Guide to California Planning, Solano Press
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Vested Rights

COMPENSATION FOR A taking of property is not the only issue of concern to developers and others in the property rights movement. Equally important over the last 30 years, at least in California, has been the concept of "vested rights."

A vested right to build is the irrevocable right of a property owner to develop his or her property—a right that cannot be changed by local government permitting agencies or a slow-growth initiative. In 1976, the California Supreme Court issued a ruling that made it very difficult for California developers to obtain vested rights. Since then, two new tools have emerged that are used in most cases to lock in vested rights.

The so-called *Avco* case arose out of the passage of Proposition 20, the coastal initiative, in 1972. At the time, Avco Community Developers, a large homebuilder, had spent more than $2 million planning and grading a subdivision site in Orange County that had already been approved by local officials. Even though grading had already begun, the brand-new Coastal Commission claimed it had the power to review the project because Avco had not yet established a vested right to build. When the case went to court, the state Supreme Court agreed: California developers could obtain vested

in existence. And the plan establishes competition among the target sites. Not all 13 sites can be built out to their maximum potential; the landowners who come forward first will be allowed to build. The remaining target sites will be developed with smaller buildings.

The Sunset Specific Plan also had to deal with the vexing problem of the Strip's nationally renowned billboards. Since incorporation, the city's planners and political leaders had struggled with the question of the landmark billboards along the Strip, considering everything from protecting them as historic structures to forcing the owners to tear them down. In general, the Sunset Specific Plan seeks to maintain some existing large billboards along the Strip and permits some new ones through what has been dubbed the "creative billboard process." New billboards will be permitted if they don't affect views, are "well integrated into the urban context," and enhance the architectural elements located on a particular site.

Development Agreements

Often used in conjunction with a specific plan, the development agreement is a contract between a city or county and a developer. The intent of the DA is to provide security for both sides. The local government gets a legally binding promise that the developer will provide infrastructure and/or pay fees required by a new project. In return, the developer gets a legally binding promise that he or she can build the project, even if the locality later passes a growth-control initiative. Like specific plans, development agreements cover projects of all types and sizes, from new towns with shopping centers and thousands of homes, to single buildings.

Development agreements were authorized by the legislature in 1979 in response to the California Supreme Court's decision in 1976 that made obtaining vested rights much more difficult. (The development agreement statute is Government Code §§ 65864–65869.5.) The law originally envisioned that developers would be willing to make huge up-front infrastructure investments in exchange for vested rights to build, especially on a long-term, multi-phase project. But, as written, the law permits virtually open-ended

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bargaining between developers and local governments. Theoretically, DAs must conform with local general plans. But in practice, everything is thrown open for discussion—especially because DAs are often processed concurrently with general plan amendments and specific plans. There might be more backroom negotiating over development agreements than about anything else related to planning and development. Still, the law specifically classifies DAs as legislative, so they are subject to initiative and referendum. And they have, on occasion, been turned down by the voters.

Uses of Development Agreements

Many of the provisions included in development agreements could be dealt with through other regulatory agreements such as the specific plan. But developers find the vested rights available through development agreements to be very attractive, especially if they are expected to make large front-end investments in infrastructure. The risk on a multi-phase project without such vested rights is too great. One good example came in the Ventura County city of Moorpark, where Urban West Communities, a homebuilder, negotiated a 10-year DA for a 2,500-home subdivision called Mountain Meadows. Relying on the agreement, Urban West made infrastructure investments it valued at $28 million. But in a controversial election, voters rejected the DA, while imposing a growth cap of 250 homes per year for the entire city. Claiming it had a vested right to build, Urban West went to court. The company eventually won the vested rights case on other grounds, but the project was held up for years in the process and easily could have lost in court.

Development agreements have been popular in rapidly growing areas such as Riverside, Orange, and San Diego Counties, where large developers own huge tracts of land on which they are processing specific plans. These DAs have represented the institutionalization of development fees—with cities and counties extracting far more in fees and/or infrastructure than they would have obtained under traditional processes. Local governments may extract these extraordinary concessions because DAs are exempt from the post-*Nollan* nexus requirement and *Dolan*'s rough proportionality test. Development agreements are specifically

rights only after getting building permits and investing substantial expenditure. And Avco's $2 million investment wasn't enough, the court said. *Avco Community Developers, Inc. v. South Coastal Regional Commission,* 17 Cal. 3d 785 (1976). Over the next decade, the legislature responded with two new techniques that permit builders to obtain earlier vested rights by following alternate processes.

The first was the development agreement law, which permits developers and local government to, in essence, sign a contract for a development proposal. In a development agreement situation, developers typically agree to provide infrastructure beyond what would be permitted under normal exactions in exchange for a guaranteed right to build. Although development agreements are legally suspect (local governments may not contract away their police power), they are widely used in conjunction with specific plans to process large development projects.

The other is the vesting tentative map process, which permits property owners to seek vested rights for a tentative map under the Subdivision Map Act. Vesting tentative maps, which are usually used for single subdivisions that are too small for development agreements, are discussed in more detail in chapter 8.

exempted from the provisions of AB 1600 because they serve as a voluntary alternative to normal regulation.

In Orange County, development agreements were the cornerstone of the Foothill Circulation Phasing Program. Large landowners such as The Irvine Company, Mission Viejo Company, and Rancho Santa Margarita Company planned to build tens of thousands of homes in the area. But traditional sources of funds were inadequate to pay for the arterial roads the new developments required. So 19 Orange County developers agreed to provide more than $200 million in exchange for a vested right to build their projects. The vast majority of the funds came from bond issues, and the DAs—guaranteeing that the houses will receive governmental approval—were vital in marketing the Orange County bonds on Wall Street.

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Cities and counties also use these agreements to deal with tricky problems involved with timing and sequencing, to lock in assurance that a particular mix of development will occur, and to bring together small developers to fund large public improvements. More recently, development agreements have been used as tools to broker a deal between developers and neighbors or other slow-growth forces. In exchange for the right to develop part of its land, the development company agrees to dedicate other parts for open space, parks, or farms. The developer might even help pay for maintenance of the land that will not be developed.

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For years, local governments and developers relied on development agreements even though the constitutionality of DAs was uncertain. Not until 2000 did an appellate court publish a decision specifically upholding the constitutionality of the state development agreement statute. That case also provided a good example of the sort of horse-trading behind many DAs.

The Santa Margarita Ranch was a huge chunk of farmland, pasture, and hills in a desirable area between San Luis Obispo and Paso Robles. Developers were eager to build, but area residents and San Luis Obispo County officials opposed large-scale development. So a development company called Santa Margarita Limited uncovered an antiquated parcel map and insisted the county recognize the map. The county refused, so the developer sued the county to determine the number of legal parcels that could be developed (*see* chapter 8 for a discussion of antiquated subdivision maps). Rather than let a court decide, the county, the developer, and a slow-growth group (the smartly named Santa Margarita Area Resi-

dents Together) negotiated a settlement that became a development agreement. The DA designated 1,800 acres for development of 550 homes, plus a golf course, lodge, and equestrian center. The agreement set aside 8,400 acres for permanent open space, and made the remaining 3,600 acres subject to a long-term contract for agricultural production. These were the same designations made in the Salinas River Area Plan, which the county adopted before signing the development agreement.

The county agreed to freeze those land use designations for five years, which was a common move. The Santa Margarita Ranch DA was unusual in that it called for the developer to follow up with a specific plan, a vesting tentative map, an environmental impact report, and a second development agreement. Typically, the county would approve those items prior to, or at the same time as, the development agreement itself. Members of SMART, who were dissatisfied with the deal, jumped on the unusual process and sued, claiming that the county signed the DA too early. An appellate court, however, ruled that a development agreement was appropriate "as soon as the government and the developer are required to make significant financial and personnel commitments to a project." *Santa Margarita Area Residents Together (SMART) v. San Luis Obispo County Board of Supervisors*, 84 Cal. App. 4th 221.

The Santa Margarita Ranch DA was unusual in that it called for the developer to follow up with a specific plan, a vesting tentative map, an environmental impact report, and a second development agreement.

More importantly, the court rejected a second argument from SMART—that the county had improperly surrendered its police power by signing a DA that froze the zoning for a prescribed period of time. The argument over the surrendering of police powers was one that development opponents elsewhere had tried before in court. But the appellate court in the Santa Margarita Ranch case ruled that the DA—as well as the development agreement statute—did not conflict with the county's regulatory responsibilities. "This type of action by the county is more accurately described as a legitimate exercise of governmental police power in the public interest than as a surrender of police power to a special interest," the court ruled.

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Problems With Development Agreements

Despite their popularity throughout the state, development agreements do raise three significant issues. First, the negotiations between the local government and developer may unfairly lock out citizen groups—or may even constitute an attempt to circumvent their efforts. Second, in many cases, renegotiation may be necessary,

but both developers and local officials are often afraid to try it for fear that they will lose more than they gain. And, third, some cities have become known for using DAs to strong-arm developers.

Development agreements in Orange and Riverside Counties raised questions about citizen participation. In both counties, slow-growthers placed growth-control initiatives on the ballot in 1988, causing the boards of supervisors to rush through DAs prior to the election. The result was quick approval—and vested rights—for 60,000 units in Orange County and about 100,000 units in Riverside County. Many of these projects had already received all other governmental approvals. Some were partially built. On other projects, the counties were able to exact additional concessions from developers in exchange for the DAs. Nevertheless, the projects protected by DAs are immune from any future growth measure or change in political sentiment.

The second question, regarding renegotiation, naturally did not arise until after development agreements had been around. The law's drafters did not really contemplate renegotiation, although they did specify that DA amendments should be subject to the same notice-and-public-hearing process as the original agreement.

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But renegotiation, which is common in long-term private real estate contracts, seems inevitable in the case of 15- to 30-year development agreements. For developers, market and financial circumstances change; for cities and counties, the political climate might change, as might the cost of public facilities required to service a project. And, recognizing a DA's vested rights as currency, many developers sell the projects before they are built—bringing in new owners who may want to change things around. A few cities have responded by building a process for renegotiation into the original agreement.

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The third issue—strong-arm tactics—rose to prominence during the real estate boom that started during the late 1990s. Cities in which developers badly want to build essentially give developers two options: accept a development agreement or go through the "normal" process. If the developer goes the DA route, he is much more likely to win approval for the project, but at the price of big fees or extraordinary dedications of land for public purposes. If a developer opts against a DA, he might get a cool reception at City Hall and find himself bogged down in a bureaucratic and uncertain process. In other words, city officials know they are in the driver's seat. Developers eager to build expensive houses while the market

is hot have little choice but to accept the conditions and exactions that the city includes in a DA. If a town has a slow-growth reputation, the city's position at the bargaining table only strengthens.

Although developers and building industry leaders seethe over some cities' strong-arm approach to DAs, developers have been unwilling to challenge the cities publicly or in court. Because development agreement haggling typically occurs behind the scenes and with an incomplete paper trail, city officials may easily disavow any allegations of extortion. They were simply watching out for the best interest of their constituents! Even if a developer were to win a lawsuit, the victory could take years to achieve; meanwhile, the real estate market might have changed drastically, making the victory a hollow one.

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