tr>
<td><strong>Voter Review</strong></td>
<td>No — approval is an adjudicatory act not subject to referendum</td>
<td>No — approval is an adjudicatory act not subject to referendum</td>
</tr>
<tr>
<td><strong>Time Limit for Challenging</strong></td>
<td>90 day statute of limitations</td>
<td>90 day statute of limitations</td>
</tr>
<tr>
<td><strong>Governing Statutes</strong></td>
<td>Government Code sections 66410 to 66499.37</td>
<td>Government Code sections 66498.1 to 66498.9</td>
</tr>
</tbody>
</table>
SUMMARY

This chapter has examined the advantages of the three defining characteristics of development agreements—greater regulatory latitude, flexibility and assurance for project proponents. But these characteristics can also present obstacles for the parties negotiating a development agreement.

Some developers may continue avoiding the use of development agreements because of the potential for expensive project requirements. Some local agency staff may avoid development agreements because of the limitations that development agreements impose on an agency's ability to respond to a changing regulatory environment. Nevertheless, the latitude afforded by development agreements to advance local agencies' planning objectives—in sometimes new and innovative ways—makes the development agreement a useful and viable tool in service to the community in a number of different applications.

For both parties, a development agreement can involve a great deal of time and energy to negotiate and implement. Accordingly, it is important at the outset to carefully evaluate the advantages and disadvantages of using a development agreement in each specific instance.
ACHIEVING LAND USE PLANNING OBJECTIVES THROUGH DEVELOPMENT AGREEMENTS

Development agreements can be used for a wide range of projects, from large mixed-use developments to smaller projects. Moreover, the scope of a development agreement can vary according to the needs of the project in question. Although a development agreement can be comprehensive, detailing every aspect of the project, it can also focus on particular aspects of a project.

This chapter discusses the role that development agreements can play in a local agency’s overall planning process. Fundamentally, development agreements are one tool in the local agency’s toolbox for achieving the community’s long-term planning and development goals.

THE IMPORTANCE OF COMPREHENSIVE PLANNING

In authorizing the use of development agreements, the Legislature emphasized that development agreements are intended to serve as a tool to strengthen a community’s commitment to comprehensive land use planning. The concept behind the use of development agreements is to encourage communities to think ahead, in a comprehensive manner, about the impacts of development within their jurisdiction and the steps necessary to make that development a win-win proposition for both the project proponents and the community.

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32 See Cal. Gov’t Code § 65864(a) (“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.”) (emphasis added).
A development agreement generally allows a project proponent to proceed with a project that meets the "policies, rules and regulations" in effect at the time the development agreement is approved. A development agreement may also supercede an agency's existing policies, rules and regulations, as long as the project is consistent with the general plan and any applicable specific plan.

THE ROLE OF PLANNING POLICIES IN THE NEGOTIATION PROCESS

A helpful starting point is having well-understood planning regulations that reflect the community's current and anticipated needs. Such policies, when adhered to, facilitate the negotiation process, ensuring that a proposed development agreement reflects the local governing body's policies. This approach can also address a source of decisionmaker discomfort with the development agreement process, because even though the governing body ultimately approves a development agreement, it also needs a mechanism to provide direction to the negotiation process. Planning policies meet this need.

Typically in a negotiation process, decisionmakers provide their negotiators with parameters on key bargaining issues. It is important that the parameters remain confidential, so the other side does not know how much leeway the negotiators have.

Confidentiality is difficult in the context of development agreement negotiations because the state’s open meeting laws do not generally allow an exception for public agency negotiators on development agreements to receive direction from the governing body. There may be aspects of a development agreement—for example, the price and terms of payment for acquisition of property—that can be discussed in closed session. However, only those issues may be discussed in closed session—not the development agreement in general.

The agency's planning policies, therefore, may serve as the negotiators' key source of direction in this circumstance. In addition, a local agency may want to consider directing its staff to adopt a different type of negotiating style, where identification of "interests" replaces the need to establish outer

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33 See Cal. Gov't Code § 65864(b) ("The Legislature finds and declares that: ... (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.") (emphasis added). See also Cal. Gov't Code § 65866.

34 See Cal. Gov't Code § 65867.5.

35 See generally Cal. Gov't Code § 54950 and following (The Ralph M. Brown Act).
"positions" or parameters (see discussion in Chapter 4). If an agency uses an interest-based negotiating strategy, there are fewer strategic disadvantages associated with a governing body's trying to provide direction in open session.

Well-conceived and up-to-date planning policies can also assist local agencies to avoid having to ask the staff to negotiate in a vacuum, with little or no immediate direction or feedback from decisionmakers. When the agreement is before the legislative body for final approval, it may be difficult for the body to modify aspects of the agreement without, in effect, renegotiating the agreement from the dais to change the terms that the staff negotiated.

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**Development Agreements and Annexations/Incorporations**

The development agreement law provides that cities generally inherit development agreements negotiated by counties for newly incorporated or newly annexed areas. *See Cal. Gov't Code § 65865.3(a)* (for incorporations, the effective date of the incorporation must be after January 1, 1987). The development agreement must meet the following requirements, however:

- The application for the agreement must have been submitted before the first signature was placed on the petition for annexation or incorporation (or resolution initiating such proceedings);
- The agreement must have been entered into prior to the incorporation/annexation election (or prior to the date on which the conducting authority ordered the annexation); and
- The annexation is initiated by the city (or, if initiated by someone else, the city does not adopt written findings that the development agreement is injurious to the health, safety or welfare of city residents. *See Cal. Gov't Code § 65865.3(c) and (d).*

The duration of such inherited development agreements is the duration of the agreement or eight years, whichever is shorter. *See Cal. Gov't Code § 65865.3(a).*

The city may modify or suspend the development agreement's provisions if the city determines that failure to do so would place the residents of the territory subject to the development agreement (or the residents of the city in general — or both) in a condition dangerous to their health or safety (or both). *See Cal. Gov't Code § 65865.3(a).*

However, the development agreement law also authorizes cities to enter into development agreements for unincorporated territory within their sphere of influence. *See Cal. Gov't Code § 65865(b).* The agreement does not become operative until the annexation occurs. *See Cal. Gov't Code § 65865(b).* The timeframe for the annexation must be specified in the agreement and the annexation must occur within that timeframe. *See Cal. Gov't Code § 65865(b).* Extensions are possible, however. *See Cal. Gov't Code § 65865(b).*
PLANNING POLICIES AS A MECHANISM FOR DEFINING PROJECT PROponent EXPECTATIONS

An agency’s planning documents, including its local development agreement procedures, can provide an important source of guidance for project proponents going into negotiations. By stating in the procedures that the local agency is committed to using development agreements as a tool to promote the community’s needs, the agency makes clear that it expects to receive greater community benefits than it could otherwise achieve through the land use regulatory process. This level of understanding can be helpful in setting the proper tone, so both parties have realistic expectations going into the negotiations.

Such an approach also may be helpful in responding to community concerns that the community has not received adequate benefits in the past from development agreements. These concerns may arise, especially when the project proponent has an ongoing relationship with the public agency.

USES OF DEVELOPMENT AGREEMENTS

Local government agencies have successfully used development agreements to facilitate:

- School, park and other facility funding;
- Affordable housing projects;
- Large-scale mixed use projects; and
- Multi-phase commercial projects.

Development agreements can also be a vehicle for addressing concerns among developers about perceived adverse impacts of neighboring projects.

SUMMARY

Used judiciously, development agreements are a useful tool for achieving an agency’s land use planning objectives. Well-articulated planning policies

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36 Cal. Gov’t Code § 14045.
37 Cal. Gov’t Code §§ 65460.10, 65460.2.
38 Cal. Gov’t Code § 65913.5
may also provide important policy direction to staff in negotiating such agreements.
The Nuts and Bolts of Processing Development Agreements

From a local agency standpoint, the development agreement process begins with the local agency’s procedures for development agreements. The development agreement law contemplates the adoption of such procedures by local government agencies. If there are none, some must be adopted upon the request of an applicant. Sample procedures are available online at www.ilsg.org/devtagmt and typically include the following:

- A statement of purpose/findings concerning the public benefits of development agreements;
- Application requirements;
- Notice and hearing procedures;
- Planning commission and governing body review;
- Recordation;
- Amendment and termination; and
- Periodic review.

39 See Cal. Gov’t Code § 65865(b) (“Every city, county, or city and county, shall, upon request of an applicant, by resolution or ordinance, establish procedures and requirements for the consideration of development agreements ...”).

40 See Cal. Gov’t Code § 65865(b).
WHO MAY INITIATE THE DEVELOPMENT AGREEMENT PROCESS?

An owner (with legal or equitable title) must apply in accordance with the local agency's procedures. See Cal. Govt Code § 65865(b).


Such procedures may be adopted by ordinance or resolution.41 The development agreement law allows local agencies to recover the direct costs associated with adopting procedures for the agencies' consideration of development agreements.42

This chapter discusses procedures and issues an agency may include in its development agreement procedures resolution or ordinance, as well as the general steps in the process of approving a development agreement.

PURPOSE/FINDINGS

The agency’s development agreement procedures provide an opportunity for the local agency to state its goal for considering development agreement requests, which is “...to promote the community’s needs and receive greater community benefits than otherwise can be achieved through the land use regulatory process.” A goal statement similar to this example can be helpful in setting the tone for negotiations, so that both parties have realistic expectations going into the negotiations.

It is also helpful to refer to the development agreement statute, California Government Code section 65864 and following.

APPLICATION PROCESS

An application form specifying the type of information an agency needs to process the development agreement request is an efficient way of ensuring that the agency receives all of the information it needs in a timely manner. Some development procedures authorize the agency’s planning director to develop a form application for development agreements. A sample form is also available online at www.ilsg.org/devtagmt.

It can also be helpful for an agency’s development agreement procedures to authorize the local agency’s attorney to develop a form agreement. Having a readily available form agreement saves staff time in reviewing development agreements; it also provides

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41 See Cal. Gov’t Code § 65865(b).
42 See Cal. Gov’t Code § 65865(d).
greater assurance that the agreement will cover all of the agency’s needs. Chapter 6 discusses the content of development agreements. Sample forms are available online at www.ilsg.org/devagmt.

Some public agencies charge fees to process applications. A local agency’s development agreement procedures can specify those fees or cross reference a fee schedule that includes this particular type of fee.\footnote{See generally Cal. Gov’t Code § 66000(b) (excluding “fees collected under development agreements” from the type of fee covered under the Mitigation Fee Act) and following.}

The local agency will also need to ensure that the environmental analysis requirements under the California Environmental Quality Act (CEQA) have been satisfied.\footnote{See generally Cal. Pub. Res. Code § 21000 and following.}

\section*{PUBLIC HEARINGS AND NOTICE}

Another important aspect of development agreements is the role of public input. The development agreement law requires a noticed public hearing by both the planning agency and by the local agency’s governing body before a development agreement is approved.\footnote{See Cal. Gov’t Code § 65867.}

\section*{DEVELOPMENT AGREEMENTS AND PUBLIC INPUT}

Both the project proponent and the local agency have an interest in satisfying community concerns with respect to a development agreement, insofar as development agreements are subject to repeal by voter referendum.\footnote{See Cal. Elect. Code § 9141; Referendum Committee v. City of Hermosa Beach, 184 Cal. App. 3d 152 (1986); Midway Orchards v. County of Butte, 220 Cal. App. 3d 765 (1990).} In fact, a development agreement cannot legally take effect until after the 30-day period for such a referendum expires.\footnote{See Cal. Gov’t Code § 65867.5.}

There is also a 90-day statute of limitations to challenge the adoption or amendments of any development agreement approved after January 1, 1996.\footnote{See Cal. Gov’t Code § 65009.}
As a practical matter, though, it may be advisable to include stakeholders (interested parties such as community groups, business leaders and others interested in the community’s development) in the development agreement process. While it may not be practical to allow stakeholders to attend negotiations, it may be possible to consult with them ahead of time, or perhaps on a “meet and confer” basis as negotiations proceed.

As the following example illustrates, the process of negotiating a development agreement is susceptible to “community backlash” in instances when community members find out after the fact, that public agency staff has agreed to recommend what they perceive as controversial concessions.

**ILLUSTRATION — TAXCO**

Destination City is looking for a way to increase its general fund. Taxco is a large retail outlet that generates more than $500,000 worth of sales tax revenue each year for other cities in which it is located. Taxco plans to build a store in the vicinity.

Public agency senior staff meet with Taxco senior staff to discuss the benefits of locating in Destination City. Aware that a neighboring city would also like a Taxco retail outlet, these meetings are kept confidential. Senior staff suggest ways that Destination City may be able to write down land costs, waive development fees and otherwise provide incentives for Taxco to locate in their city. Eighteen months later, a deal is struck and the terms are commemorated in a development agreement, which is to be reviewed by the planning commission and approved by city council.

At this point, Bill Chamber, president of the Downtown Merchants Association, sees the public hearing notice and learns for the first time that the city is considering agreeing to a variety of incentives to entice Taxco to locate in Destination City. Mr. Chamber calls a meeting of the merchants.

During the meeting, merchants express their concerns that the city should not entice Taxco to locate in the city; it is not fair for the city to agree to monetary incentives not offered to other businesses; the city ought to be concerned about the very real threat that Taxco will run other merchants out of town; and the city should focus on business retention rather than attracting new businesses. The group decides to formally oppose approval of the development agreement. They also discuss initiating a recall of the entire city council, for secretly acting against the business community’s interests. Unlike the Sports World illustration, these parties do not live happily ever after.

Meeting with stakeholders ahead of time to discuss possible actions, such as attracting a large retail outlet, allows legitimate issues to be aired before serious negotiations begin. After some evaluation, stakeholders may decide their issues can be resolved, or the agency may decide it should re-evaluate its priorities. In the case of the merchants in this illustration, had they been given the opportunity to meet with the agency to learn about the experiences of other cities, they might have concluded that attracting Taxco would actually help business retention.
Meeting and conferring with stakeholders during the negotiation process allows them to provide input on the specific terms and conditions that are being negotiated. Many times, the same underlying goal can be accomplished in a slightly different manner to accommodate stakeholders' needs.

In the Taxco example, city staff needed to keep the negotiations confidential, so that a neighboring city would not undermine their efforts. While the need for confidentiality makes it more difficult to include stakeholders, including them in the process without sharing every detail enables the local agency to be on a firmer community relations footing when it comes to approving the development agreement.

PUBLIC INPUT ON CONSIDERATION OF THE PROPOSED AGREEMENT

The development agreement law specifies what kind of public hearings and notice must be given when an agency gets to the point of considering whether to approve development agreements.\(^\text{49}\) Hearings must be held by the local planning agency and its governing body.\(^\text{50}\) Such hearings are subject to the state's open meetings laws,\(^\text{51}\) which require that all interested persons be allowed to attend these meetings and provide public comment before the planning commission's or governing body's consideration of the development agreement.\(^\text{52}\) Members of the public are also entitled to request copies of all documents included in the agenda packet.\(^\text{53}\) The state's Public Records Act also may entitle members of the public to request other documents relating to the proposed agreement.\(^\text{54}\)

\(^{49}\) See Cal. Gov't Code § 65867.

\(^{50}\) See Cal. Gov't Code § 65867.

\(^{51}\) See Cal. Gov't Code § 54950 and following.

\(^{52}\) See Cal. Gov't Code § 54953(a).

\(^{53}\) See Cal. Gov't Code § 54954.3.

\(^{54}\) See Cal. Gov't Code § 54954.1.

\(^{55}\) See Cal. Gov't Code § 6250 and following. An exception may be preliminary drafts of development agreements if they are not kept in the ordinary course of business. See Cal. Gov't Code § 6254(a).
Notice Issues

The development agreement law provides notice requirements for hearings related to the potential adoption of a development agreement.56 The notice is the same as that required under the planning and zoning law for:

- Plans (publication in at least one newspaper of general circulation or posting in three public places within the jurisdiction if there is no newspaper of general circulation, with special consideration given to drive-through facilities);57

- Projects (10-day mailed notice to the property owner, the project proponent, affected local agency service/facility providers; and58

- Neighboring property owners within 300 feet, as well as published and posted notice, again with special consideration given to drive-through facilities).59 The agency must also give notice to anyone who has requested it.60

The notice must contain:

- The date, time, and place of the hearing;

- The identity of the hearing body;

- A general explanation of the matter to be considered (in other words, the development agreement); and

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58 This includes each local agency expected to provide water, sewage, streets, roads, schools, or other essential facilities or services to the project, whose ability to provide those facilities and services may be significantly affected. See Cal. Gov't Code § 65091(a)(2).
60 See Cal. Gov't Code § 65092: "When a provision of this title requires notice of a public hearing to be given pursuant to Section 65090 or 65091, the notice shall also be mailed or delivered at least 10 days prior to the hearing to any person who has filed a written request for notice with either the clerk of the governing body or with any other person designated by the governing body to receive these requests. The local agency may charge a fee which is reasonably related to the costs of providing this service and the local agency may require each request to be annually renewed."
A general description, in text or by diagram, of the location of the property that is the subject of the development agreement, and hence the hearing.61

To facilitate informed public discussion of the matter, it may be helpful to include a brief explanation of what development agreements are. A sample of such a description is available online at www.ilsg.org/devtagmt.

DECISIONMAKER INPUT ON DEVELOPMENT AGREEMENTS AND FINDINGS

A local agency's development agreement procedures present an opportunity for the governing body to ask the planning commission to make a recommendation on whether to approve the agreement and weigh in on proposed findings.

INVOLVING THE PLANNING COMMISSION EARLY ON

When development agreements are negotiated by staff, subject to planning commission review before final approval by the legislative body, planning commissioners may feel they have been "left out of the loop." This may be especially true if the legislative body is the only one receiving updates as negotiations proceed.

The consequences of the planning commission feeling insufficiently involved may include:

• Bad feelings on the part of individual planning commissioners;

• A lack of planning commission input during negotiations; and

• Less protection of elected officials’ interests by appointed commissioners.

One approach to informing the planning commission early on is to schedule the project for discussion at a regular planning commission meeting at the start of negotiations. This provides the planning commission with an opportunity to provide its input to the negotiating team on key policies and objectives to be achieved on behalf of the community through the development agreement.

Another approach is to convene a subcommittee of the planning commission as an adjunct to the negotiation process. If the subcommittee is less than a quorum of the commission, the discussion may occur without the overlay of open meetings requirements. While the subcommittee could be made part of the negotiating team, it may be more practical, given the competing demands on planning commissioners’ time, for staff to confer with the subcommittee outside of negotiations. This approach allows the negotiating team to benefit from at least some planning commissioners’ perspective, while the negotiating team remains reasonably sized.

**Planning Commission Recommendation and Input on Findings**

An agency’s development agreement procedures can solicit the planning commission’s input both on whether the development agreement should be approved, and on the findings accompanying any approval. Such findings may include whether the agreement:

• Is consistent with the objectives, policies, general land uses and programs specified in the agency’s general plan and any applicable specific plan;

• Is consistent with the provisions of the agency’s zoning regulations;

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62 See Cal. Gov’t Code §§ 54952.2(a) (“As used in this chapter, ‘meeting’ includes any congregation of a majority of the members of a legislative body at the same time and place to hear, discuss, or deliberate upon any item that is within the subject matter jurisdiction of the legislative body or the local agency to which it pertains.”) 54952 (“As used in this chapter, ‘legislative body’ means: … (b) A ... committee ... of a local agency, whether permanent or temporary, decision-making or advisory, created by charter, ordinance, resolution, or formal action of a legislative body. However, any advisory committee, composed solely of members of the legislative body which are less than a quorum of the legislative body are not legislative bodies ...”).
- Promotes the public health, safety, and general welfare;
- Is just, reasonable, fair and equitable under the circumstances facing the agency;\footnote{See generally\ Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App. 3d 724 (1976) (analyzing the “contracting away the police power” issue in the context of an annexation agreement). See also\ Denio v. City of Huntington Beach, 22 Cal. 2d 589 (1943); Carruth v. City of Madera, 233 Cal. App. 2d 688 (1965).}
- Has a positive effect on the orderly development of property or the preservation of neighboring property values; and
- Provides sufficient benefit to the community to justify entering into the agreement.

**GOVERNING BODY HEARING AND DECISION ON THE DEVELOPMENT AGREEMENT**

As discussed in Chapter 3, well-articulated planning policies and objectives should increase the likelihood that the staff’s and planning commission’s input to the development agreement negotiation process produces a satisfactory agreement for the governing body. Adoption of an interest-based negotiation approach may also allow the governing body to provide direction to negotiators early on in the process in open session, consistent with the state’s open meeting laws.\footnote{See generally Cal. Gov’t Code § 54950 and following (The Ralph M. Brown Act).}

Well-conceived and up-to-date planning policies also avoid the prospect of asking staff to negotiate in a vacuum, with little or no immediate direction or feedback from decisionmakers. This maximizes the likelihood that the agreement presented for decisionmaker approval reflects their concerns and policy direction. It minimizes the likelihood of having to renegotiate the agreement from the dias. (The downside of which, is inclusion of language in the agreement which may have unintended consequences or not fully protect the agency’s interests.)
ACTION ON THE AGREEMENT

The governing body must approve a development agreement by resolution or ordinance. Ordinances must go through a two-reading process, with at least a five-day intervening period. Changes require an additional five-day waiting period.

RECORDATION AND OTHER POST-APPROVAL STEPS

After a development agreement is approved, the clerk of the governing body must:

- Record a copy of the development agreement within 10 days of the entity’s entry into the agreement, along with a description of the land subject to the development agreement and

- Publish the ordinance approving the development agreement.

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65 See Cal. Gov’t Code § 65867.5.
66 See Cal. Gov’t Code §§ 36934 (city requirements), 25131 (county requirements).
67 See Cal. Gov’t Code §§ 36934 (city requirements), 25131 (county requirements).
68 See Cal. Gov’t Code § 65868.5.
69 A clerk must publish each ordinance (or a summary of it) within 15 days after passage as follows: 1) In a newspaper of general circulation published within the jurisdiction, or 2) If there is none, by posting as required by state law. Cal. Gov’t Code §§ 36933 (cities), 25124 (counties) (note that state codes are available online at http://www.leginfo.ca.gov by clicking on “California Law”). The publication must include the names of the governing body members voting for and against the ordinance. Cal. Gov’t Code §§ 36933(c) (cities), 25124 (counties).
In cities and counties, failure to satisfy the publication requirement in a timely manner prevents the ordinance from taking effect or being valid.\textsuperscript{70}

**AMENDING THE DEVELOPMENT AGREEMENT**

After a development agreement has been signed, it may be amended only by mutual agreement of parties.\textsuperscript{71} Most development agreement procedures require amendments that are initiated by the project proponent to go through the same process as the initial application for the development agreement. For local agency-initiated amendments, the procedures usually require notice to the project proponent and provision of information about the process that the agency will employ.

**DEVELOPMENT AGREEMENTS AND ACCOUNTABILITY**

Fundamental to the concept of an enforceable agreement is the notion that each party will do what it promises to do in the agreement. To underscore that notion, the development agreement law requires local agencies to include at least an annual review of the project proponent’s compliance with the delineated responsibilities.\textsuperscript{72} The review must require the proponent to demonstrate good faith compliance with the terms of the agreement.\textsuperscript{73} If a local agency finds, based on substantial evidence, that such compliance has not occurred, the agency may modify or terminate the agreement.\textsuperscript{74}

In addition, the development agreement law provides that the development agreement is “enforceable by any party.”\textsuperscript{75} A development agreement typically contains provisions specifying procedures for notice and termination in the event of a default by either party.

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\textsuperscript{70} Cal. Gov't Code § 36933(b) (cities). Cf. Cal. Gov't Code § 25124(c) (providing failure of county clerk to publish means the ordinance does not take effect for 30 days).

\textsuperscript{71} See Cal. Gov't Code § 65868.

\textsuperscript{72} See Cal. Gov't Code § 65865.1.

\textsuperscript{73} See Cal. Gov't Code § 65865.1.

\textsuperscript{74} See Cal. Gov't Code § 65865.1.

\textsuperscript{75} See Cal. Gov't Code § 65865.4.
SAN DIEGO DATABASE KEEPS DEVELOPMENT AGREEMENTS ON TRACK

The City of San Diego's Development Agreement Monitoring System tracks the status of payments owed by developers to cover the cost of project-related infrastructure, facilities and public services. In addition to helping city staff monitor compliance with the terms and conditions of development agreements, the system also generates reminders of annual report deadlines and due dates for administrative costs owed to the city.

Before the city developed the system in 1997, several departments shared responsibility for monitoring the status of development agreements. The lack of effective coordination made oversight of the agreements uncertain. If, for example, the city's issuance of a building permit for the 250th unit of a residential project obligated the developer to pay the city $250,000 for completion of a library, the city had no means to ensure that it requested the funds in a timely manner.

To address this problem, city staff formed an inter-departmental task force called the Development Monitoring Team. The Monitoring Team worked with city Management Information Systems personnel to create the Development Agreement Monitoring System. The system comprises a database containing files for each development agreement. The files list developer obligations and due dates under each agreement.

The monitoring team updates the status of developer obligations and shares this information with appropriate departments on a regular basis. As a result, the city has improved the timeliness of developer invoicing and collection. By February 2000, the Development Agreement Monitoring System helped the city to collect $17 million in developer obligations, and to track another $28 million that the city is due to receive by 2005.

SUMMARY

A well-crafted set of development agreement procedures will provide a useful road map to staff and others in shepherding an agreement through the approval process. Such procedures are also useful for considering any amendments to and termination of an agreement.

Important parts of the process include the notice and hearing process, as well as mechanisms for providing decision-maker input.

76 City of San Diego, Development Agreement Monitoring System, February 2000 (Submission for League of California Cities Helen Putnam Award for Excellence).
65864. 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 not 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.

65865. (a) Any city, county, or city and county, may enter into a development agreement with any person having a legal or equitable interest in real property for the development of the property as provided in this article.
   (b) Any city may enter into a development agreement with any person having a legal or equitable interest in real property in unincorporated territory within that city's sphere of influence for the development of the property as provided in this article. However, the agreement shall not become operative unless annexation proceedings annexing the property to the city are completed within the period of time specified by the agreement. If the annexation is not completed within the time specified in the agreement or any extension of the agreement, the agreement is null and void.
   (c) Every city, county, or city and county, shall, upon request of an applicant, by resolution or ordinance, establish procedures and requirements for the consideration of development agreements upon application by, or on behalf of, the property owner or other person having a legal or equitable interest in the property.
   (d) A city, county, or city and county may recover from applicants the direct costs associated with adopting a resolution or ordinance to establish procedures and requirements for the consideration of development agreements.
   (e) For any development agreement entered into on or after January 1, 2004, a city, county, or city and county shall comply with Section 66006 with respect to any fee it receives or cost it recovers pursuant to this article.
65865.1. Procedures established pursuant to Section 65865 shall include provisions requiring periodic review at least every 12 months, at which time the applicant, or successor in interest thereto, shall be required to demonstrate good faith compliance with the terms of the agreement. If, as a result of such periodic review, the local agency finds and determines, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with terms or conditions of the agreement, the local agency may terminate or modify the agreement.

65865.2. A development agreement shall specify the duration of the agreement, the permitted uses of the property, the density or intensity of use, the maximum height and size of proposed buildings, and provisions for reservation or dedication of land for public purposes. The development agreement may include conditions, terms, restrictions, and requirements for subsequent discretionary actions, provided that such conditions, terms, restrictions, and requirements for subsequent discretionary actions shall not prevent development of the land for the uses and to the density or intensity of development set forth in the agreement. The agreement may provide that construction shall be commenced within a specified time and that the project or any phase thereof be completed within a specified time.

The agreement may also include terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time.

65865.3. (a) Except as otherwise provided in subdivisions (b) and (c), Section 65868, or Section 65869.5, notwithstanding any other law, if a newly incorporated city or newly annexed area comprises territory that was formerly unincorporated, any development agreement entered into by the county prior to the effective date of the incorporation or annexation shall remain valid for the duration of the agreement, or eight years from the effective date of the incorporation or annexation, whichever is earlier. The holder of the development agreement and the city may agree that the development agreement shall remain valid for more than eight years, provided that the longer period shall not exceed 15 years from the effective date of the incorporation or annexation. The holder of the development agreement and the city shall have the same rights and obligations with respect to each other as if the property had remained in the unincorporated territory of the county.

(b) The city may modify or suspend the provisions of the development agreement if the city determines that the failure of the city to do so would place the residents of the territory subject to the development agreement, or the residents of the city, or both, in a condition dangerous to their health or safety, or both.

(c) Except as otherwise provided in subdivision (d), this section applies to any development agreement which meets all of the following requirements:

(1) The application for the agreement is submitted to the county prior to the date that the first signature was affixed to the petition for incorporation or annexation pursuant to Section 56704 or the adoption of the resolution pursuant to Section 56800, whichever
occurs first.

(2) The county enters into the agreement with the applicant prior to the date of the election on the question of incorporation or annexation, or, in the case of an annexation without an election pursuant to Section 57075, prior to the date that the conducting authority orders the annexation.

(3) The annexation proposal is initiated by the city. If the annexation proposal is initiated by a petitioner other than the city, the development agreement is valid unless the city adopts written findings that implementation of the development agreement would create a condition injurious to the health, safety, or welfare of city residents.

(d) This section does not apply to any territory subject to a development agreement if that territory is incorporated and the effective date of the incorporation is prior to January 1, 1987.

65865.4. Unless amended or canceled pursuant to Section 65868, or modified or suspended pursuant to Section 65869.5, and except as otherwise provided in subdivision (b) of Section 65865.3, a development agreement shall be enforceable by any party thereto notwithstanding any change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city, county, or city and county entering the agreement, which alters or amends the rules, regulations, or policies specified in Section 65866.

65865.5. (a) Notwithstanding any other provision of law, after the amendments required by Sections 65302.9 and 65860.1 have become effective, the legislative body of a city or county within the Sacramento-San Joaquin Valley shall not enter into a development agreement for property that is located within a flood hazard zone unless the city or county finds, based on substantial evidence in the record, one of the following:

(1) The facilities of the State Plan of Flood Control or other flood management facilities protect the property to the urban level of flood protection in urban and urbanizing areas or the national Federal Emergency Management Agency standard of flood protection in nonurbanized areas.

(2) The city or county has imposed conditions on the development agreement that will protect the property to the urban level of flood protection in urban and urbanizing areas or the national Federal Emergency Management Agency standard of flood protection in nonurbanized areas.

(3) The local flood management agency has made adequate progress on the construction of a flood protection system that will result in flood protection equal to or greater than the urban level of flood protection in urban or urbanizing areas or the national Federal Emergency Management Agency standard of flood protection in nonurbanized areas for property located within a flood hazard zone, intended to be protected by the system. For urban and urbanizing areas protected by project levees, the urban level of flood protection shall be achieved by 2025.

(b) The effective date of amendments referred to in this section
shall be the date upon which the statutes of limitation specified in subdivision (c) of Section 65009 have run or, if the amendments and any associated environmental documents are challenged in court, the validity of the amendments and any associated environmental documents has been upheld in a final decision.

(c) This section does not change or diminish existing requirements of local flood plain management laws, ordinances, resolutions, or regulations necessary to local agency participation in the national flood insurance program.

65866. 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.

65867. 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 Sections 65090 and 65091 in addition to any other notice required by law for other actions to be considered concurrently with the development agreement.

65867.5. (a) A development agreement is a legislative act that shall be approved by ordinance and is subject to referendum.

(b) 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.

(c) A development agreement that includes a subdivision, as defined in Section 66473.7, shall not be approved unless the agreement provides that any tentative map prepared for the subdivision will comply with the provisions of Section 66473.7.

65868. 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. Notice of intention to amend or cancel any portion of the agreement shall be given in the manner provided by Section 65867. An amendment to an agreement shall be subject to
the provisions of Section 65867.5.

65868.5. No later than 10 days after a city, county, or city and county enters into a development agreement, the clerk of the legislative body shall record with the county recorder a copy of the agreement, which shall describe the land subject thereto. From and after the time of such recordation, the agreement shall impart such notice thereof to all persons as is afforded by the recording laws of this state. The burdens of the agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

65869. 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 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.

65869.5. In the event that state or federal laws or regulations, enacted after a development agreement has been entered into, prevent or preclude compliance with one or more provisions of the development agreement, such provisions of the agreement shall be modified or suspended as may be necessary to comply with such state or federal laws or regulations.