Value Capture:

Development Agreements and Other Contract-Based Value Capture Techniques—A Primer



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FOREWORD

State and local governments often struggle to mobilize the necessary funds to maintain, rebuild, and expand their local transportation networks. Planned projects often face funding hurdles that may result in projects being delayed or cancelled altogether leaving important safety and mobility objectives unmet.

Derived from real estate developments, value capture refers to a set of techniques that allow monetizing the appreciation in real property values triggered by infrastructure improvements. Such monetization enables generation of future revenues that can be leveraged up front to help finance current or future infrastructure improvements. Under the right circumstances, this may allow practitioners to help close funding gaps and accelerate project delivery, as well as trigger much-needed economic development/redevelopment to promote livability, create jobs, and improve environmental conditions.

Contract-based value capture techniques (the subject of this Primer)—such as development agreements (DAs), community benefits agreements (CBAs), joint development agreements (JDAs), and right-of-way (ROWs) use agreements—are among the most evolved value capture techniques available today. Relative to other techniques, they provide more flexible and less litigious means to generating new revenues to finance infrastructure improvements.

This primer was developed on behalf of the FHWA Every Day Counts (EDC-5) Value Capture Implementation Team and is based on literature reviews, interviews, case studies, and lessons learned from practicing agencies. The primer introduces the concept of contract-based value capture techniques and how they can provide a gap funding source to help maintain and improve road networks and other critical infrastructure needs. Several cases within the primer illustrate how public agencies have approached instituting and managing DAs, CBAs, JDAs, and other contract-based value capture techniques.

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LIST OF ACRONYMS AND ABBREVIATIONS

ACORN	Association of Community Organization for Reform Now (Colorado)
AC Transit	Alameda-Contra Costa Transit District (California)
APM	automated people mover system
AP P3	availability payment-based P3
BBO	buy-build-operate
BLO	build-lease-operate
BOO	build-own-operate
BOT	build-operate-transfer
BTO	build-transfer-operate
CBA	Community Benefits Agreement
CC&R	covenants, conditions, and restrictions
CDA	Comprehensive Development Agreement
CDLA	Colorado Department of Local Affairs
CFD	community facilities district
CRD	Campaign for Responsible Development
CS	community signatory
CTA	Chicago Transit Authority
DA	Development Agreement
D-B-B	design-bid-build
DOT	Department of Transportation
EIR/EIS	Environmental Impact Report/Environmental Impact Statement
ENA	exclusive negotiation agreement
FAA	Federal Aviation Administration
FRESC	Forest and Rangeland Ecosystem Science Center
FTA	Federal Transit Administration
GHG	greenhouse gas
GP	General Plan
GPS	global positioning system
HART	Hillsborough Area Regional Transit (Florida)
HYIC	Hudson Yards Infrastructure Corporation (New York)

IHO	Inclusionary Housing Ordinance
ITS	intelligent transportation system
JDA	Joint Development Agreement
LAANE	Los Angeles Alliance for New Economy
LACMTA	Los Angeles County Metropolitan Transportation Authority (LA Metro)
LASED	Los Angeles Stadium and Entertainment District
LAWA	Los Angeles World Airports
LAX	Los Angeles International Airport
MARTA	Metropolitan Atlanta Rapid Transit Authority
MassDOT	Massachusetts Department of Transportation
MBE/WBE	minority-owned business enterprise/women-owned business enterprise
MBTA	Massachusetts Bay Transportation Authority
MSRC	Municipal Research and Service Center (Washington)
MTA	Metropolitan Transportation Authority (New York)
MTRC	Mass Transit Rail Corporation (Hong Kong)
NBDG	New Balance Development Group
NYC	New York City
OED	Office of Economic Development
OJT	on-the-job training
O&M	operations and maintenance
OMB&ED	Office of Minority Business & Economic Development (U.S. Department of Energy)
P3	Public-private partnership
PPA	power purchase agreement
RFI/RFQ/RFP	request for information/qualifications/proposal
ROW	right of way
RR P3	revenue-risk P3
SAD	special assessment district
SAJE	Strategic Action for a Just Economy (California)
SDOT	State Department of Transportation
SEPTA	Southeastern Pennsylvania Transportation Authority
SP	Specific Plan

STAND-UP	Strategic Alliance for New Directions and Unified Policies (Georgia)
TAD	Tax Allocation District
TBD	to be determined
TDR	transfer of development right
TIF	tax increment financing
TOD	transit-oriented development
TPLC	The Public Law Center (Tulane University)
TRCP	Transit Research Cooperative Program
VC	value capture
VCAB	Voluntary Cleanup Advisory Board

EXECUTIVE SUMMARY

Contract-based value capture (VC) techniques—such as development agreement (DA), community benefits agreement (CBA), and joint development agreement (JDA)—are among the most evolved VC techniques available today. They provide more flexible and less litigious solutions to generating new revenues. They also offer an effective means to implement integrated VC strategy by enabling multiple VC techniques to be engaged over the project lifecycle. This helps to spread out both the VC benefits and costs as equitably and as widely as possible across the key VC stakeholders involved.

This Primer provides practical information for implementing DA, CBA, JDA, and other contract-based VC techniques (such as public right of way [ROW] use agreements). It includes overviews of these techniques, processes involved in implementing them, their role in key VC opportunities and challenges, as well as real-world case examples of when and how best they can be used.

Chapter 1: DA Relative to Other VC Techniques and as Distinct From P3 CDA

Developer-based VC is the third-most prevalent technique category after tax increment financing (TIF) (based on existing *ad valorem* tax base) and special assessment districts (SAD) financing (based on new *non ad valorem* tax surcharge). Relative to TIF and SAD, however, value capture from developer-based techniques can be more challenging and uncertain because (1) it is often contested, especially when involuntary, and (2) depending on the local economic conditions and political climate, local governments often settle for incremental tax revenues anticipated from the development projects and not seek any additional exactions from the developers. Because developer exactions are often contested, court rulings have established the need for two basic tests before exactions can be imposed: (1) *essential nexus test* to establish a direct cause-effect relationship between the proposed project and the exaction imposed, and (2) *rough proportionality test* to establish the exaction amount is roughly proportional to the impact created by the project.

Most evolved among the developer-based VC techniques is the **development agreement (DA)**. It is a voluntary, but legally binding, contract between one or more developers and a local government. In a DA, developers provide upfront contributions for public improvements and, in exchange, the local government grants them the vested development rights, where local zoning and land use entitlements that apply to developers' projects remain unchanged for the duration of the contract. By locking the entitlements for a longer period than otherwise possible, DAs make it easier for developers to secure the upfront financing and protect their investments from potential cancellation in project mid-stream. DAs are also generally exempt from the essential nexus and rough proportionality tests and allow local governments to negotiate larger concessions from developers that exceed what they would have obtained otherwise.

For transportation infrastructure, DA in the context of value capture should not be confused with **"comprehensive development agreement" (CDA)**, a term often used to refer to a public-private partnership (P3) concession agreement. DA as covered in this Primer is between the local government and real estate developer(s) and solely addresses the "revenue" side of the public improvements needed to support the development projects. P3 CDA, on the other hand, is between the local government and a private concessionaire based on whole-life performance-based capital project delivery plans. These plans come with a private sector project financing package over the project lifecycle.

Chapter 2: Detailed Primer on DA

The most important legal aspect of a DA is a “vested right,” which is the property owner’s irrevocable right to develop his or her property that cannot be changed by future growth restrictions or other regulatory reversals. In exchange for large-scale public benefit provisions, DAs make it easier for developers to obtain the vested rights that reduce developer risk and increase investor/lender confidence. In general, DAs adhere to all State and Federal environmental requirements and conform to local general plans (GP). They are often processed concurrently with GP amendments and accompanied by specific plans (SP) that establish a special set of development and zoning standards for the project. From the local government perspective, DAs can (1) facilitate the general planning process to help achieve long-range planning goals, (2) help to secure commitments for public improvements, (3) provide public benefits not otherwise obtainable under the regulatory takings doctrine, and (4) help to avoid administrative and litigation expenses. In contrast, the popularity of DAs in the developer community suggests that developers value the certainty afforded by vested rights highly and are willing to pay a high price to acquire this certainty.

Although they vary from project to project, the key DA provisions typically include:

- Permitted uses of the property
- Density or intensity of use
- Maximum height and size of proposed buildings
- Provisions for reservation or dedication of land for public purposes
- Terms and conditions relating to financing of necessary public improvements, as well as provisions for subsequent reimbursement for that financing, as appropriate
- Timeframes for commencement and completion of construction, or any phases thereof
- Subsequent discretionary approval provisions, as needed, that do not prevent development of the project as described in the DA
- The duration of the DA

During the DA negotiation and implementation phase, it is important for local planning staff to work closely with their land use attorney to answer key questions on (1) the purpose of the DA, (2) whether the benefits to the community are balanced with those to the developer, (3) whether the requirements are consistent for similar developments, (4) the specific people to be involved in the DA process, and (5) how DA would be maintained throughout the life of the agreement.

In general, the **key DA implementation step**s would include:

- Establishment of the DA Purpose/Findings
- Application Process
- Public Hearing and Notice Process
- Decision-Maker Input and Review Process
- Recordation and Other Post-Approval Steps

- Amendment and Termination Process
- DA Accountability and Periodic Review

DAs have **three defining characteristics**: (1) They allow greater latitude than other methods of approval to advance local land use policies in sometimes new and creative ways, (2) they allow public agencies greater flexibility in imposing conditions and requirements on proposed projects, and (3) they afford project proponents greater assurance that once approved, their projects will be built. Although these characteristics can be advantageous and offer significant VC **opportunities**, they can also present important **challenges**. In advancing local land use policies, while DAs provide ability to better implement innovative planning policies, they can also promote bad planning. In imposing greater developer requirements for public benefit, while DAs make it easier to circumvent particularly restrictive legal constraints, they can also create unrealistic expectations to make the project infeasible. Finally, in ensuring that the project will be built once approved, DAs offer fewer surprises after the project approval, which can also result in the relinquishing of the local agency's regulatory control when needed or limiting developers' options if there are significant market shifts.

DAs have a **wide range of applications** in terms of project type, size, location, and the extent to which public improvements are covered. Because DAs can be used to advance overall land use planning policies, they can be most effective for large-scale master planned level development projects involving multiple developers and implemented in multiple phases over a long time. As such, DAs have been particularly popular in rapidly growing areas where significant changes in land uses have taken place. Especially for large projects requiring significant infrastructure improvements, DAs are now used not only to obtain developer exactions but also as a means to engage other VC techniques (such as TIF and SAD) to ensure future funding sources are clearly delineated at the project outset (case example: the City of Inglewood and Hollywood Parkland Co.).

In most cases, DAs are driven by major real estate development projects initiated by developers and include provisions for additional infrastructure capacity needed for their projects. These provisions could include (for both capital and operations and maintenance spending), for example, new access roads, street widening and other improvements, intelligent transportation systems (ITS) at intersections, and other public services (e.g., fire, police, traffic, telecommunication). In terms of direct linkage to core transportation projects, DAs can be a useful technique in capturing and monetizing anticipated property value increases from new developments along planned major highway or transit corridors.

Chapters 3 and 4: Detailed Primer on CBA, JBA, and Other Contract-Based VC Techniques

In addition to the DA, the **community benefits agreement (CBA)** is the second contract-based VC technique whose use has proliferated significantly in recent years. Introduced in the late 1990s, CBA is a voluntary contract negotiated between local community groups and developers, where developers provide certain community benefits in exchange for the community's support for the proposed project. DAs and CBAs are often used in conjunction to increase both the DA's overall transparency and the CBA's enforceability. When combined, they can also make it easier for developers to secure the upfront project financing because they help reduce the possibility that the project may be denied altogether.

In negotiating a CBA, the three most critical issues that need to be addressed are (1) the legal entity that is representing the community coalition, (2) the specific benefits the community receives, and (3) the enforcement and monitoring mechanisms for CBA commitments. In particular, the CBA community benefits in the past have variously included:

- Affordable housing for both rental and ownership
- Local hiring for both construction and non-construction jobs, including first source hiring
- Living wages and right to organize
- Job training, both for pre-apprenticeship and on-the-job training (OJT)
- Local business support
- Open space and parks
- Community facilities and services (e.g., youth centers, health clinics, child care centers, community centers, senior centers, recreational facilities)
- Education partnership between developers and community schools (e.g., construction of new schools, scholarship program)
- Community inputs in environmental, design, and other project-related issues
- Neighborhood parking for existing residents
- Other miscellaneous (e.g., priority access to project facilities such as athletic facilities)

In general, it has been found that the real bottom line for CBAs lies in their unintended effect of coalescing marginalized communities to influence policies and resources beyond those tied directly to development projects. An effective CBA is grounded in four core principles:

- Representativeness—The CBA is negotiated by a coalition that effectively represents the interests of the impacted community.
- Transparency/Inclusivity—The CBA process is transparent, inclusive, and accessible to the community.
- Community Benefits—CBA terms provide specific, concrete, meaningful benefits, and deliver what the community needs.
- Accountability—The CBA has clearly defined, formal means by which the community can hold the developer (and other parties) accountable to their obligations.

There are numerous examples of CBAs, most of which are linked to major real estate development projects. Relatively speaking, CBAs associated with dedicated transportation projects are less common. This Primer presents three CBA case examples: two based on transit-oriented developments (TODs) (linked to Denver light rail and Atlanta BeltLine) and one based on an airport (Los Angeles International Airport).

Joint development agreements (JDA) are the third common contract-based VC technique where local government agencies directly partake in the development projects alongside developers by committing public assets in one form or another. In addition to publicly owned land and rights-of-way (ROWs), public assets can include development rights above, below, or adjacent to public ROWs (e.g., air rights above railroad tracks/stations or expressway turnpikes). Public assets are generally committed to private development projects in exchange for various revenue sharing arrangements and other public benefits such as improved transit access.

As an international example, JDA has been used most successfully in Hong Kong as part of building the public rail transit system. In the United States, transit-related use of JDA has been more limited in comparison.[1] A few notable examples include joint developments by Los Angeles County Metropolitan Transportation Authority (LACMTA) and in-fill station joint developments linked to corporate headquarters by MassDOT and MARTA. More common in the United States is the commitment of public rights as part of a JDA—the best-known large-scale case example being Hudson Yards developments in New York City, New York.

Other contract-based VC techniques include various use agreements for public assets. These use arrangements can be a subset of a larger JDA (most of which pertain to air rights) or they can represent separate stand-alone agreements. Stand-alone use agreements can take various forms and involve a wide variety of public assets, which could range from naming rights, advertising, and corporate sponsorships to more complex third-party franchise agreements (e.g., renewable energy assets on public real estate with various energy and revenue sharing arrangements).

Chapter 5: Integrated VC Strategy Through Contract-Based Techniques

In general, it would be helpful to establish an integrated VC policy framework at the outset, which is designed to both help pay for major infrastructure projects directly and continue to support major real-estate development projects that require additional public improvement capacity. Such a policy framework would be multi-layered and risk-adjusted with the goal of ensuring that both benefits and costs linked to VC implementations are equitably distributed across key VC stakeholders. It would also help ensure transparency and accountability from the project outset to help local governments best manage VC stakeholder expectations.

Once the integrated policy framework is in place, contract-based vehicles such as DAs and JDAs can serve to implement integrated VC strategies for different projects. At a single project level, DAs can help engage multiple VC techniques (both developer-based and publicly sponsored) to ensure sufficient funding is available throughout the project lifecycle. DAs (together with JDAs) can also be very effective in multiple project context (e.g., when there is strong co-dependency between large scale real-estate development and core transportation corridor projects). By casting as wide a net as possible for VC opportunity areas, sufficient new funding sources can be generated to support both the real estate and core infrastructure projects. Ultimately, having the integrated VC policy framework would facilitate the development of lifecycle VC strategies at project levels and streamline the VC implementation process.

[1] For public transit-related joint developments in the United States, guidance developed by the Federal Transit Administration (FTA) is available at: https://www.transit.dot.gov/sites/fta.dot.gov/files/2020-08/Joint-Development-Circular-C-7050-1B.pdf.

Concluding Remarks

As the examples in this Primer illustrate, an effective VC strategy is ultimately about starting early when there is a general recognition of a project's potential value and before it is given away without a full assessment of its monetization potential based on benefits and costs to each major stakeholder involved. At a strategic level over the long run, the basic VC approach could be multi-layered, starting with those techniques that have the least new impact on stakeholders (real or perceived) (e.g., TIF with no new taxes) and proceeding with those involving new charges (e.g., SAD and, as needed, developer exactions) in a manner that is phased and risk-adjusted so that the stakeholders can bear the VC financial burden when best able.

Contract-based VC models—such as DA, CBA and JDA—are among the most evolved VC techniques available today, providing more flexible and less litigious solutions to generating new revenues. They offer an effective means to implement integrated VC strategies by enabling multiple VC techniques to be engaged over the project lifecycle to spread out both the VC benefits and costs as equitably and as widely as possible for the key stakeholders involved.

1. BACKGROUND AND INTRODUCTION

1.1 Developer-Based Value Capture and Development Agreement

In the overall value capture (VC) typology, developer-based VC techniques represent one of the most prevalent VC categories, which are based on various forms of exactions or contributions directly involving the developer community. Other more prevalent VC categories are (1) tax increment financing (TIF) (based on existing ad valorem tax involving general taxpayers with no new taxes) and (2) special assessment district (SAD) financing (based on new non-ad valorem tax assessments involving property/business owners and tenants).

Several developer-based VC techniques are considered—either voluntary contributions (e.g., land dedication, in-kind facility or service) or involuntary exactions (e.g., impact or linkage fees). There are others that are based on regulatory incentives designed to help induce developer exactions (e.g., density bonus, transfer of development right or TDR). Relative to TIF and SAD, value capture from developer-based techniques can be more challenging and uncertain because (1) it is often contested, especially when involuntary, and (2) depending on the local economic conditions and political climate, local governments may choose to settle only for incremental tax revenues anticipated from the development projects (i.e., sales, transient occupancy, and/or property tax) and not seek any additional exactions from the developers.

In general, developer-based VC techniques are directly or indirectly linked to development rights and land use entitlements. The potential magnitude of VC revenues can thus vary significantly depending on local economic conditions and the specific properties under consideration. For example, in rural growth-hungry areas, the potential for developer exactions is often minimal, whereas, in fast-growing, high-demand areas, it can be very high.[2] Because the primary financial burden falls on developers (and their landowner partners), depending on the prevailing real estate market condition, developers normally pass on some or all of their VC financial burden to the ultimate property owners (buyers) or tenants if the projects can be completed.

The legal and constitutional basis for exactions is found in local governments' exercise of their police power that permits restrictions on private activities in order to protect public health, safety, and welfare. When properly applied, exactions are considered to engender a legitimate public interest. Although not mandated by law to the extent that property taxes and special assessments are, most developer exactions are generally construed as involuntary and mandated.

Historically, exactions have faced constitutional challenges in that they constitute a taking of property without just compensation, which may occur:

- When government physically takes a property under eminent domain, or
- When "regulatory taking" takes place (e.g., when government imposes regulations such as zoning) that limit the owner's use of that property, or exactions or fees on a specific group to pay for improvements that benefit not only the group but also the public at large.

[2] For example, the City of San Francisco was able to capture close to $250 million in VC revenues from developer impact fees alone in FY2015–2016 (Germán and Bernstein 2020).

Because developer exactions are often contested, local governments' ability to collect them can sometimes be challenging. Through three landmark cases,[3] court rulings have thus established the need for two basic tests before exactions can be imposed:

- **Essential Nexus Test**: the need to establish a direct cause-effect relationship between the proposed project and the exaction imposed; and
- **Rough Proportionality Test**: the need for the exaction amount to be roughly proportional to the impact created by the project.

To impose developer impact fees, therefore, local governments often commission nexus and fee studies to satisfy these tests and establish a quantitative and legal basis for the fees. In some cases, to avoid legal disputes, local governments can also choose to offer a compromise by creating new special assessment districts to generate additional revenues to supplement developer exactions to help pay for the necessary public improvements.

Most evolved among the developer-based VC techniques is the development agreement (DA). The DA is a technique based on a negotiated contract that provides a more flexible and less litigious solution to involuntary exactions. First introduced in California in the 1970s, the DA is a voluntary, but legally binding, contract between one or more developers and a local government (Barclay and Gray 2020). In a DA, developers provide upfront contributions for public improvements and other public benefits and, in exchange, the local government grants them the vested development rights in which local zoning and land use entitlements that apply to developers' projects remain unchanged for the duration of the contract.

By locking the entitlements for a longer period than otherwise possible, DAs make it easier for developers to secure the upfront financing and protect their investments from the risk of project cancellation in the mid-stream. DAs are also generally exempt from the essential nexus and rough proportionality tests and allow local governments to negotiate larger concessions from developers that exceed what they would have obtained otherwise.

Because of their potentially significant benefits, the use of DAs has been increasing significantly in recent years. This Primer provides information and practical details on what a DA is, its background and history, basic processes needed for its implementation, and representative case examples. While highlighting the key advantages compared to other developer-based VC techniques, this Primer also addresses some of DA's emerging challenges even as its uses are gaining ground.

1.2 Other Contract-Based Value Capture Techniques

In addition to the DA, this Primer covers other contract-based VC techniques; most notably community benefits agreements (CBAs). Introduced in the late 1990s, CBAs are other contract-based VC techniques that are voluntary and negotiated between local community groups and developers, which can be initiated by either or both parties. Under CBA, developers provide certain social amenities (e.g., local and minority hiring goals, funding for community centers, affordable housing provisions) that benefit the local communities in exchange for their support for the proposed project.

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[3] The three landmark cases, often referred to as Nollan/Dolan and Koontz, that resulted in the need for the two basic tests are (1) *Nollan v. California Coastal Commission* (1987), (2) *Dolan v. City of Tigard* (1994), and (3) *Koontz v. St. John River Management District* (2013) (Barclay and Gray 2020).

DAs and CBAs are often used in conjunction with each other to increase both the DA's overall transparency and the CBA's enforceability. Along with DAs, CBAs can also make it easier for developers to secure their financing because CBAs in essence help reduce the possibility that the project may not be approved due to lack of local support. CBAs may also be helpful in obtaining government grants and support.

Joint development agreement (JDA) is another common form of contract-based VC techniques. JDAs are an arrangement in which local government is directly involved in the private developer's development project. This is different from DA, which deals with the need for the public improvement necessitated by private development projects. In JDAs, local agencies often commit development rights above, below, or adjacent to public rights-of-way (ROWs) (e.g., air rights above railroad tracks/stations or expressway turnpikes) as an integral part of the development project in exchange for various cost and/or revenue sharing arrangements.

Finally, there are various use agreements for public assets, public ROWs, as well as development rights above, below, or adjacent to public ROWs. These use arrangements can be a subset of a larger JDA, as mentioned above, or they can constitute a separate stand-alone agreement. Stand-alone use agreements can take various forms and involve a wide variety of public assets. They can range from relatively simple naming rights on a public building or advertising rights in various public spaces to more complex third-party franchise agreements involving, for example, solar panel installations on public real estate with various energy and revenue sharing arrangements.

This Primer also provides practical information about CBA, JDA, and public asset use agreements. In addition to detailed overviews of these techniques, this Primer presents their effectiveness in providing key VC opportunities and challenges as well as real-world case examples of when and how best they can be used.

1.3 Further Defining "Development Agreement" as Used in This Primer

In real estate, four common categories of "development agreements" (as used generically) involve developers and local governments driven by developer projects. These are (1) public improvement development agreements concerning provisions of infrastructure, public spaces, and amenities linked to the development project; (2) disposition development agreements involving the sale of public-owned land to the developer; (3) lease disposition development agreements involving the lease of public-owned land or property to the developer; and (4) owner participation development agreements (private) that allow development of property owned by an entity other than the local government, generally the property owner and/or developer. This Primer is focused primarily on (1) above.

More important distinction when dealing with transportation infrastructure, however, is between the term "Development Agreement" in the context of value capture from the term "Comprehensive Development Agreement" in a capital project delivery context—especially as it pertains to public-private partnership (P3) project delivery models.

“Development agreement” (DA) in a value capture context is about identifying revenue funding sources for necessary public improvements[4] linked to major development projects. DA is between the local government and real estate developer(s) responsible for the development projects. From a financial perspective, a DA solely addresses the “revenue” side of the public improvements, not the method used to deliver the improvements.

In contrast, the basic contract underlying a P3 delivery model is a long-term concession agreement between a private “concessionaire” (also referred to as the project proponent or project “developer”) and a public sponsor. Such a concession agreement is often labelled as “Comprehensive Development Agreement (CDA).” CDAs are based on whole-life, performance-based capital project delivery plans. These plans come with a private sector project financing package over the project lifecycle. CDA is not directly related to value capture and thus is not covered in detail this Primer. Value capture DA (as separate and distinct from P3 project delivery CDA), however, can play a role in increasing the financial viability of P3 projects.

In general, securing P3 project financing upfront by the private sector is based on reasonable assumptions about an anticipated future funding (i.e., revenue) stream. Typically, P3 is delivered using either revenue-risk (RR) (also referred to as demand-risk) P3 model or availability payment (AP) P3 model (see Table 1). Under RR P3, most of the anticipated funding (revenue) generally comes from third-party user charges with the private sector taking on the revenue (or demand) risk. Under AP P3, the more prevalent of the two models, the anticipated funding (revenue) comes from the public sponsor where the private sector is paid pre-established annual payments (albeit contingent on performance) for the life of the contract, in part for securing the upfront financing. In short, under AP P3, the long-term P3 financial liability lies on the public sponsor’s shoulders.

Table 1. Revenue Sources and Risks for Two Prevalent P3 Models

Parameter	P3 Model	
	Revenue-Risk (RR) P3	**Availability Payment (AP) P3**
Primary Revenue Source	User Charges	Annual Payments from Public Sponsor
Type of Risk	User Demand (i.e., Revenues from Users)	Public Sponsor Fiscal Status
Risk Bearer	P3 Private Concessionaire	Public Sponsor

When a P3 project is based on the AP P3 model with a significant real estate development component (within its scope or with direct benefits to adjacent major development project(s) outside its scope), having a separate VC-based DA in place can contribute to the P3 success. This is especially true if the DA is able to establish an integrated value capture strategy and identify clear additional future revenue streams for the public sponsor.

[4] As will be further explained later, public improvements included in a DA are primarily infrastructure but can also include other public benefits, such as open space and social programs.

1.4 Organization of This Primer

This Primer is organized as follows. Chapter 2 provides a detailed overview of DA, its basic components and implementing processes, its opportunities and limitations as an effective VC technique, and relevant case examples. The subsequent two chapters cover the other contract-based VC techniques—CBA (Chapter 3) and JDA and Use Agreements (Chapter 4)—each with an overview and background of the technique, key implementation issues, opportunities and limitations associated with each technique, and representative case examples. Chapter 5 presents how a contract-based vehicle such as a DA or JDA can be used as a basis for developing an integrated VC strategy (i.e., phased and risk-adjusted involving multiple VC techniques) to allocate both VC-related benefits and costs equitably across multiple stakeholders. Finally, sample agreements representing each contract-based technique are provided in the appendices at the end of this Primer.

2. DEVELOPMENT AGREEMENT

2.1 Development Agreement Definition and History

There are currently two relatively new but effective VC techniques in the United States that are based on negotiated contracts—development agreements (DA) and community benefits agreements (CBA)—that provide more flexible and less litigious means to VC when compared to other existing techniques. Each serves very different and specific needs for infrastructure funding. The recent proliferation of these techniques has occurred rather quickly and with little debate, in part due to their significant perceived benefits (Selmi 2011). This chapter discusses the DA and the next chapter (Chapter 3) explores the CBA.

A DA is a contract between a local jurisdiction (usually a city) and a property owner (usually a developer) (see Sidebar 2.1). The agreement sets the standards and conditions that govern the development of the property. It not only provides certainty to the developer that his or her project will be

Sidebar 2.1: DA Further Explained

"DAs are contracts negotiated between project proponents and public agencies that govern the land uses that may be allowed in a particular development 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,[5] and consistent with any applicable specific plan.

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

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

(Source: Larsen 2002)

[5] Also referred to as comprehensive plan or master plan.

isolated from changes in the jurisdiction's zoning laws over the course of development, but it also contracts the developer to provide benefits to the city, such as infrastructure improvements, public pen space, or monetary payment into funds, including "in lieu" fees (e.g., impact or linkage fees), in exchange for that certainty.

DAs are voluntary, negotiated, and provide legally binding assurances for both local governments and developers. As discussed later, many local governments and developers have used this technique to create win-win opportunities, especially when dealing with uncertainties in the regulatory environment. Through DA, the local government is afforded greater latitude in advancing local planning policies and greater flexibility in imposing conditions and requirements on the proposed development projects, while the developer is afforded greater assurance that once the project is approved, it can be built.

First introduced in California in the 1970s, DA was in part triggered by the new requirements for "vested rights" set by the *Avco* case. A vested right is the property owner's irrevocable right to develop his or her property that cannot be changed by future growth restrictions or other regulatory reversals. The California Supreme Court ruling in *Avco Community Developers v. South Coastal Regional Commission* (1976) resulted in more restrictive requirements for property owners, whereby vested rights are granted only after they obtain all building permits and make substantial investments on their development project. The *Avco* ruling left developers much more vulnerable to changes in requirements and other discretionary approvals. In an attempt to reduce the impact of *Avco*, the California legislature subsequently established *the Development Agreement Law* in 1979 (Government Code § 65864 et seq.) (Barclay and Gray 2020) (see Sidebar 2.2).[6]

In exchange for large-scale infrastructure provisions, DAs make it easier for developers to obtain vested rights that reduce developer risk and increase investor and creditor confidence. DAs must conform to local general plans and they are often processed concurrently with general plan amendments. They are also often accompanied by specific plans that establish a special set of development and zoning standards for the project. From the local government perspective, DAs can (1) facilitate the general planning process to help achieve long-range planning goals, (2) help secure commitments for infrastructure, (3) provide public benefits not otherwise obtainable under the regulatory takings doctrine, and (4) help avoid administrative and litigation expenses (Selmi 2011). In contrast, the popularity of DAs in the developer community suggest that developers highly value the certainty afforded by vested rights and are willing to pay a high price to acquire this certainty.

[6] Subject to general contract law, the use of DAs does not necessarily require State DA legislation. However, to fully capitalize on DAs' advantages, such as the exemptions from essential nexus/rough proportionality tests and vested rights, State DA legislation would be required.

2.2 Development Agreement Basic Elements

DAs are negotiated and, because each DA is unique and based on a particular development site and/or project, they vary widely in content and the specific terms negotiated. In general, DAs contain the following basic elements:

- **Recitals**: Statement of purpose (e.g., the intent of the DA, the authorization of the parties to enter into the agreement)
- **General Provisions**: Project description, use of the property, definitions of key terms, process for amending or terminating the agreement, and the relationship of the agreement to other local regulations pertaining to land use, zoning, etc.
- **Obligations**: Specific terms of the agreement and responsibilities of both local government and developers, including fiduciary responsibilities and the use of various VC techniques
- **Exhibits or Attachments**: Legal description of the property, any specific costs related to the obligations in the agreement, and other necessary supporting documents

A number of considerations would be taken into account when drafting a DA. For efficiency, a local agency might start with a standard agreement that has already been reviewed and approved by the agency's attorney. It is also helpful for the assigned DA negotiators to have reviewed:

- Current version of the State DA law (where established)

Sidebar 2.2: DA Legislative History—the *Avco* Case

Zoning ordinances can be changed at the will of the governing body, or by the people of the city through ballot initiatives. Thus, a project that was agreed upon and permitted one year could be required to dramatically change to meet legislation passed another year. "Vested rights" is a legal doctrine establishing when a project would be protected from further actions of the city government, such as changes in the zoning code. The issue is, of course, when does the vesting take place?

The Development Agreement Law was first enacted in 1979 in California, in response to the *Avco Community Developers, Inc. v. South Coast Regional Commission* decision (17 Cal. 3d 785, 1976). The Avco case involved a large development in Orange County, California, some of which was in the coastal zone. Under the California Coastal Act of 1976 (CA PRC Sec. 30000-30265.5), the developer had to obtain a permit from the Coastal Commission unless it had obtained a building permit. In this case, the developer had secured a final subdivision map and a grading permit, but did not have a building permit. The developer had already spent a great deal of money on the site.

The court ruled that the developer's project was indeed subject to the Coastal Act's additional requirements and restrictions, reaffirming the rule that property owners can acquire a vested right to complete construction only after they have performed substantial work and incurred substantial liabilities in good faith reliance on a permit issued by regulatory authorities. Only at that point can a project be completely free of new restrictions.

The result in *Avco* created great consternation in the development community, which lobbied the Legislature to create a mechanism that would allow developers to know earlier on in the process what requirements would apply to their projects. The Development Agreement Law is a result of this effort.

(Source: Barclay and Gray 2020)

- Planning policies for the project area in question, including applicable fees and environmental analyses
- Agency procedures for processing DAs

When drafting the agreement, these steps help those involved to think ahead about potential implementation issues that need to be negotiated to protect the public's interests. In the final analysis, a well-drafted DA would accurately capture the deal points negotiated by the parties, and anticipate and address potential problems that may arise during implementation of its terms.

Some of the key provisions to be covered in a DA include (see Sidebar 2.3 for additional details on key provisions and Appendix A for a sample DA template):

- Permitted uses of the property
- Density or intensity of use
- Maximum height and size of proposed buildings
- Provisions for reservation or dedication of land for public purposes
- Terms and conditions relating to financing of public improvements, as well as provisions for subsequent reimbursement for that financing, as appropriate (<u>Note</u>: In addition to developer exactions linked to the DA, the financing terms could include the use of local agency-initiated VC techniques, such as a special assessment district, to supplement the exactions)
- Timeframes for commencement and completion of construction, or any phases thereof
- Subsequent discretionary approval provisions, as needed, that do not prevent development of the project as described in the DA
- The duration of the DA

Sidebar 2.3: Key Provisions Covered in DAs

- **The Parties to the DA.** For a local agency, authorized persons whose participation is necessary to receive the benefit of the bargain. For developers, persons with a “legal or equitable interest” in the property in question, including lenders.
- **Use of Recitals.** Explanation for who the parties are, what the project is, that the project is consistent with the general plan and any applicable specific plan, and that the parties have complied with applicable environmental clearances. May also include other discretionary approvals and contingencies that could delay the effective date of the DA.
- **Term.** Effective duration of the DA (Note: The term may be one factor that the courts will evaluate if the DA is challenged. In the event of material breach, the parties are generally allowed to terminate the DA early. See further discussion concerning default, remedies, and termination below).
- **Required Contents.** Definition of “the development plan,” which includes (a) permitted uses of the property, (b) density or intensity of use, and (c) maximum height and size of proposed buildings. These can be general or specific depending on the goals of the parties. For example, permitted uses can be based on a general zoning category (e.g., retail commercial) or a specific site plan with every project details. Density/intensity can be a range (e.g., 6 to 10 units per acre) or specifically designated (two units per acre).
- **Public Benefits.** Provisions for reservation/dedication of land for a public purpose, terms/conditions for developer’s financing of necessary public facilities (and subsequent reimbursement for its non-pro rata share over time), and all other public benefits with the recognition that developer is being afforded greater latitude in exchange for providing greater public benefits, with full knowledge and consent, than could otherwise be required.
- **Addressing Potential Police Power Challenge.** Explanation for the extent to which the property will continue to be subject to the local agency’s zoning rules, regulations, and policies; explicitly reserves the agency’s police powers unto itself, except as otherwise provided in the DA.
- **Recovery of Costs.** Negotiating a DA can involve significant costs for the public agency in the form of staff time and legal fees. Some or all of those costs can be recovered either in the local procedures (as part of the cost of processing a DA) or as a term of the DA itself. If provided for in the agency’s local procedures, developer would not be assessed more than its actual costs. One way is to establish an hourly rate and record the staff’s time spent working on the project.
- **Which Regulations Are Frozen?** Specific provisions/language (1) to not apply rules or land use policies that would effectively nullify prior approvals, (2) that allow new rules in the future, as long as they are not in conflict with those that were in place when the DA was adopted, (3) that state then-existing zoning ordinance governs only to the extent it is not inconsistent with any provisions of the DA (allowing the ability to amend the zoning ordinance to be consistent with the DA), and (4) that specify the DA compliance is subject to later-enacted State and Federal regulations.
- **Milestone Requirements.** On larger, phased-in projects, “milestone” requirements allow the local agency the ability to terminate the DA if phases of construction have not been completed within a specified timeframe. The agency can make sure there are adequate incentives for the developer to stay on schedule so that the decision to begin the next phase is not left entirely to the developer’s discretion.
- **Default, Remedies, and Termination.** Provisions concerning default, available remedies, and termination in the event of a material breach, including specified time to “cure” the breach before termination and “force majeure” that preclude termination.
- **Non-Performance Issues**. Clauses limiting remedies against the agency to specific performance, including liquidated damages (to protect the upside risks), and assurances in case of defaults (e.g., letters of credit, performance bonds, and withholding of certain approvals).

Sidebar 2.3: Key Provisions Covered in DAs (cont.)

- **State and Federal Laws.** Provision specifying that State and Federal regulations are not suspended by a DA and if they are amended in a way that would preclude further performance under the DA, the affected provisions of the DA will be modified or suspended.
- **Annual Review.** Requirement for an annual review of the DA. It may be preferable to require the annual reviews in the local agency's procedures ordinance or by resolution rather than include them as part of DA contractual obligations.
- **Enforcement.** DA is enforceable notwithstanding any changes to the general plan, specific plan (if any), or the zoning, which alters or amends an ordinance, rule, regulation, or policy governing the zoning of the property during the term of the DA.
- **Recordation.** Requirement that the DA be recorded within pre-established timeframe following execution.
- **Certificate of Satisfaction.** Issuance of "certificates of satisfaction" from the local agency as phases of construction are completed and in full compliance with its obligations under the DA, which may be important to potential lenders.
- **Indemnification and Hold Harmless Provision.** Provision requiring the developer to indemnify and defend the local agency at his/her cost against any legal action instituted by a third party to challenges the validity of the DA, including those related to environmental compliance.
- **Amendment or Cancellation.** DA can be amended or canceled, in whole or in part, by the mutual consent of the parties upon notice of intent and adoption of an ordinance amending the DA. The ordinance must also be consistent with the general plan and any applicable specific plan, and is subject to referendum, just as the original ordinance adopting the DA was.
- **Assignment.** Neither party shall assign or transfer any of its rights, interests or obligations under the DA without the prior written consent of the other, which consent shall not be unreasonably withheld. Includes language that states subsequent purchasers automatically become parties to the DA upon transfer of ownership.
- **Successors.** Require as a condition of approval that the developer has homeowners (or property owner) associations governed by covenants, conditions, and restrictions (CC&Rs). The CC&Rs generally include the DA obligations so that the association, as well as individual property owners, is responsible for ensuring performance of the DA.
- **Validity of Portions of the DA Severability.** Provision stating that if one aspect of the DA is held by a court to be illegal, the validity of the remaining provisions is not affected.
- **Attorney Fees.** Provision stating that if a lawsuit or other legal action is brought with respect to the DA, the prevailing party is entitled to recoup from the other party reasonable attorney's fees and costs.
- **Good Faith and Fair Dealing.** Many DAs recite that the parties expressly acknowledge any actions they take pursuant to the DA will be measured by the "implied covenant of good faith and fair dealing."
- **Signatures and Subordination.** In addition to the property owner and public agency, local agency may require lenders, lessees and others with an interest in the property to sign the DA. Others may require lenders, lessees and other interested parties to sign subordination agreements, which make their interests in the property subject to the terms and conditions of the DA. At minimum, local agencies may want to require other interested parties to at least sign a written acknowledgment and consent, stating they are aware of the existence of the DA and that they understand its terms.

Source: Larsen, D. J. (2002). Development Agreement Manual: Collaboration in Pursuit of Community Interest. Institute for Local Self-Government, Sacramento, CA.

2.3 Development Agreement Implementation Process

From a local agency standpoint, the DA implementation process begins with the local agency's procedures for DAs.[7] A well-crafted set of DA procedures would provide a useful road map to local staff and others in shepherding a DA through the approval process. Such procedures would also be useful for considering any amendments to and termination of a DA. Important parts of the process would also include the notice and hearing process, as well as mechanisms for providing decision-maker input.

Once the procedures are in place and the parties enter into negotiations for a specific development project, the developer and the local government would both work with legal counsel to develop and execute a contract that binds all parties. During the negotiation of such an agreement, planning staff would work closely with their land use attorney, appointed and elected officials, and the public to answer the following key questions:

- What is the purpose of the DA? Crafting the purpose and goals will solidify why a DA is necessary and help articulate the expectations of both parties. This step would also act as a screening process for whether the purpose of the DA is consistent with a general plan or other policies generated by the local jurisdiction.
- Are the benefits to the community balanced with those to the developer? This details the benefits of the DA to health, safety, and welfare of the community.
- Will these requirements be consistent for similar developments? In addition to site-specific DA requirements, a local agency may choose to require the same standards for planned developments with similar conditions.
- Who will be involved in the DA process? Opportunities for public input and stakeholder feedback are often important components of a DA, which can help limit any negative response from the community.
- How will the DA be maintained throughout the life of the agreement? This describes the long-term costs and maintenance requirements for both the local agency and the developer, as well as monitoring procedures and processes for amending agreement terms in the future.

By preparing in advance a negotiating framework and adopting basic ground rules in how negotiations are conducted, the parties would be able to create a negotiating environment that increases the likelihood of reaching consensus. Each party should be clear on their and the other party's priority issues going into the negotiations so that each priority can be addressed early on. For local agencies, these priority issues often include:

- Land Use Issues. What regulations relating to density, design, uses, and construction standards is the agency willing to freeze in place at the time the DA is executed? On what issues does the agency wish to retain the flexibility to adapt its regulations to changing circumstances and new information?
- Exaction Issues. Which public improvements and facilities will be constructed, dedicated, or financed by the developer? On what schedule? Will there be a reimbursement provision if the developer fronts the financing for a facility?

[7] Although DAs become part of local ordinance once approved, DA implementation process and procedures, if established at all, are considered more as general guidelines rather than local regulations or ordinance.

- Other Potentially Relevant Issues. Beyond the public improvements directly linked to the project itself, what role will school facilities and affordable housing issues play?

Once the preparation is complete, the key DA implementation steps could include the following (see Sidebar 2.4 for more details):

- Establishment of the DA Purpose/Findings
- Application Process
- Public Hearing and Notice Process
- Decision-Maker Input and Review Process
- Recordation and Other Post-Approval Steps
- Amendment and Termination Process
- DA Accountability and Periodic Review

Sidebar 2.4: Key DA Implementation Steps

Establishing Purpose/Findings. A goal statement such as "to promote the community's needs and receive greater community benefits than otherwise can be achieved through the land use regulatory process" can be helpful in setting the tone for negotiations, so that both parties have realistic expectations going into the negotiations. Where available, reference to the DA statute can be helpful in this step.

Application Process. An application form specifying the type of information an agency needs to process the DA request ensures that the agency receives all the information it needs in a timely manner. Having a readily available form saves staff time in reviewing DAs. It also provides greater assurance that the agreement will cover all of the agency's needs, including all requirements pertaining to environmental analysis. Some agencies charge fees to process applications.

Public Hearing and Notices. The DA law, if established at the State level, may require a notification and public hearing by both the planning agency and by the local agency's governing body before a DA is approved.

- **Public Input (DA Negotiation)**—DAs may be subject to repeal by voter referendum before the final approval and there may also be statute of limitations to challenge the adoption (or amendments) of any DA approved.[8] In addressing the potential reversal, it helps to include stakeholders (e.g., community groups, business leaders and others interested in the community's development) in the DA process on a "meet and confer" basis as negotiations proceed. The process of negotiating a DA 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. Meeting with stakeholders ahead of time to discuss possible actions allows legitimate issues to be aired before serious negotiations begin. When there are competing proposals from different developers, while the need for confidentiality makes it more difficult to include stakeholders, their participation in the DA process without sharing every detail enables the local agency to be on a firmer community relations footing when it comes to approving the DA.

[8] In California, for example, DAs are subject to voter referenda where voters must file their opposition within 30 days after the local agency's approval of the DA (prior to the final adoption) in order to put the DA approval issue on the ballot. Once the 30-day period is over, the developer can safely assume that the project will not be affected by any future ballot measures. The adoption of a DA can also be challenged in California but the challenge must be within 90 days of the adoption.

Sidebar 2.4: Key DA Implementation Steps (cont.)

- **Public Hearing (DA Approval)**—In general, the DA law specifies what kind of public hearings and notice must be given for approving DAs. Hearings are typically held by the local planning agency and its governing body subject to the State's open meetings laws, 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 DA. Members of the public are also entitled to request copies of all documents included in the agenda packet.
- **Notices**—The DA law may also provide notice requirements for hearings related to the potential adoption of a DA. The notice is typically the same as that required under the planning and zoning law for Plans (e.g., at least one general circulation newspaper), Projects (e.g., mailed notice to affected local service/facility providers), and Neighboring Property Owners (e.g., within 300 feet) and must contain (a) date, time, and place of the hearing, (b) identity of the hearing body, (c) general explanation of the matter at hand (i.e., the DA), and (d) general description of the location of the property that is the subject of the DA and hence the hearing.
- **Decision-Maker Input and Review**. DA implementation procedures present an opportunity for the local legislative body to ask the planning commission to make a recommendation on whether to approve the agreement and weigh in on proposed findings.
- ***Involving Planning Commission Early On***—When DAs are negotiated by staff, planning commissioners may feel they have been "left out of the loop," especially if the legislative body is the only one receiving updates as negotiations proceed. One approach to informing the planning commission early on is to schedule the project for discussion at a regular planning commission meeting from the start of negotiations. Another approach is to convene a subcommittee of the planning commission as an adjunct to the negotiation process.
- ***Planning Commission Input and Findings***—The planning commission's input can be obtained on the DA prior to approval and also on the findings accompanying any approval. The findings can include whether the DA (a) is consistent with the overall general/specific plan policy goals and zoning regulations; (b) promotes the public health, safety, and general welfare; (c) is just, reasonable, fair and equitable; (d) has a positive effect on the orderly development of property or the preservation of neighboring property values; and (e) provides sufficient benefit to the community to justify entering into the agreement
- ***Legislative Body Action on the DA***—Well-articulated planning policies and objectives would increase the likelihood that the staff's and planning commission's input to the DA negotiation process produces a satisfactory agreement for the legislative (government) body. Well-conceived and up-to-date planning policies also avoid the prospect of asking staff to negotiate in a vacuum, minimizing the likelihood of having to renegotiate the agreement. The final approval of the DA would come from the action of the governing body, either by resolution or ordinance.

Recordation and Other Post-Approval Steps. After a DA is approved, the clerk of the governing body must (a) record a copy of the DA within a pre-established time period (e.g., 10 days in California) from the entity's entry into the agreement, along with a description of the land subject to the DA, and (b) publish the ordinance approving the DA. Failure to satisfy the publication requirement in a timely manner prevents the ordinance from taking effect or being valid.

Amending the DA. After a DA has been signed, it may be amended only by mutual agreement of parties. Most DA procedures require amendments that are initiated by the developer to follow the same process as the initial application. For local agency-initiated amendments, the procedures usually require notice to the developer and provision of information about the process that the agency will employ.

Sidebar 2.4: Key DA Implementation Steps (cont.)

DA Accountability. In California, the DA law requires local agencies to include at least an annual review of the developer's compliance with the delineated responsibilities. The review must require the developer to demonstrate good faith compliance with the terms of the DA. If a local agency finds, based on substantial evidence, that such compliance has not occurred, the agency may modify or terminate the DA. In addition, the DA law provides that the DA is "enforceable by any party." A DA typically contains provisions specifying procedures for notice and termination in the event of a default by either party.

Source: Larsen, D. J. (2002). Development Agreement Manual: Collaboration in Pursuit of Community Interest. Institute for Local Self-Government, Sacramento, CA.

2.4 Development Agreement Opportunities and Limitations

Despite DAs' significant benefits, some developers avoid using them because of the potential for expensive project requirements, whereas some local agencies avoid them because of the limitations that they impose on their ability to respond to a changing regulatory environment. Nevertheless, the latitude afforded by DAs to advance local agencies' planning objectives—sometimes in new and innovative ways, as mentioned, as well as lowering developer risks and enhancing predictability—makes the DA a useful and viable technique in service to the community, including finding critical funding sources for much needed public improvements. For both parties, DAs 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 DA in each specific circumstance (see Sidebar 2.5).

Sidebar 2.5: DA General Advantages and Disadvantages

DAs allow communities a degree of flexibility not otherwise available under existing local zoning regulations. Advantages include:

- Flexibility to create a separate contract from the zoning code and other ordinances allows all parties to negotiate any aspects of the development
- Ability to tailor specific mitigation actions and tie them to conditions of approval, thereby securing commitments
- Ability to prescribe periodic reviews for compliance, which is especially helpful for site development standards such as landscaping or parking
- Assurance that developer can obtain "vested rights" protected from any changes to existing zoning or land use laws during the term of the agreement

Critics of development agreements claim that they circumvent traditional development review processes. Other challenges include:

- Need for trained land use or real estate attorney to draft and implement
- Negative public perception as "back-door deals" with little to no opportunity for input
- Difficulty for planners to track over time
- The time required to amend DAs. Once both parties enter into the agreement, they are locked into those provisions unless they both agree to an amendment.

(Source: CDLA 2016)

In essence, DAs have three defining characteristics: (1) They allow greater latitude than other methods of approval to advance local land use policies, (2) they allow public agencies greater flexibility in imposing conditions and requirements on proposed projects, and (3) they afford project proponents greater assurance that once approved, their projects will be built. Although these characteristics can be advantageous and offer significant VC opportunities, they can also present important challenges.

2.4.1 Advancing Local Land Use Policies

Opportunity—Ability to Better Implement Innovative Planning Policies

For local agencies, literal compliance with individual zoning ordinances can sometimes thwart promotion of the larger policies underlying the general plan. The general plan, for example, may encourage the existence of open space but the applicable zoning district does not allow sufficient density for residential units necessary to accommodate an open space component. In the past, DAs enabled creative (and, at times, award-winning) land use projects because they can facilitate projects that would not have been allowed under otherwise applicable zoning regulations. The approval of creative land use concepts, and the resulting project constructions, have advanced the state of urban planning and allowed local agencies to better combat the visual and aesthetic impacts of “cookie-cutter” development approaches (CDLA 2016).

As long as the project is consistent with the local planning policies formulated by the legislative body through its general plan, DAs can provide greater latitude to incorporate land use concepts and components that are tailored to address particular community concerns. Such tailored land use concepts can also reflect various ways to maximize VC opportunities. The ability to vary from strict adherence to otherwise applicable zoning provisions can help ensure that the local agency’s land use policies are being advanced, in sometimes new and innovative ways. These advantages are shared by the local agency and the developer alike.

Limitation—Potential to Promote Bad Planning

From the local agency’s perspective, if a developer is willing to provide a significant level of public amenities through a DA, it may feel pressured 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 developer’s perspective, it is possible that the legislative body may decide to put additional requirements in the DA that could limit the property uses that are already allowed and appropriate from a conventional planning perspective.

The planning policies and objectives that have been embraced by the community through the general plan adoption, together with any applicable specific plan, would be an integral part of the DA negotiations. By identifying applicable planning policies early on and continuing to use them as yardsticks in determining what land uses are appropriate, the parties would be able to avoid unacceptable compromises when negotiating DAs.

2.4.2 Imposing Greater Project Conditions for Public Benefits

Opportunity—More Developer Requirements Without Statutory/Constitutional Constraints

For many years, local agencies have been facing legal constraints that directly affect their ability to regulate development. In particular, voter initiatives that limit local agencies' revenue raising authority (e.g., property tax) and questions associated with these initiatives have created legal uncertainties. As a result, local agencies have increasingly required developers to bear the costs to the community associated with their development projects. As mentioned earlier, many agencies have adopted impact fees, for example, to require developers to pay the costs of infrastructure, facilities, and public services required to service their projects. This has sometimes resulted in costly legal challenges.

A local agency might avoid these legal constraints and uncertainties by entering into DAs, where the developers agree to the fees and other requirements. Once the DA is executed, the developer waives his or her right to challenge the fairness or appropriateness of a particular requirement. As such, DAs are generally exempt from the essential nexus and rough proportionality tests associated with other traditional forms of developer exactions (unless the DA process uses inappropriate leverage to impose conditions or achieve developer concessions). The fact that the DA is recorded as a local ordinance also provides a convenient mechanism that could be used for binding future owners to the requirements and obligations created by the agreement.

With these constraints removed, local governments are often well-positioned to negotiate larger concessions from developers that exceed what they would have obtained otherwise. For example, they can ask the developer to agree to (1) finance public facilities and improvements without the specter of a regulatory takings claim, (2) construct a new school without fear that school facility fee limitations will be invoked, (3) complete facilities and improvements earlier in the development process (resulting in needed infrastructure and facilities being put in place prior to or concurrent with the development, reducing the development's impact on existing facilities or services), and/or (4) pay additional fees to protect the agency and existing residents from any budgetary impacts associated with the development.

Limitation—Unrealistic Expectations Can Make Project Infeasible

In the early phases of projects, developers face a myriad of issues (e.g., land availability, financing, market considerations, and various Federal, State and local regulatory requirements) that present challenges to devising financially feasible development projects. In projects where a DA is considered, some developers may choose to abandon the DA altogether in the midstream to avoid the risk of discovering after months of negotiations that the local agency expects the developer to construct an expensive public amenity, such as a school or park, that overrides any benefit he or she can derive from the DA. As mentioned in the DA implementation process, one way to avoid this problem is to discuss the parties' expectations at the outset as a prelude to DA negotiations, thereby allowing each party to assess early on whether a DA will meet each party's needs.

2.4.3 Ensuring Project Will Be Built Once Approved

Opportunity—Fewer Surprises After Project Approval

As mentioned, development projects must meet the regulatory standards that are in effect at each stage of the development process until their projects become "vested" after substantial amounts of time and money have been invested. In DAs, developers receive vested rights immediately upon the execution of the agreement, because a DA "freezes" applicable local land use regulations for the proposed project.

From a developer's perspective, the added certainty associated with receiving vested rights can be extremely valuable, especially for large projects that require securing financing for large upfront costs. The added certainty is also critical in situations where a potential ballot measure or a change in the makeup of the legislative body majority could adversely affect the project.[9] There are a few limits to this assurance, such as a finding that further analysis is required for final environmental clearance.[10] Final approval of a DA also cannot prevent the application of State or Federal regulations.

Limitation—Relinquishing Local Agency's Regulatory Control

DAs can limit the local agency's ability to respond to a changing regulatory environment. If the agency's planning regulations are in need of review or updating, DA terms and conditions may not sufficiently protect the community's interests. Since changes to the agreement require mutual consent, 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. DAs place a premium on the agency's ability to identify all of the issues presented by a project at the outset of the DA negotiations.

From the developer's perspective, the DA obligations are also locked in, without any flexibility to respond to changes in the real estate market and the resulting project economics. As mentioned, DA's protection from regulatory change is limited to local regulations. In general, DAs must be modified if necessary to comply with subsequently enacted State or Federal requirements, which could prevent or preclude compliance with the provisions of the DA.[11]

2.4.4 Other Issues

Other practical criticisms against DAs have included the need for greater public participation and transparency. Also, recognizing the high value placed on DAs' vested rights, especially when the DA term is long (sometimes as long as 30 years or more), developers often sell the projects before they are built, bringing in new owners who may want changes in the original development program linked to the DA. As a result, the lack of a framework for renegotiation (and appropriate terms and conditions for amendments, extensions, and terminations) can be an area of concern (Fulton and Shigley 2012).

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[9] As mentioned earlier, in California, each DA is subject to a voter referendum that must be filed within 30 days of local agency's DA approval in order to reverse its decision.

[10] It should be noted that DAs must adhere to all applicable State and Federal environmental clearance requirements.

[11] It should be noted that any and all development program(s) or project(s) associated with a DA, once finalized, must comply with any and all State and Federal environmental regulations, which are no different from those required of any other development projects/programs.

In his article “The Contract Transformation in Land Use Regulation” related to DA, Selmi (2011) also raises questions about reconciling the public law of land use with the private contract law. He identifies six potential long-term effects[12] associated with the use of a contract-based model such as a DA and suggests the need for further legislative oversight of DAs and other land use–based contracts.

2.5 Development Agreement Representative Case Examples

2.5.1 General Discussion

DAs have a wide range of applications in terms of project type, size, location, and the extent to which public improvements are covered. As mentioned, because DAs can be used to advance overall land use planning policies, they have been found to be most effective for large-scale development projects involving multiple developers implemented in multiple phases over a long time. As such, DAs have been particularly popular in rapidly growing areas where significant changes in land uses have taken place. In California, for example, DAs were the cornerstone of the Foothill Circulation Phasing Program, often cited as a successful DA example, where 19 developers in Orange County agreed to contribute a substantial portion of more than $250 million for public improvements in exchange for the vested right to build their projects and create new bedroom communities (Irani et al. 1991).

In terms of direct linkage to transportation infrastructure, DAs can be a useful technique in capturing and monetizing anticipated property value increases from new developments along planned major highway corridors or transit-oriented developments (TODs). These capital project-induced DAs can be at corridor level involving multiple jurisdictions or at an individual intersection or station involving a single jurisdiction. In most cases, however, DAs are driven by major real estate development projects initiated by developers and include provisions for additional infrastructure capacity needed for their projects. Public improvements for a DA, for example, could include (for both capital and operations and maintenance (O&M)) new access roads, existing street widening and other improvements, intelligent transportation systems (ITS) at intersections, and other public services (e.g., fire, police, traffic, telecommunication) needed for the development project.

Although the number of States that authorize the use of DAs is still limited, their use has been expanding rapidly where they are allowed. Since its introduction in the 1970s, the use of DAs in California has evolved greatly. Especially for large projects requiring significant infrastructure improvements, DAs are now used not only to obtain developer contributions but also as a means to engage other VC techniques (such as TIF and SAD) to ensure all necessary future funding sources for these improvements are clearly delineated at the project outset. One such case example—the SoFi Complex DA between the City of Inglewood and Hollywood Parkland Co.—is described in Section 2.5.2.

Beyond California, many cities in Washington State have been using DAs in a wide variety of applications involving both small and large complex projects and ranging from cleanup and redevelopment of a contaminated riverfront site to a 1,200-acre phased, master-planned community that includes affordable housing provisions and significant open space (MRSC 2016). Various DA applications used in

[12] Selmi’s six long-term effects include (1) reconfiguring the status relationship between developers and government, (2) imposing constraints on government’s ability to respond both to new information and changed circumstances, (3) circumventing constitutional restraints designed to prevent local government from leveraging its monopolistic land use authority, (4) increasing the likelihood that local governments will not treat similarly situated applicants equally, (5) interfering with the implementation of planning as a means of rationalizing government’s land use decisions, and (6) weakening the democratic norms of public participation and transparency in government decision-making.

Washington (presented in Table 2) provide a good representation of different ways DAs can be used by local governments to obtain VC-related funding for public improvements, including those for local transportation infrastructure.

In addition to general public improvements, DAs are sometimes used to serve a very specific public benefit purpose. In Colorado, for example, LaPlata and Eagle counties have used DAs specifically for hazard mitigation purposes to guarantee reduction in risk from project-related hazards by specifying provisions not required by existing land development regulations, including site development standards for conservation and long-term maintenance needs (CDLA 2016).

Finally, DAs are long-term by design and sometimes require amendments as market conditions change. A developer, for example, may need to extend or terminate an agreement if he/she fails to secure financing or wants to do something entirely different with the property. Either party can also seek termination if the terms of the agreement have not been met. Specific case examples pertaining to DA amendments, extensions and terminations can also be found (see MSRC 2016).[13]

Table 2. Range of Potential DA Applications—Washington State Example

DA Parties	Year/Term	Project Scope (Size)	Public Improvements Covered	VC Technique Used*
City of Bellevue and WR-SRI 120th LLC	2009/5 yrs	36-acre, $1B mixed-use urban revitalization linked to light rail (Sound Transit East Link) (Small)	Park and recreation space; transportation and other public improvements	Impact fees
City of Issaquah and Grand Glacier LLC	2007/20 yrs	TOD area development for zero-energy & affordable housing; sustainable development demonstration project (Small)	Municipal facilities and services (transportation, fire, police, general gov't and parks)	Impact fees
City of Redmond and Microsoft	2007/20 yrs	27-acre, 550,000 sq. ft. development for secondary Microsoft campus with density transfer needs (Small)	Multi-modal access, intersections, traffic signals, internal roads, transportation demand management, utilities, water/sewer, storm water	Transport. impact fees
Snohomish County and Community Transit	2009/5 yrs	Swift BRT project with 29 stations along Hwy 99 corridor connecting regional transportation nodes (Small)	Transportation and other public improvements/mitigations	Impact fees
City of Black Diamond and BD Village Partners L.P.	2011/15 yrs	1,200-acre, phased, mixed-use, master-planned community development (Large)	Transportation and other public infrastructure; park and open space, recreation facilities; affordable housing	TDR, impact fees

[13] See, for example, Bremerton Termination DA (2011), King County-Issaquah 3rd DA Amendment (2010), and Vancouver DA Extension (2012) (MSRC 2016).

DA Parties	Year/Term	Project Scope (Size)	Public Improvements Covered	VC Technique Used*
City of Des Moines and SSI Pacific Place LLC	2007/15 yrs	Redevelopment of a blighted area into new urban community with Sound Transit regional light rail link (Large)	Transportation and other public infrastructure	Traffic impact fees
City of Everett and OMH LLC	2009/20 yrs	Cleanup and redevelopment of riverfront brownfield sites into mixed use (Large/Complex)	Transportation and other public infrastructure	Transport/school impact fees
City of Issaquah and Lakeside Industries, Inc.	2012/28 yrs	123-acre, master-planned, urban village involving reclamation of mineral resources site & hillside development (Large/Complex)	Transportation and other public infrastructure, affordable housing	Impact fees and other cost sharing
City of Tukwila and La Pianta LLC	2009	512-acre, 10 million sq. ft. master-planned, mixed-use, adjacent to regional shopping mall (Large)	Transportation and other public infrastructure; park and open space	Impact fees

Source: DA for each of these cases can be found at: http://mrsc.org/Home/Explore-Topics/Planning/Land-Use-Administration/Development-Agreements.aspx (MRSC 2016)

** In addition to the VC technique identified, in several cases, developers also provided additional cost-sharing measures and/or in-kind contributions to fund the needed public improvements.*

2.5.2 SoFi Stadium Sports Complex DA (Inglewood, California)

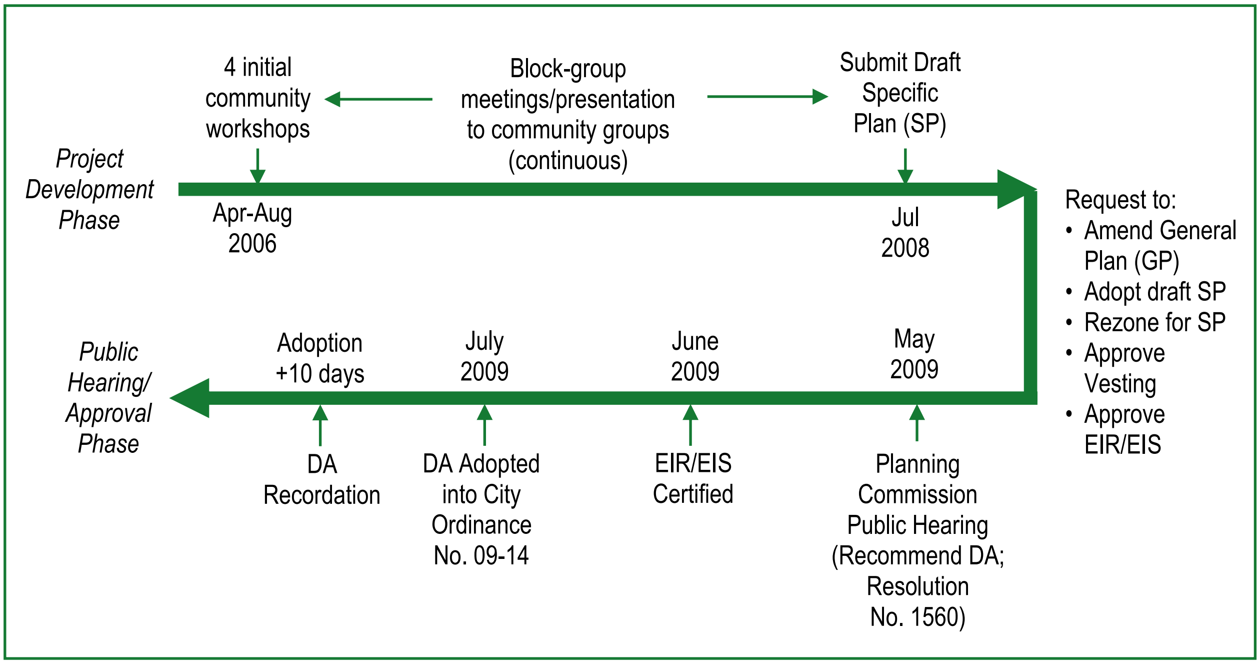
As mentioned, a DA can be used to implement multiple VC techniques other than developer exactions. One such example is the DA between City of Inglewood and Hollywood Park LLC. Hollywood Park is a $5-billion, 300-acre master-planned community in the heart of the City of Inglewood. The project is anchored by the new SoFi Stadium, home to L.A. Rams and L.A. Chargers professional football teams, and consists of a major entertainment complex and mixed-use retail center. It is located only 3 miles from Los Angeles International Airport (LAX) and also close to three Los Angeles County Metropolitan Transit Authority (LACMTA) (commonly referred to as "LA Metro") transit stations. The City is currently planning an automated people mover (APM) system to connect the stadium complex with one of the Metro stations and looking to one or more VC techniques as a potential funding source for the APM. In addition to engaging multiple VC techniques as part of the DA, pre-planning and other implementation steps taken by both parties leading to the final approval also contributed to the success of the DA.

Project Components. L.A. Stadium and Entertainment District (LASED) includes:

- State-of-the-art NFL SoFi Stadium (72,000 seats)
- Performing arts venue (6,000 seats)
- Public parks and open space (25 acres), pedestrian walkways, and bike path
- Other commercial mixed use: retail (850,000 sq. ft.), office (750,000 sq. ft.), residential (2,500 units), hotel (300 rooms)

Project Development and DA Implementation Timeline: See Figure 1 below. In addition, post-adoption annual reviews are also included in the DA provisions.

Figure 1. DA Planning and Development Process (Source: Inglewood 2009)



DA Term. 15 years with an option to extend for another 5 years.

Public Benefits and Improvements. The DA identified the following as the primary public benefits that the developer would provide to the City and the community:

- Park improvements and maintenance that exceed cost and quality mandated by City's existing ordinance
- Implementation of Jobs/Employment and Training program (i.e., workforce outreach coordination, senior management position set asides, project labor agreement, MBE/WBE participation, job fairs)
- Conveyance of four acres of land at no cost to the City for civic land uses, including affordable housing
- Funding for intelligent transportation system (ITS) improvements at 13 intersections not significantly impacted by the Project but improved to make the ITS system more effective
- Construction of Hybrid Retail Center (minimum 500,000 sq. ft.) with at least two major anchors (minimum 12-screen theatre and 10,000 sq. ft. upscale restaurant)
- Payments to offset general fund tax revenue of up to $1,742,000 annually lost following the project commencement and prior to stabilization of general fund revenues generated as a result of the development

- On-site police storefront facility in the mixed-use zone to be operated by Inglewood Police Department
- Public improvements, both lands and facilities and both on- and off-site, to be constructed by the developer and publicly dedicated for public use, including:
  - Right-of-way (ROW) improvements
  - Streets and roads within the Project property
  - Funding of ITS at six intersections impacted by the Project
  - Utilities (gas, electricity, cable television, telecommunications, water, sewer, storm drainage)
  - Pedestrian and bicycle paths
  - Other infrastructure improvements and facilities required by the EIR/EIS mitigation measures
- Sustainable storm water treatment system
- Transfer of water rights

Financing Plan and VC Techniques Used. Public improvement construction and park maintenance costs to be paid by:

- **Developer payments**, including any private debt financing
- **Community Facilities District (CFD) financing** (a form of special assessment district in California): (a) City to initiate district formation at the request of developer and (b) total tax obligation—including all property taxes, special assessments from CFDs—not to exceed 1.85 percent of the assessed value ("special tax cap")
- **Tax increment financing**
- Homeowner association fees
- The developer also pays all fees in existence at the time of DA approval/adoption, including sewer service, sewer construction, parkland dedication, and public art fees

As needed, additional impact fees and other exactions payable by the developer to be adopted after the DA approval/adoption date, not to exceed $10 million.

Others—Costs in connection with DA annual reviews and other administrative costs to be paid by the developer.

3. COMMUNITY BENEFITS AGREEMENT

3.1 Community Benefits Agreement Overview

3.1.1 Definition and History

Community benefits agreement (CBA) is a voluntary but legally binding contract between a developer and community representatives committing the developer to fulfill specific obligations for the benefit of the community in connection with a development project. In exchange, the community provides their support (or at minimum, their acquiescence) for the proposed projects. Although many development projects often create new jobs and economic growth, they do not automatically result in sustained, local economic benefits. CBA is a technique that State and local governments and communities are increasingly looking to in order to help build sustained benefits to host communities.

Developer commitments in CBA are typically monetary in nature but can include many non-monetary benefits as well (e.g., investment in a community center, an affordable housing fund, agreements to pay workers a living wage, legal assistance). The promise of community support in return can be especially useful for developers seeking timely project approvals or government subsidies. In addition to helping to avoid long delays for developers, CBAs help minimize the possibility that their projects may be denied altogether. Similar to DAs, the existence of CBAs can make it easier for developers to secure project financing. In CBA, developers also benefit by establishing relationships with community members and elected officials that can help avoid costly legal disputes and public protests.

CBA is a product of negotiations between the developer and community members who have banded together to safeguard their community's interests. The CBA negotiation and implementation process opens leadership opportunities for community members and ensures that essential resources are leveraged to meet the short- and long-term needs of local residents. CBAs can help in managing and sustaining the accountability mechanisms and public engagement needed to ensure that an investment's benefits are shared across the community, including its most vulnerable populations.

In particular, in addressing potential gentrification and displacement impacts of development projects, CBAs can help reduce their negative impacts and increase transparency and accountability in public spending (Gross et. al. 2005). While CBAs have so far been used to secure a range of commitments around local workforce development, hiring, and community investment from private developers, they are sometimes leveraged to create even broader and more lasting change away from speculation-driven development (see Sidebar 3.1).

Often, developers' pledges in CBAs are in exchange for tax abatements, subsidies, regulatory changes or exemptions granted by the local government for their projects. Although the only CBA signatories are developers and community coalitions in most cases, local governments can also play an important role in the CBA negotiation and implementation process (see Sidebar 3.2).[14]

[14] In recent years, some local governments and other public agencies have chosen to become direct signatories to CBAs. See Sidebar 3.4 in Section 3.3 for Detroit CBA case example.

Sidebar 3.1: CBA History and the Larger "Community Benefits" Movement

The very first CBA in U.S. history was executed in California in 1999, linked to the Hollywood and Highland Center project (home to the Academy Awards ceremonies), which dealt for the first time with labor organizing commitments and other community benefits (e.g., affordable housing, first source hiring, job training, living wages). The "Staples" CBA, the best known and widely regarded as an exemplary CBA, soon followed in 2001, involving the L.A. Live Sports and Entertainment Complex (see Section 3.3.1 for more detailed description).

With the success of the Staples CBA, the broader "community benefits" movement began in California, where community coalitions in Los Angeles, San Diego, San Jose, and the Bay Area used CBAs and other techniques to realize the social justice potential of economic development and land use planning. Soon thereafter, community organizations in Atlanta, Boston, Chicago, Denver, Indianapolis, Miami, Milwaukee, Minneapolis/St. Paul, Pittsburgh, New Orleans, New York City, Seattle, and Washington, D.C., have pursued a similar community benefits approach to major economic development projects, often successfully. The Partnership for Working Families estimated that 104,000 construction jobs and 113,000 permanent jobs were associated with CBAs between 2000 and 2006. In the same period, from Seattle to Miami, more than 50 large-scale projects had enforceable CBAs linked to them. Today, it is becoming rare for developers to strike major deals with city governments without first negotiating some sort of CBA.

Sidebar 3.2: Roles and Responsibilities During CBA Implementation

Developers:

- Identify stakeholders and build public trust. Stakeholders would represent a diverse group of community-based organizations and individuals
- Engage with community representatives and coalitions, and communicate project benefits through open dialogue and transparency
- Ensure stakeholder representatives are part of the project development team early in the process and align project goals and schedules with their understanding
- Initiate project briefings with key State and local government officials
- Train company project representatives about community outreach and CBAs
- Educate stakeholders about the technical aspects of the development

Communities:

- Research development proposals in their region and identify any that have the potential to bring important benefits or significant impacts to the neighborhood(s) where they will be located
- Organize a broad-based coalition of community interests and recruit stakeholder organizations
- In order to maximize turnout, hold public meetings with assistance from identified leaders. Utilize multiple communication mechanisms to reach affected populations
- Actively engage the developer(s) with sustainable community objectives, via open dialogue and transparency

Sidebar 3.2: Roles and Responsibilities During CBA Implementation (cont.)

State and Local Governments:

- Inform community coalitions of proposed developments
- Encourage developers to enter good-faith negotiations with responsible coalitions
- Inform developers of the benefits they can achieve through CBAs
- Respect the negotiating process and honor community coalition agreements
- Fold CBAs into public-private partnership (PPP) agreements, when and where appropriate, for added enforcement

(Source: OMB&ED 2017)

3.1.2 Basic CBA Elements

A list of basic elements included in CBA is provided in Appendix B. As CBAs are becoming more common, many public and non-profit resources are now available to help communities maneuver the complex legal landscape linked to CBAs. Past CBA experience indicates that there are three critical issues to be addressed when developing a CBA: (1) the legal entity that is representing the community coalition, (2) the specific benefits the community receives, and (3) enforcement and monitoring mechanisms for CBA commitments.

Community Benefits

When community benefits are delineated in CBA, the community and the developer would establish clear and measurable commitments, not just aspirational standards. CBAs would describe expectations of project deliverables and specify reporting requirements, including how the reports will be publicly available. CBAs would also clearly describe roles and responsibilities to facilitate compliance and specify how noncompliance will be addressed. The following is a representative list of community benefits that have been included in past CBAs:

- **Affordable Housing** for both rental and ownership (e.g., construction of on-site units, funding for off-site units, housing assistance funds, no-interest loans to nonprofit, inclusionary zoning)
- **Local Hiring** for both construction and non-construction jobs (e.g., targeted first source hiring, first source referral centers, affirmative action and diverse DBE/MBE/WBE hiring standards, worker retention program when there is change in employer, such as change in developers during construction or in tenants/leaseholders during operation)
- **Living Wages, Right to Organize** (e.g., target living wage goals; right to organize commitments, including labor unions; project labor agreement)
- **Job Training** for both pre-apprenticeship and on-the-job training (OJT) (e.g., construction skills training; OJT with wage subsidies, job counseling and other support services; youth employment and skills building)

- **Local Business Support** (e.g., grant for local businesses to hire locally, project space set aside for local businesses)
- **Open Space and Parks** (e.g., improvements to existing open space, parks, playgrounds, and recreational facilities; construction of new facilities)
- **Community Facilities and Services** (e.g., youth centers, health clinics, child care centers, community centers, senior centers, recreational facilities, new paved roads, road repair, streetscape improvements, public arts, 24-hour community hot line, other neighborhood improvement projects)
- **Education Partnership** between developers and community schools (e.g., construction of new schools, scholarship program, arts program, adult education and skills-building program, other donation to local schools)
- **Community Inputs** in environmental, design, and other project-related issues (e.g., steering committee to facilitate community participation, neighborhood partnership program, green building standards, greater pollution standards, input to environmentally friendly designs, handicap accessibility standards)
- **Neighborhood Parking** (e.g., local parking for existing residents)
- **Other Miscellaneous** (e.g., priority access to project facilities such as athletic facilities, healthcare (access to outreach for uninsured medical care), legal aid to impoverished residents, prohibition of big-box stores, State and/or local economic incentive packages such as annual economic trust fund, etc.

Legal Signatory to Community Coalition

The local community signatory to CBAs are typically coalitions of community groups that incorporate a broad array of local stakeholders, often including local residents (across income spectrum and ethnicity), representatives from labor, environmental, and religious organizations, and affordable housing advocates. Through a well-structured CBA process, those most likely to be affected by a project—but who might be excluded from conventional governing procedures—have greater opportunities to contribute to the decision-making regarding the development of local community assets. Community-based organizations involved in CBA negotiations are usually formed by concerned citizens and may be built upon traditional community organizing structures, such as block clubs or church-based groups. These groups sometimes coalesce with other nonprofit advocacy groups linked to specific issues, such as living wage or affordable housing.

Collective action is inherently difficult. The members of a community benefits coalition will likely work together for years to ensure strong implementation of the commitments they negotiate. Although organization can be informal, there are benefits associated with more formal coalescing (e.g., a group could draft and agree to an operating agreement or establish an advisory council, or oversight committee, to manage and distribute CBA resources and monitor the progress of delivery of benefits agreed upon.

In addition, for certain provisions, such as local hiring commitments, communities benefit from basic program setup to successfully deliver the benefits. For example, local or targeted hiring provisions in CBAs may involve support from multiple entities, including a central job center capable of conducting intake, screenings of prospective applicants, and making referrals to employers.

Because a CBA community coalition is negotiating as a single entity, it is natural to think that the coalition itself will enter into the CBA with the developer. However, most coalitions that enter into CBAs are not incorporated legally as stand-alone nonprofits. Rather, they are simply groups of organizations and individuals working together. Few coalitions have structured systems for determining who official members are and who can speak or act on their behalf. This uncertainty could cause significant problems if an unincorporated coalition were the legal signatory to a CBA.

If the coalition were to sign the CBA, every coalition member could be forced to comply with the coalition's commitments under the CBA. While associations that are not legally incorporated can enter into contracts, when compared to a legally incorporated entity, the individual members making up the association can more easily be held responsible for the association's commitments. For this reason, a better approach has been to have each coalition member (organizations, not individuals) sign the CBA on its own behalf to make it clear that each must live up to the CBA's legal commitments based on its own internal approval process (see Sidebar 3.3).

Enforcement and Monitoring

Community groups should consider how each CBA benefit would be monitored and enforced. Financial commitments and other one-time benefits are probably the easiest aspects of a CBA to monitor. Much more challenging are ongoing tenant commitments, such as living wage and local hiring requirements. According to Gross, the most effective approaches include affirmative reporting requirements as well as the ability to investigate complaints in case of noncompliance. Also, required reports should be no less frequent than once a year, publicly available, and due by a particular date each year (Gross et. al. 2005).

One possible compromise is to empower local government officials to verify reports and/or investigate complaints. This is possible if the CBA

Sidebar 3.3: Coalition as a Legal Entity

With each coalition member as a signatory, CBA implementation could become complex and cumbersome, involving as many as several dozen different parties. As such, clear definitions and technical language would be important. For example, the definitions and responsibilities of "Coalition" and "Organization" could be clearly spelled out using the following language:

- "Coalition" shall mean [***a formal name established for the coalition for purposes of the CBA***], an unincorporated association comprised exclusively of the following Organizations that are signatories to this Agreement, and no other organizations or individuals: [all signing organizations are listed].
- "Organization" shall mean each entity that is a member of the Coalition as defined above. Obligations of an Organization shall be obligations only of (1) the Organization itself, as distinct from its member organizations or any natural persons; and (2) staff members or members of the board of directors of the Organization when authorized to act on behalf of the Organization.
- Coalition Responsibilities: ". . . All obligations, powers, rights, and responsibilities of the Coalition under this Agreement shall be obligations, powers, rights, and responsibilities of each Organization."

This language makes clear that each signing organization has the power to enforce the CBA, and the responsibility to comply with it. It also makes clear that only the signing organizations can be held to the CBA commitments. Finally, it clarifies that a signing organization cannot be held responsible for actions of its members, staffers, or board, except when those parties are authorized to act for the organization.

(Source: Gross et. al. 2005)

is folded into a DA, where the developer's commitments are made to the local government subject to governmental monitoring. In general, requirements of a CBA would become part of a DA if the local jurisdiction is providing government subsidy to the developer. Inclusion of a CBA in the DA often facilitates its enforcement because the prospect of government enforcement for the DA provides an incentive for compliance. In addition, the local government may be able to fold enforcement of some community benefits into existing administrative systems (e.g., living wage noncompliance).

In some cases, community groups would prefer the ability to monitor performance themselves, rather than having to rely on the local government. There is no one-size-fits-all approach to monitoring community benefits. A verifiable monitoring system and other challenging issues can often be addressed explicitly through a creative and collaborative problem-solving approach during the CBA negotiation process.

Community groups entering into CBAs typically can seek to enforce CBAs against the developer in court. While most contracts have provisions for monetary recovery, community groups are generally more concerned about ensuring that promised benefits are provided. CBAs often recognize the right to ask for a court order if the developers do not honor their commitments. For example, the only alternative to direct enforcement against the tenants and contractors is to make the developer responsible for the behavior of tenants and contractors. CBAs sometimes specify that the developer is subject to court orders to fulfill its commitments and cannot escape by paying money damages. All these enforcement issues benefit from close attention from an attorney trusted by community groups.

Correction and dispute-resolution provisions in CBAs allow each party a chance to correct problems and the ability to come together and work out solutions to avoid litigation. Court action or arbitration would be an important but last-resort enforcement option. Open communication and good-faith efforts to work out problems—backed by the ability to take legal action if necessary—would solve most CBA compliance issues.

3.2 Community Benefits Agreement Opportunities and Limitations

CBAs can at times conflict with existing local political and policy priorities for community revitalization. While this can create some challenges between grassroots community leaders and local elected officials, the conflict can also reveal opportunities that would be overlooked otherwise. Additionally, CBAs can prove ineffective if they were created through secretive negotiations with little community participation, contain vague commitments with no timeframes, or allow for little community control or public accountability.

Compared to other techniques, the CBA concept is still in its infancy in the United States and is a relative newcomer to the VC tool box. In States that authorize DAs, as mentioned, CBAs have often been incorporated into DAs to help increase both their transparency and enforceability. Although the use of CBAs has generally been more common than DAs in terms of the number of States that use them,[15] CBA performance outcomes have been much more mixed in comparison (Salkin and Lavine 2008, Abello 2015).

[15] According to some studies, States that have used CBAs have included, in addition to California, Colorado, Connecticut, the District of Columbia, Delaware, Georgia, Louisiana, Minnesota, New Jersey, New York, Pennsylvania, and Wisconsin (Salkin and Lavine 2008, TPLC 2011).

For one, the legal environment surrounding CBAs is still being tested and there are concerns about their enforceability in the courts. When not combined with DAs, CBAs are considered enforceable only by contracting community groups. As mentioned, there has also been concern about the legitimacy of community representatives for purposes of negotiating on behalf of the public (Gross et. al. 2005). More broadly, because CBAs are also considered an economic development technique, questions have been raised regarding the effectiveness of CBAs in the context of the larger redistributive effects, such as social equity and poverty reduction (Wolf-Powers 2012).[16]

In a recent survey of 225 CBA participants, respondents ranked “increases in public participation on development outcomes” as the number one way that CBAs improve the development process (DeBarbieri 2017). The bottom line for CBAs thus may lie in their (generally) unintended effect of coalescing marginalized communities to influence policies and resources beyond those tied directly to development projects (Abello 2015). Nonetheless, without CBAs, there appears to be limited alternative solutions that can ensure accountable development with shared economic benefits.

An effective CBA is grounded in four core principles (PWF 2016):

- **Representativeness**. It is negotiated by a coalition that effectively represents the interests of the impacted community.
- **Transparency/Inclusivity**. The CBA process is transparent, inclusive, and accessible to the community.
- **Community Benefits**. The terms provide specific, concrete, meaningful benefits, and deliver what the community needs.
- **Accountability**. There are clearly defined, formal means by which the community can hold the developer (and other parties) accountable to their obligations.

Table 3 summarizes basic features that contribute to CBAs being either effective or ineffective along the four principles.

[16] Wolf-Powers (2012) suggests that CBAs’ effectiveness would be viewed from local governments’ overall land value capture policy goals and treat CBAs’ ability to mitigate negative impacts (through just compensation) as distinct from their use as an instrument to pursue redistributive goals. Wolf-Powers also suggests the importance of identifying legitimate claimants to the value created when the public sector takes actions that increase the worth of private property.

Table 3. Basic Features of Effective vs. Ineffective CBAs

Criteria	Effective CBA Features	Ineffective CBA Features
Representativeness	▪ Community signatories (CSs) are independent, diverse, and aligned with CBA expertise network ▪ CSs represent well-organized coalition and strong capacity to secure appropriate bargain ▪ CSs represent those most threatened by project impacts	▪ No CSs ▪ CSs are selected by developers or local politicians ▪ Divided community ▪ CSs have no CBA negotiating experience or are not aligned with expertise network
Transparency, Inclusivity	▪ Community has opportunity to provide input throughout process; effective mechanisms to ensure transparency within coalition ▪ Negotiations process transparent and inclusive ▪ Multi-year stakeholder engagement process	▪ Negotiations marked by secrecy ▪ Negotiations are exclusionary ▪ Conflict of interest ▪ Negotiation timeframe rushed
Community Benefits	▪ Details addressed through detailed, concrete, measurable terms ▪ Addresses real community needs, agreed upon by coalition consensus that affect most vulnerable members of impacted community ▪ Specific, measurable commitments with dollar amounts attached	▪ Vague, aspirational terms with few details on execution ▪ Does not address real community needs and unlikely to benefit impacted residents ▪ Commitments are voluntary ▪ Conflicts of interest
Accountability	▪ Monetary damages and injection relief are explicitly available ▪ CBA outlines concrete, specific, and clearly defined oversight process ▪ CBA is enforceable against third parties and successors of each party	▪ In case of default, remedies are limited and inductive relief is not available ▪ Overly burdensome enforcement and arbitration process ▪ Not enforceable against third parties ▪ Lack of consideration ▪ Limited term ▪ Termination without cause or opt out ▪ Lack of integrity in provision of benefits

(Source: PWF 2016)

3.3 Community Benefits Agreement Representative Case Example

There are numerous examples of CBA, most of which are linked to major real estate development projects. Relatively speaking, CBAs associated with dedicated transportation projects are less common, especially those related to highways. The following presents two CBAs that were linked to transit-oriented developments (TODs) in Denver (Gates Cherokee CBA) and Atlanta (Atlanta BeltLine CBA) (PWF 2020, TPLC 2011). Also presented in this section is the CBA for Los Angeles International Airport (LAX CBA), one of the largest and most comprehensive CBAs to date (PWF 2020).

As mentioned earlier, CBAs are typically between developers and community coalitions. Unless a CBA is folded directly into a DA, the role of a local government in CBA is one of a facilitator. More recently, local governments are choosing to become a direct signatory to CBA, in some cases making CBAs no longer voluntary but mandatory for any substantive development projects (see Sidebar 3.4). While a local agency's participation can enhance the enforceability of the developer's commitment for the community benefits, it can also potentially diminish the negotiating position of the coalition if the agency's interests are strongly aligned with the development project and the developer.

3.3.1 Gates Cherokee CBA (Denver, Colorado)

Background

In February 2006, FRESC[17] and the coalition members of the Campaign for Responsible Development (CRD) secured a set of Community Benefit Achievements at the site of the former Gates Rubber Factory. These achievements were the result of more than 3 years of research, advocacy, organizing, leadership from the city and elected officials, and a process of dialogue with the private developer. The redevelopment project, undertaken by developer Cherokee Investment Partners, was a 50+ acre, $1 billion brownfield located on a light rail transit line and at the intersection of I-25 and Broadway in central Denver. Cherokee sought $126 million in public subsidies and taxing authority to support the cleanup and redevelopment of the site into a mixed-use, transit-oriented development that would include retail, offices, housing, and open space. The CRD took the position that any project receiving that magnitude of public support would meet principles of responsible development and provide community benefits.

Community benefits included:

- Landmark Affordable Housing Plan that not only exceeds the Inclusionary Housing Ordinance (IHO) in for-sale affordable units but also includes hundreds of affordable rental units targeting the income levels of Denver's greatest need
- Construction of 150 affordable for-sale units out of 1,500 total for-sale units (10 percent)
- Construction of 200 low-income rental units out of 1,000 (20 percent)
- A commitment to conform with State, Federal, and local handicapped accessibility standards, ensuring that all housing units in the development are accessible or accessible-convertible
- A unique agreement that excludes low-cost, big-box grocery stores who undercut existing good jobs in the grocery industry through poverty wages/inadequate healthcare
- Cooperation and participation with the neighborhood coalition Voluntary Cleanup Advisory Board (VCAB) that is monitoring the cleanup and communicating cleanup issues to affected neighbors
- An unprecedented agreement to pay prevailing wages and benefits for every construction worker engaged in the publicly funded construction of site infrastructure and maintenance of public spaces and facilities
- An unprecedented agreement to extend Denver's Living Wage Ordinance to include parking lot attendants and security personnel employed at the site's public facilities

[17] Acronyms for community coalitions included in the case examples are given at the beginning of this Primer.

- An enhanced "First Source" local hiring system that promotes recruitment of local residents to fill new positions and prioritizes immediately adjacent low-income neighborhoods

As a result of this CBA, Denver's Office of Economic Development (OED) employed, for the first time, an explicit "public benefits framework" to outline the public financing package for this project.

CBA Participation

- Local Government:
  - City of Denver
- Developer:
  - Cherokee, Inc. and Gates Rubber (the latter was only involved in helping Cherokee acquire the land)
- Community Organization(s):
  - Colorado ACORN
  - The Front Range Economic Strategy Center
  - The Denver Area Labor Federation
  - United Food and Commercial Workers
  - Service Employees International Union
  - Colorado Jobs with Justice

CBA Implementation Issues

Negotiations took many months, and the agreement was set to be signed on June 11, 2003. But negotiations over certain community benefits resulted in serious conflict among the parties. The project took a 3-year hiatus, with many thinking the disgruntled party representatives would abandon the project all together. In 2006 negotiations resumed and the CBA was signed months later. The development and community benefits were produced on schedule.

3.3.2 Atlanta BeltLine CBA (Atlanta, Georgia)

Background

In 2005, Georgia STAND-UP succeeded in attaching community benefits language to a City ordinance authorizing almost $2 billion in public funding over a 20-year period for transit-oriented development. The Atlanta BeltLine project involved the development of a **22-mile light rail transit loop** encircling the city. The $2.8 billion project is expected to take 25 years and includes transit-oriented design, including multi-use trails, as well as 1,200 acres of green space, affordable housing, brownfield remediation, historic preservation, and public art. The 2005 city resolution that created the BeltLine Tax Allocation District (TAD)[18] included several community benefits principles that apply not to an individual project, but to every project within the BeltLine redevelopment area. These included:

- Section 11—Established the BeltLine Affordable Housing Trust Fund, created by setting aside 15 percent of the net proceeds of every TAD bond issued to develop 5,600 units of affordable housing

[18] In Georgia, tax increment financing (TIF) districts are referred to as Tax Allocation Districts (TAD).

- Section 12—Established an Economic Incentives Fund by setting aside a portion of each TAD bond issuance that will incentivize private development in targeted areas of the BeltLine that have historically experienced disinvestment, poverty, and unemployment
- Section 19—Required that all capital projects that receive TAD bond funding will have attached "certain community benefits principles, including but not limited to prevailing wages for workers, a 'first source' hiring system to target job opportunities for residents of impacted low-income BeltLine neighborhoods, establishment and usage of apprenticeship and pre-apprenticeship programs for workers of impacted BeltLine neighborhoods." Additionally, "a more complete list of such principles and a community benefit policy shall be developed with community input and included within the agreements to be approved by City Council."

Summary of community benefits:

- Affordable housing
- Historic preservation of select sites and buildings
- Purchase and display of modern art
- First source hiring
- Apprenticeship and pre-apprenticeship programs for impoverished and uneducated residents residing near BeltLine construction

CBA Participation

- Local government:
  - Atlanta Development Authority—the official development agency for the City of Atlanta chaired by the mayor of Atlanta
  - Tax Allocation District Advisory Committee
  - BeltLine Affordable Housing Advisory Board
  - Atlanta City Council
  - The Atlanta Public School Board 7
  - Fulton County Commission
- Developer:
  - Atlanta BeltLine Inc.
- Community Group(s):
  - Georgia STAND-UP

CBA Implementation Issues

Both the local government and developer ran into legal problems when beginning the project because provisions of the CBA unintentionally required both parties to step outside their jurisdiction (TPLC 2011):

- In 2008, the Georgia Supreme Court ruled that school district tax funds could not be included in the TADs used to pay for the BeltLine (*Woodham v. City of Atlanta*[19]). In response, the State held a referendum to change the constitution to allow TADs to use educational purpose revenue. The referendum narrowly passed, after which Georgia passed House bill 63, also known as the "Redevelopment Powers Law." That law explicitly allows TADs to use school district revenue to fund redevelopment projects.[20] In 2013, the Georgia Supreme Court ruled again on a related case, reaffirming the prior decision.[21]
- The BeltLine ran into some territorial and track ownership disputes with the Georgia Department of Transportation (GDOT) and Amtrak. The DOT and Amtrak wanted the railroad line/tracks to connect Atlanta to New York and New Orleans, instead of forming a loop around the city. The DOT and Amtrak eventually withdrew their complaints due to immense public protest.[22]

3.3.3 Los Angeles International Airport (LAX) CBA (Los Angeles, California)

Background

In December 2004, a broad coalition of community-based organizations and labor unions in Los Angeles entered into the largest CBA at the time, addressing the LAX's $11 billion modernization plan. The CBA was a legally binding contract between the LAX Coalition for Economic, Environmental, and Educational Justice and the Los Angeles World Airports (LAWA), the governmental entity that operates LAX. The bulk of the benefits were set forth in the LAX CBA. In addition, the airport's commitments to two area school districts were set forth in side agreements that were negotiated as part of the Coalition's CBA campaign. The CBA has been hailed as a model for future airport development nationally.

The wide range of benefits included:

- $15 million in job training funds for airport and aviation-related jobs
- A local hiring program giving priority for LAX jobs to local residents and low-income and special needs individuals
- Funds for soundproofing affected schools and residences
- Retrofitting diesel construction vehicles and diesel vehicles operating on the tarmac, curbing dangerous air pollutants by up to 90 percent
- Electrifying airplane gates to eliminate pollution from jet engine idling
- Funds for studying the health impacts of airport operations on surrounding communities
- Increased opportunities for local, minority, and women-owned businesses to participate in the modernization of LAX

[19] Woodham v. City of Atlanta et al. (Two Cases). Nos. S07A1309, S07A1566. Decided: February 11, 2008.

[20] FHWA, Case Studies: Atlanta Beltline Tax Allocation District, https://www.fhwa.dot.gov/ipd/value_capture/case_studies/atlanta_beltline_tax_allocation_district.aspx.

[21] Sherman v. Atlanta Independent School System, S13A0333, decided June 3, 2013.

[22] Surface Transportation Board Decision, STB Finance Docket No. 35215, National Railroad Passenger Corporation – Application Under 49 U.S.C. 24311(C) To Condemn Certain Rail Carrier Property In Atlanta, Fulton County, Ga – Norfolk Southern Railway Company, Decided: April 10, 2009.

The CBA also detailed monitoring and enforcement provisions, enabling Coalition members to ensure implementation of these benefits and hold accountable the responsible parties.

Sidebar 3.4: Local Government as CBA Signatory—City of Detroit Case Example

In November 2016, Detroit voters approved a groundbreaking ordinance that requires developers to sign a city-negotiated CBA before a project can break the ground. The law applies to private projects that cost at least $75 million and receive $1 million in either tax abatements or city-owned land. In exchange for public subsidies approved by local government, developers must sign a guarantee that may include job opportunities, environmental protections, or neighborhood improvements. These CBAs are among the first in the United States to be negotiated through a mandatory, government-led process.

Detroit voters opted for a law that institutionalizes a process that has been largely improvised, putting Detroit at the leading edge of the “community benefits” movement, a two-decades-old effort to make developers more accountable to the neighborhoods in which they build. Instead of dealing on a project-by-project basis, CBA standards and/or processes have been mandated at the city level.

Specifically, once a developer proposes a project, the city sets up a nine-member neighborhood advisory council, made up of residents of the census tracts near the project site. City officials and City Council members can choose most of the advisory council members from a pool of residents nominated by their neighbors. Two members of the advisory council are selected directly by the residents themselves.

The law requires the developer to attend one meeting with the neighborhood advisory council to hear its concerns about the project. The developer then enters into negotiations with Detroit’s planning director, who reports to the City Council on whether and how the neighborhood concerns are to be addressed. Whatever community benefits the city and developer negotiate, along with enforcement mechanisms and plans for compliance reports, are to be included in a binding agreement along with the tax abatement or land transfer.

(Source: Trickery 2017)

4. OTHER CONTRACT-BASED VC TECHNIQUES

4.1 Joint Development Agreement

In its Guidance on Joint Development, the Federal Transit Administration (FTA) defines "joint development" as a public transportation project that integrally relates to, and often co-locates with, commercial, residential, mixed-use, or other non-transit development.[23] This section discusses Joint Development Agreement (JDA), a potentially powerful VC technique founded on a public-private partnership that can offer many direct benefits to the parties, while also enhancing the overall value of both transportation- and non-transportation-related developments.

4.1.1 JDA Overview

JDA is an agreement between the landowner and the developer for the construction of new projects. In a typical JDA, a landowner provides access to property and the developer undertakes the responsibility for the construction and operation of property improvements, including approvals, launching, and marketing the development project. In a JDA, the developer agrees to compensate the landowner; examples of which include a percentage of sales revenue or of the newly constructed project.

In this Primer, we use the term JDA only for non-private deals in which the public sector (usually a transit agency or local government) is a party to the agreement. JDA as used in this Primer applies when public agencies directly partake in the development projects alongside developers by committing public assets in one form or another. In addition to publicly owned land, "public assets" here can include development rights above, below, or adjacent to public ROWs (e.g., air rights above railroad tracks/stations or expressway turnpikes).[24]

Public assets are generally committed to private development projects in exchange for various revenue sharing arrangements and other public benefits. As is the case for private JDA deals, the developer can earmark certain portions of the project to the local agency—either for the agency's own use of the built facility and/or for potential ground lease to a third party as a new revenue source for the agency—and sell off the remaining areas (with or without additional revenue sharing with the agency).

Depending on the local economic and political climate, however, local governments may choose to commit public assets primarily to trigger positive economic impetus for the local community through the development projects without any revenue sharing arrangements. Under this scenario, if the projects are successful, they would generate a significant increase in sales and property tax revenues for the local governments even without the revenue sharing.

In addition to merely committing development rights and other public assets, local agencies can get involved directly in the development activities themselves under JDA. This can occur when infrastructure is a critical component to the core development program (over and beyond the ancillary public

[23] FTA, Guidance on Joint Development, FTA Circular 7050.1B, rev. 2, August 14, 2020, https://www.transit.dot.gov/sites/fta.dot.gov/files/2020-08/Joint-Development-Circular-C-7050-1B.pdf.

[24] Where Federal funding is involved, the use of ROWs require Federal approval. For example, the use of air rights on facilities constructed or improved with federal-aid highway funding must obtain a ROW use agreement approved by FHWA (see 23 CFR 710.405).

improvements to support the development project).[25] A good example is the development of a new business headquarter complex where a new (unplanned) in-fill transit station near the complex is an essential element of the development program to enhance the employee commuting situation (see Sidebar 4.2 in the next section for specific case examples). In this case, the local agency may have a direct hand in in-fill station development.

Although the lines are often blurred, it is beneficial to distinguish JDA from DA. For a real estate development project, DA is primarily about ancillary public improvements needed for the project, including who pays for them. JDA is about the real estate development project itself and the public agency's involvement in the development itself. There is a natural nexus between JDA and DA in that JDA may contain key "DA-like" provisions to account for ancillary public improvements needed for the JDA project. When project economics are in the balance, in addition to revenue sharing arrangement, a JDA may also contain cost sharing arrangement for necessary ancillary public improvements. Especially when the project is critical for boosting the local economy, local agencies may choose to supplement developer exactions/contributions with additional funding that could be generated from other government-sponsored VC techniques, such as TIF and SAD.

It is important to note that funding sourced from a JDA revenue sharing arrangement, e.g., third-party ground lease revenues, could be considered as part of local governments' general fund which has flexibility to be used for general public benefit purposes. Developer exactions (and other VC-related revenues) secured through a DA, on the other hand, would be much more restricted and their uses would typically be confined to public improvements linked directly to the development project under consideration.

Finally, for transit-related JDAs specifically, as mentioned earlier, the FTA has developed Guidance on Joint Development that involves the coordinated development of public transportation facilities with non-transit development (see https://www.transit.dot.gov/sites/fta.dot.gov/files/2020-08/Joint-Development-Circular-C-7050-1B.pdf). According to FTA, when coordinated properly, joint development can enhance the value of both transit and non-transit (and both public and private) activities taking place on real property. As distinct from transit-oriented development (TOD),[26] joint development may include partnerships for public or private development associated with any mode of transit system that is being improved through new construction, renovation, or extension, including intermodal facilities, intercity bus and rail facilities, transit malls, or historic transportation facilities.

As is the case in general, one of the primary benefits of transit-related joint development is revenue generation, such as income derived from rental or lease payments, as well as private sector contributions to public infrastructure. According to the FTA Guidance, while revenue generation is critical, it is not the only motivation for the public agency to enter into a JDA. For transit-related JDA, other important goals

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[25] To minimize confusion, the term "infrastructure" is used in this discussion to mean a core component of the development project program and the term "public improvements" is used to mean ancillary infrastructure to support the real estate component of the development program.

[26] Although related in purpose (i.e., creating vibrant, compact, mixed-use, economically successful communities near public transportation) joint development and transit-oriented development (TOD) differ in several respects. In joint development, a local agency is an active partner contributing either property or funds for use in the joint development project. Joint development is much smaller in scope and uses project property owned by the agency. TOD, on the other hand, has a much broader scope that can range from several parcels of property to as much as an entire community. In TOD, the local agency is a stakeholder but may not always be a partner. Both joint development and TOD projects encourage private investment near public transportation and help grow local economies.

include shared costs, efficient land use, reduced distance between transportation and other activities, economic development, increased transit ridership, and improved transit connectivity.

4.1.2 JDA Representative Case Examples

Globally, as a VC technique, there is a general consensus that JDA has been used most successfully by Hong Kong's Mass Transit Rail Corporation (MTRC) (see Sidebar 4.1). In the United States, the use of JDA has been much more limited in comparison. For example, LA Metro, one of the largest transit agencies in the United States, has been using the term "joint development" specifically to entail a real estate development program through which Metro collaborates with qualified developers to build transit-oriented developments on Metro-owned properties. The preferred VC mechanism used in Metro's JDAs is third-party ground leases supplemented with collaborative in-lieu contributions from other public agencies. For LA Metro, the valuable part of its joint development program as a case example is its streamlined implementation process, which is depicted in Figure 2.

The most common form of JDA in the United States is the commitment of publicly owned air rights in exchange for various revenue and/or cost sharing arrangements. The best-known large-scale example of this type is Hudson Yards developments in New York City (ongoing), where unused air rights above the Metropolitan Transportation Authority (MTA) West Side Yard (a storage yard for Long Island railroad trains) was transferred to private developers for over 17 million sq. ft. of development on a 28-acre site.[27]

Sidebar 4.1: Global Best Practice—Hong Kong's Mass Transit Rail Corporation (MTRC)

Hong Kong MTRC's JDA model, widely viewed as one of the most successful VC examples overall, entails the following:

- The government grants a land development right for sites that are comprehensively planned by MTRC for rail transit development
- MTRC pays a land price to the government computed as if the rail transit did not exist
- MTRC builds the rail transit and develops properties in partnership with private developers
- Once the rail transit infrastructure is complete, property value increases significantly
- MTRC benefits from the value appreciation through lease payments from developers, which in turn helps fund rail transit construction and O&M costs

The Hong Kong model relies on important underlying characteristics that are needed to make the joint development approach successful, including (a) the area being Kowloon, a dense urban area oriented to public transport where developable land is scarce and valuable, (b) a very tight working relationship between the Hong Kong government and MTRC, facilitating land assembly and site planning, and (c) MTRC's expertise in commercial development which was gained over time, where nearly half its revenues now come from activities unrelated to rail transport.

(Source: Maier and Jordan-Tank 2014)

[27] Considered one of the most expensive real estate projects in U.S. history (estimated at $25 billion), the core program includes commercial mixed use, subway extension, new open space network, and convention center corridor. The development is based in complex multi-layered JDA arrangements between a private developer consortium, City of New York, MTA, and other private/public entities.

For the Hudson Yards project, one of the key core program elements has been the extension of MTA's No. 7 Subway. This major infrastructure undertaking prompted the City to create the Hudson Yards Infrastructure Corporation (HYIC). HYIC is a non-profit entity focused on the infrastructure portion of the project with a larger goal of promoting the overall economic development on the west side of Midtown Manhattan. HYIC has deployed many different VC techniques, including developer exactions, TIF, SAD, TDRs, up zoning, and density bonuses to raise funding not only for the subway extension itself but also for other wider public benefit provisions, including affordable housing.

Table 4. LA Metro JDA Implementation Process

Stage	Initial Community Outreach	Developer Solicitation/Selection	Project Refinement, JDA Ground Lease Negotiations	Permitting and Construction
Actions	→ Community meetings → Creation of Development Guidelines	→ Issue RFI, RFQ, and/or RFP → Evaluate proposals → Community update	→ Developers progress architectural design → Community outreach/input (several iterations) → Entitlements and environmental clearance process → Negotiation of financial terms	→ City engineering → Construction documents → City building permits → Seek concurrence from FTA (where there is Federal interest) → City-related approvals → On-site construction → Occupancy
Result	Metro Board approves Development Guidelines	Metro Board authorizes Exclusive Negotiation Agreement (ENA) with recommended developer(s)	Metro Board approves JDA and Ground Lease Agreement	Completed project
Timeline	6–8 months	6–8 months	18–30 months	18–24 months

Additional JDA examples where transportation infrastructure (such as in-fill transit station) is part of core JDA program are provided in the following (Sidebar 4.2).[28]

[28] For additional JDA examples involving transportation infrastructure, see http://www.fhwa.dot.gov/real_estate/right-of-way/corridor_management/innovative_uses.ctm.

4.2 Other Public Asset and ROW Use Agreements[29]

There are various use agreements for public assets, which can include assets themselves as well as development rights above, below, or adjacent to public ROWs.[30] These use agreements can be a subset of a larger JDA as mentioned above (most of which typically pertain to air rights) or they can represent separate stand-alone agreements. Stand-alone use agreements can take various forms and involve a wide variety of public assets. Notable among them are:

- Naming rights, advertising, and corporate sponsorships
- Third-party franchise agreements involving, for example, renewable energy generated on public real estate with various power purchase and/or revenue sharing arrangements

4.2.1 Naming Rights, Advertising, and Corporate Sponsorships

Naming rights, advertising, and corporate sponsorships are linked to various public spaces, including highways, rest areas, transit stations, major buildings (stadiums, arenas, etc.), and vehicle fleets.[31,32] They generate new sources of funding other than more conventional taxes, fees, and developer exactions and their revenue potential can be significant.

For example, naming rights linked to major sports stadiums, landmark commercial buildings, and transit stations[33] sometimes fetch top dollars for local governments. As a point of reference, Table 4 lists the top 10 recent naming right case examples linked to sports stadiums and the order of magnitude revenues involved. For transit stations, among others, naming rights have been used by the Southeastern Pennsylvania Transportation Authority (SEPTA) for the Broad Street Line AT&T Station (formerly Pattison Station), by NY MTA for Atlantic Avenue-Barclays Center Station, and by Chicago Transit Authority (CTA) as a means to establish broad corporate partnerships.[34]

[29] For this section, refer to the significant VC resources already available at https://www.fhwa.dot.gov/ipd/value_capture/value_capture_a_to_z/ for additional details on specific techniques and case examples.

[30] As mentioned, for non-highway uses of highway ROW, FHWA regulations (23 CFR 710 Subpart D) apply if there has been federal-aid highway funding in the facility.

[31] See https://www.fhwa.dot.gov/ipd/pdfs/value_capture/capacity_building_webinars/webinar_112119.pdf for a more detailed and comprehensive overview of these techniques (FHWA 2019).

[32] It should be noted that there are some restrictions in using these techniques related to highways. Advertising, for example, is not permitted on traffic control devices, nor within Interstate Highway System rights-of-way, including in rest areas.

[33] For both existing facilities and new developments. For new developments, naming rights can be part of a DA or JDA.

[34] For more detailed information on these examples, see https://www.fhwa.dot.gov/ipd/value_capture/defined/naming_rights.aspx.

Sidebar 4.2: Transportation as Core JDA Program—Two Case Examples

NB Development Group (NBDG, a development entity affiliated with the athletic company New Balance) entered into an agreement in 2013 with the Massachusetts Department of Transportation (MassDOT) and Massachusetts Bay Transportation Authority (MBTA) to design, build, and fund an approximately $20 million commuter rail infill station. The station—completed in 2017 and named the Boston Landing Station as part of the MBTA Commuter Rail serving the Allston and Brighton neighborhoods—is part of a larger development of approximately $500 million to deliver New Balance's new world headquarters building and other commercial and sporting components. In addition to covering 100 percent of the station and track construction costs, NBDG also agreed to fund a portion of the operating and maintenance costs of the station for the first 10 years of operations. The new infill station provided a much-needed commuter station for MBTA that it could not afford, while allowing convenient access for NB's employees.

The Metropolitan Atlanta Rapid Transit Authority (MARTA) entered into a joint partnership with KDC Real Estate Development & Investments to deliver an expansion to the existing MARTA Dunwoody Station. KDC is charged with developing a four-office tower campus for State Farm Insurance, the largest corporate office project in Metro Atlanta's history. The first of the four towers is located adjacent to the Dunwoody station. The station extension will include a new access point, a structure connecting the station to the new office building, providing access to the existing platform. In return for station access, KDC (on behalf of State Farm) agreed to finance and deliver the station expansion project under a developer's agreement and, in exchange, MARTA granted the needed easement and supervised the construction in the active right of way. MARTA is responsible for owning and maintaining the public property while KDC will own and maintain the private portion of the extension.

(Source: Macek et. al. 2017)

Table 5. Top Naming Right Revenues Case Examples

Facility	Total Revenue	Time Period
MetLife Stadium, E. Rutherford NJ	$425M to $625M	2010 – 2036
Chase Center, San Francisco CA	$300M to $400M	2016 – 2040
Citi Field, Queens NY	$400M	2006 – 2028
Mercedes-Benz Stadium, Atlanta GA	$325M	2015 – 2043
NRG Stadium, Houston TX	$310M	2000 – 2032
Trust (SunTrust) Park, Atlanta GA	$250M	2014 – 2042
Hard Rock Stadium, Miami FL	$250M	2016 – 2034
Levi's Stadium, Santa Clara CA	$220M	2013 – 2033
US Bank Stadium, Minneapolis MN	$220M	2015 – 2041
American Airlines Center, Dallas TX	$195M	1999 – 2030

Source: FHWA (2019)

The use of these techniques is becoming more innovative and diverse. For advertising, for example, GPS-enabled advertising technology has been used recently on transit vehicles in Hillsborough, Florida (see Sidebar 4.3). For corporate sponsorship, projects have been as diverse as those related to enhanced landscaping, expanded maintenance, art and place making, and other aesthetic initiatives (e.g., for gateways and rural main streets).[35]

Sidebar 4.3: Innovative Approach to Advertising—A Case Example

Hillsborough Area Regional Transit (HART) in Tampa, Florida, has recently partnered with the private firm Commuter Advertising to provide GPS-enabled advertising technology, including digital onboard media and public rider announcements to generate additional revenue for its system. HART has granted Commuter Advertising exclusive access to install its technology to play both public service and paid advertising announcements on all of its vehicles. The partnership, which bears no cost to HART, generates monthly revenue for the system by securing paid private advertisements. With this technology, businesses can choose specific stops for targeted advertising using an online map. HART and Commuter Advertising have a revenue sharing agreement with a minimum guarantee for the first 5 years.

(Source: Macek et. al. 2017)

4.2.2 Third-Party Franchise Agreements

Third-party franchise agreements are generally more complex. They are essentially a form of P3 concessions where the public sector commits public real estate to the private sector having the necessary operational expertise to capitalize in the operational efficiency as well as revenue-generating opportunities. Most common third-party agreements involve renewable energy generated on public real estate (e.g., solar panels on top of maintenance facilities, public buildings, and/or parking lot canopies; wind turbines at rest areas).

State Departments of Transportation (SDOTs) are increasingly exploring the use of highway right-of-way (ROW) to accommodate renewable energy technologies as having potential to:[36]

- Add value to ROW assets and create a revenue source for SDOTs to offset energy demand and operating costs
- Promote energy security by diversifying energy generation and delivery methods
- Foster the creation of a local green job market that enhances the viability of the Nation's renewable energy industry

Some local governments share these same broad economic and sustainability goals. For renewable energy, the primary goal is often about energy cost savings, which in itself can be quite moderate but achieved without any upfront capital expenditure on the part of local governments. For example, Alameda-Contra Costa Transit District (AC Transit) in California recently partnered with SunPower Access to install solar panels in two of its locations in Oakland and Hayward. For AC Transit, the project provided energy savings of $5 million over 25 years and, for SunPower, 100 percent of the energy they

[35] For additional details, see https://www.fhwa.dot.gov/ipd/pdfs/value_capture/capacity_building_webinars/webinar_112119.pdf (FHWA 2019).

[36] For additional details, see http://www.fhwa.dot.gov/real_estate/publications/row/ (FHWA 2016). It should be noted that if a renewable project is contemplated, the FHWA Division office must be consulted for relevant restrictions and approval requirements.

provided energy savings of $5 million over 25 years and, for SunPower, 100 percent of the energy they needed to run their hydrogen fuel facility. AC Transit incurred no upfront capital costs because the project was completely funded by SunPower.[37]

From a VC standpoint, these agreements can provide additional revenue sharing arrangements beyond just energy cost savings. Depending on the business model used, they can variously involve installation, operational, and/or ownership rights residing either on the private or public sector with or without pre-established power purchase agreements (PPA).[38] Whether for renewable energy or other relevant local applications (e.g., waste-to-energy conversion, fiber-to-the-home (FTTH) broadband network, streetlight modernization), Table 5 provides alternative third-party franchise models that could be utilized by local governments.[39]

Table 6. Alternative Third-Party Franchise Models

Model	Basic Features
Build-Operate-Transfer (BOT)	• Private sector builds the underlying asset on public ROW with no cost to the public sponsor • Private sector owns the asset, earns revenues by operating it, and transfers its ownership at the end of franchise term • Can include a revenue sharing arrangement • For energy asset, may or may not include PPA
Build-Transfer-Operate (BTO)	• Private sector builds the underlying asset on public ROW with no cost to the public sponsor • Private sector transfers the asset ownership to the public sponsor after construction is complete (i.e., turnkey-based) and obtains operating right from the sponsor to earn revenues during the franchise term • Can include a revenue sharing arrangement • For energy asset, may or may not include PPA
Build-Lease-Operate (BLO)	• Private sector builds the underlying asset on public ROW, sells the asset to the public sponsor, and leases it back to operate it until the end of the lease • Can include a revenue sharing arrangement • For energy asset, may or may not include PPA
Buy-Build-Operate (BBO) or Build-Own-Operate (BOO)	• Private sector buys existing public asset (where private ownership is allowed), provides major improvements (rehabilitation, modernization, etc.), and operates it • Public sector gets sales proceeds and/or revenue sharing arrangement • For energy asset, may or may not include PPA

Source: Kim and Bennon (2017)

37 See https://www.fhwa.dot.gov/ipd/value_capture/defined/solar_energy_use.aspx for additional details and case examples related to solar energy use agreements.

38 In the case of solar energy, for example, PPA here represents the public sponsor purchasing the newly generated solar energy from the private concessionaire for its own use often at a discounted rate.

39 See Kim and Bennon (2017) for more detailed discussions and case examples on how local governments can structure P3 concessions and other third-party franchise agreements based on the characteristics of the underlying assets.

5. INTEGRATED VC STRATEGY THROUGH CONTRACT-BASED TECHNIQUES

5.1 Integrated VC Policy Framework

The concept of value capture is not new and the techniques have been used since the medieval times. What is new is that their use for infrastructure funding can no longer be supplementary in nature to pay for ancillary public improvements or as a "gap" financing mechanism. With the increasing infrastructure funding responsibility on local and State governments, VC techniques are emerging as one of the primary funding sources to pay for critical infrastructure needs. As such, local governments are looking for more expansive and innovative ways of using the techniques, including, as necessary, in new precedent-setting ways.

Establishing an integrated VC policy framework—specifically designed to help pay for major infrastructure projects directly as well as to continue to support major real estate development projects that require additional public improvement capacity—is one step available for local governments. Such a policy framework would be multi-layered and risk-adjusted with the goal of ensuring that both benefits and costs linked to VC implementations are equitably distributed across key VC stakeholders. This framework would also help ensure transparency and accountability from the project outset to help local governments best manage stakeholder expectations.

Experience has shown that an effective VC strategy benefits from starting early—alongside project planning and development processes and long before the project opening date—when there is a general recognition of a project's potential value and before the project entitlement is granted without full assessment of its monetization potential based on benefits and costs to each major stakeholder involved. At a strategic level over the long run, the basic VC approach could be multi-layered, starting with those techniques that have the least new impact on stakeholders (real or perceived) (e.g., TIF with no new taxes) and followed by those involving new charges (e.g., SAD and, as needed, developer exactions) in a manner that is risk-adjusted so that the stakeholders can better bear the VC financial burden.

The integrated VC framework would basically entail what VC techniques would be used when and where, and how these techniques would be implemented. In the end, tackling the infrastructure funding problem with VC option would not be with one big cure-all blow, but rather with many mini strokes using multiple techniques. The framework would thus address how the use of multiple techniques would be integrated and phased over a project lifecycle by taking into consideration (1) the "equity" factor (i.e., those who benefit the most would pay the most) and (2) the "risk" factor (i.e., those who bear the risk would do so when they are best able).

For example, for regional transportation projects, an integrated VC framework could encourage (real estate) developments along the new corridors (including TODs) by incentivizing developers initially through the use of government-sponsored VC techniques (e.g., TIF first followed by, as needed, SAD). As the real estate project progresses, the project risks would decrease gradually and developers' willingness to pay would increase with increasing level of exactions/contributions accordingly.

VC revenues from all of these techniques would provide potential funding sources for both the transportation project and the ancillary improvements linked to the development project over their project lifecycle. Local governments' contribution to the regional transportation project, which would already have some funding from Federal/State sources, would increase the likelihood that the project would be completed as planned.[40]

Similarly, for major real estate development projects with significant public improvement needs, when project economics are sound, developers would be responsible for the improvements and their exactions/contributions would be the primary VC mechanism. When the project is critical to the local economy but its economics are in the balance, local governments would step in with TIF (and, as needed, SAD additionally) as the primary VC mechanism until such time as the project economics improve and developers are able to share the VC financial burden.

Ultimately, having the integrated VC policy framework would facilitate establishing such VC strategies at the project outset and help streamline the VC implementation process over the project lifecycle. This has been found to be especially beneficial when multiple stakeholders and techniques are involved and the process becomes quite complex. The VC streamlining would also help reduce the uncertainties associated with project revenue streams and minimize the cost of capital in project financing.

5.2 Contract-Based Vehicle for Implementing Integrated VC Strategy—Case Example

Once the integrated policy framework is in place, contract-based vehicles such as DAs or JDAs can serve to implement integrated VC strategies at project levels. For a single project, the Inglewood Sofi Complex presented in Section 2.5.2 provides a case example of how an integrated multi-layered VC strategy involving multiple VC techniques can be implemented effectively on a given project by using a DA. DAs can also be very effective when dealing with multiple projects. As mentioned earlier, VC techniques can generate new funding sources not only for the public improvement needs linked to major real estate development projects but also for major infrastructure projects as well.[41]

The City of Inglewood situation also provides a case example for demonstrating the multiple project context. Achieving the overall development potential linked to the SoFi Complex encompasses four major projects that need to occur in parallel (see Figure 3):[42]

1. ***SoFi Sports and Entertainment Complex*** under development (as discussed in Section 2.5.2) (real estate project)
2. ***New Regional Transit Corridor*** with a direct linkage to LAX with three stations located within Inglewood City proper currently under construction by LA Metro (infrastructure project)

[40] Sometimes, local communities are reluctant to dedicate their VC revenues to major infrastructure projects that they consider as the Federal/State responsibilities. In these cases, the local VC contributions could be justified on a "but-for" grounds based on the recognition that VC from corridor developments and the resulting increase in local revenues would not be possible *but for* the transportation project.

[41] It should be noted that VC techniques would be applied for real estate development projects only where the new revenues are generated from real estate property value appreciations. For example, when considering transit stations (which are infrastructure projects), TODs around the stations are considered real estate development projects that can generate additional revenues to pay for the transit stations.

[42] Figure 3 is compiled from multiple sources available from City of Inglewood, LA Metro, and real estate developers.

3. ***Automated People Mover (APM) System*** connecting one of the Metro stations with SoFi Complex currently being planned by the City to be delivered as an AP P3 (infrastructure project)

4. ***Inglewood Metro Station TODs*** that represent anticipated real estate developments within the 1/2-mile TOD buffer zone[43] around the three Inglewood Metro stations (real estate project)

In general, there are three primary reasons for property value appreciation: (1) increase in density, (2) increase in unit value (by changing to higher value land use), and (3) increase in turnovers (with new developments that trigger reassessments and enable assessed value increases over the statutory limit). All four projects above would trigger such value appreciations and present VC opportunities in the two real estate projects (i.e., SoFi Complex and Metro station TODs) to generate potential revenue sources for all four projects. Table 6 provides a potential scenario of how DAs can be used in multiple project context to maximize potential revenue generation by casting as wide a net of VC opportunity areas as possible.[44]

As shown in Table 6, a DA contract vehicle could be applied to engage multiple VC techniques in all four projects to generate new funding sources. First and foremost, VC revenues from the SoFi Complex and TODs would be used to support their own internal public improvement needs. By engaging additional VC techniques, additional revenues could be generated for potential supplementary funding for the APM connector. This would be justified because the APM connector would benefit both the SoFi Complex and TODs (in large part through property value appreciations).

Finally, if an agreement can be reached between Metro and the City, some part of the new VC revenues could also be used as local contributions to the construction of the three Inglewood stations. This would help ensure that the stations are built and on time. This approach is in line with Metro's existing "acceleration" policy, which defines conditions under which local governments can accelerate those Metro projects that directly benefit their communities. Among others, these conditions include (1) local funding contributions, (2) strong local partnership with Metro, and (3) opportunities for innovations such as engaging private partners.

[43] Buffer zone is the transit station catchment area where TODs are likely to take place. According to FTA guidelines, the TOD "buffer zone" for dedicated heavy and light rail transit system is defined by a 1/2-mile radius around each station along the transit corridor. See FTA, Planning for Transit-Supportive Development: A Practitioner's Guide, June 2014, FTA Report No. 0052, https://www.transit.dot.gov/sites/fta.dot.gov/files/FTA_Report_No._0052.pdf.

[44] Table 6 is compiled from multiple sources available from the City of Inglewood, LA Metro, real estate developers, and others. It represents a potential future scenario of how various VC techniques could be applied in the multiple project context based on ongoing activities as well as specific characteristics of different VC techniques.

Figure 2. Integrated VC Strategy Across Multiple Diverse Projects

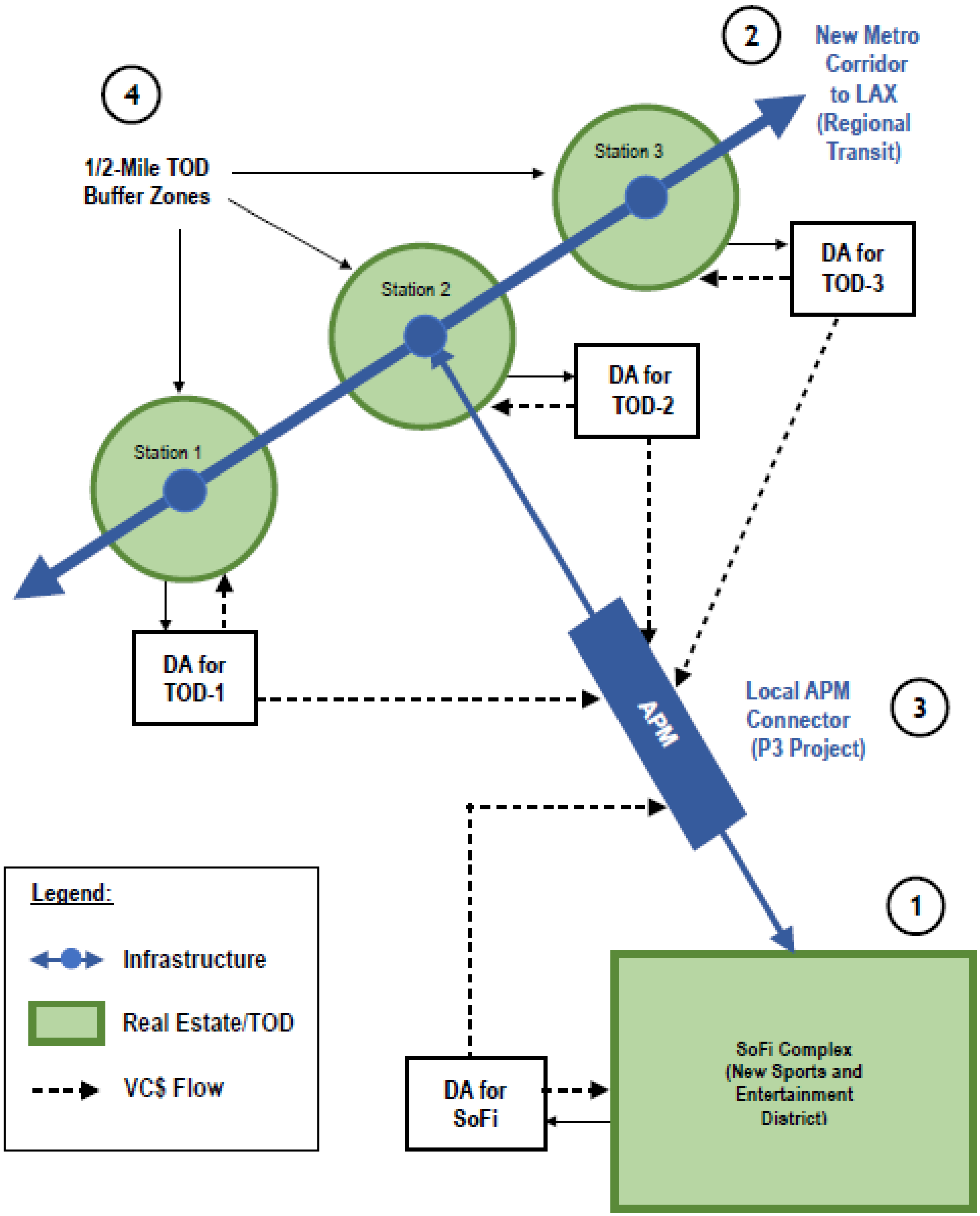

Table 7. Using DAs on Multiple Project Context—Inglewood Case Example

Project	Project Type	Year Open	VC Technique or Project Delivery Model	Infra Funding Source/ Priority	Potential VC Techniques as Funding Source: Publicly Sponsored (TIF, SAD, etc.)	Developer-Based (In-Kind, Impact Fees, etc.)	Private/Corporate (Naming Rights, Ads, Sponsor-ships, etc.)	Other (Density Bonus, TDR, 3rd Pty Franchise, etc.)
SoFi Complex	Real Estate	2020	DA	Primary		✔		
				Secondary	✔		✔	✔
Metro Regional Corridor (Inglewood Stations)	Infra.	2022	Traditional D-B-B	Primary	Sales Tax District (Ballot Measures)			
				Secondary (from Station TODs)	✔	✔	✔	✔
APM Connector	Infra.	2026	AP P3 (CDA)	Primary	Per P3 Concession CDA			
				Secondary (from SoFi & Station TODs)	✔	✔	✔	✔
Inglewood Metro Station TODs	Real Estate	2022	DA	Primary	✔			
				Secondary		✔	✔	✔

APPENDIX A: SAMPLE DEVELOPMENT AGREEMENT

**A DEVELOPMENT AGREEMENT
BY AND BETWEEN THE CITY OF __________
AND _______________, FOR THE
____________________ DEVELOPMENT**[45]

THIS DEVELOPMENT AGREEMENT is made and entered into this ____ day of __________, 200_, by and between the City of _______, hereinafter the "City," and _______________, a (corporation, limited partnership, partnership, etc.) organized under the laws of the State of ____________, hereinafter the "Developer."

RECITALS

WHEREAS, the Washington State Legislature has authorized the execution of a development agreement between a local government and a person having ownership or control of real property within its jurisdiction *[applicable government code]*; and

WHEREAS, local governments may also enter into a development agreement for property outside its boundaries as part of a proposed annexation or service agreement [*applicable government code]*; and

WHEREAS, a development agreement must set forth the development standards and other provisions that shall apply to, govern and vest the development, use and mitigation of the development of the real property for the duration specified in the agreement [*applicable government code]*; and

WHEREAS, for the purposes of this development agreement, "development standards" includes, but is not limited to, all of the standards listed in [*applicable government code*; and

WHEREAS, a development agreement must be consistent with the applicable development regulations adopted by a local government planning under [*applicable government code]*; and

WHEREAS, this Development Agreement by and between the City of _________ and the Developer (hereinafter the "Development Agreement"), relates to the known as __________________, which is located at: [street address] (hereinafter the "Property"); and

WHEREAS, the following events have occurred in the processing of the Developer's application:

a) By Ordinance No. __, the City amended the City's Comprehensive Plan land use designation for the Property to _______________;

b) By Ordinance No. __, the City amended the City's Zoning Ordinance to rezone the property to _________, subject to various conditions;

c) By Hearing Examiner's decision No. ________, approved a *[identify development approval]*, a copy of which is attached hereto;

d) After a public hearing, by Ordinance No. ___, the City Council authorized the Mayor to sign this Development Agreement with the Developer; and

Now, therefore, the parties hereto agree as follows:

[45] This sample agreement is based on a DA template used by the City of Gig Harbor in Washington State (MSRC 2016).

General Provisions

<u>Section 1</u>. *The Project*. The Project is the development and use of the Property, consisting of _______ acres in the City of ____. The _______ *[identify development permit/approval]* describes the Project as ______________ *[number of residential units, retail and service uses, parks, etc.].*

<u>Section 2</u>. *The Subject Property*. The Project site is legally described in Exhibit __, attached hereto and incorporated herein by this reference.

<u>Section 3</u>. *Definitions*. As used in this Development Agreement, the following terms, phrases and words shall have the meanings and be interpreted as set forth in this Section.

a) “Adopting Ordinance” means the Ordinance which approves this Development Agreement, as required by [applicable government code].

b) “Certificate of occupancy” means either a certificate issued after inspections by the City authorizing a person(s) in possession of property to dwell or otherwise use a specified building or dwelling unit, or the final inspection if a formal certificate is not issued.

c) “Council” means the duly elected legislative body governing the City of ______.

d) “Design Guidelines” means the _______ Design Manual, as adopted by the City.

e) “Director” means the City’s Community Development Director or Director of Planning and Building.

f) “Effective Date” means the effective date of the Adopting Ordinance.

g) “Existing Land Use Regulations” means the ordinances adopted by the City Council of _______ in effect on the Effective Date, including the adopting ordinances that govern the permitted uses of land, the density and intensity of use, and the design, improvement, construction standards and specifications applicable to the development of the Subject Property, including, but not limited to the Comprehensive Plan, the City’s Official Zoning Map and development standards, the Design Manual, the Public Works Standards, *[State environmental law]*, Concurrency Ordinance, and all other ordinances, codes, rules and regulations of the City establishing subdivision standards, park regulations, building standards. Existing Land Use Regulation does not include non-land use regulations, which includes taxes and impact fees.

h) “Landowner” or is the party who has acquired any portion of the Subject Property from the Developer who, unless otherwise released as provided in this Agreement, shall be subject to the applicable provisions of this Agreement. The “Developer” is identified in Section 5 of this Agreement.

i) “Project” means the anticipated development of the Subject Property, as specified in Section 1 and as provided for in all associated permits/approvals, and all incorporated exhibits.

<u>Section 4</u>. *Exhibits*. Exhibits to this Agreement are as follows:

a) Exhibit A – Legal Description of the Subject Property.

b) Exhibit B – Map showing Development Phases.

c) Exhibit C – Map of Wetland Areas.

<u>Section 5</u>. *Parties to Development Agreement*. The parties to this Agreement are:

a) The “City” is the City of _____, *[address]*.

b) The “Developer” or Owner is a private enterprise which owns the Subject Property in fee, and whose principal office is located at __________________________.

c) The “Landowner.” From time to time, as provided in this Agreement, the Developer may sell or otherwise lawfully dispose of a portion of the Subject Property to a Landowner who, unless otherwise released, shall be subject to the applicable provisions of this Agreement related to such portion of the Subject Property.

Section 6. *Project is a Private Undertaking*. It is agreed among the parties that the Project is a private development and that the City has no interest therein except as authorized in the exercise of its governmental functions.

Section 7. *Term of Agreement*. This Agreement shall commence upon the effective date of the Adopting Ordinance approving this Agreement, and shall continue in force for a period of ___ years unless extended or terminated as provided herein. Following the expiration of the term or extension thereof, or if sooner terminated, this Agreement shall have no force and effect, subject however, to post-termination obligations of the Developer or Landowner.

Section 8. *Vested Rights of Developer*. During the term of this Agreement, unless sooner terminated in accordance with the terms hereof, in developing the Subject Property consistent with the Project described herein, Developer is assured, and the City agrees, that the development rights, obligations, terms and conditions specified in this Agreement, are fully vested in the Developer and may not be changed or modified by the City, except as may be expressly permitted by, and in accordance with, the terms and conditions of this Agreement, including the Exhibits hereto, or as expressly consented thereto by the Developer.

Section_9. *Permitted Uses and Development Standards*. The permitted uses, the density and intensity of use, the maximum height and size of proposed buildings, provisions for reservation and dedication of land or payment of fees in lieu of dedication for public purposes, the construction, installation and extension of public improvements, development guidelines and standards for development of the Subject Property shall be those set forth in this Agreement, the permits and approvals identified herein, and all exhibits incorporated herein.

Section 10. *Minor Modifications*. Minor modifications from the approved permits or the exhibits attached hereto may be approved in accordance with the provisions of the City's code, and shall not require an amendment to this Agreement.

Section 11. *Further Discretionary Actions*. Developer acknowledges that the Existing Land Use Regulations contemplate the exercise of further discretionary powers by the City. These powers include, but are not limited to, review of additional permit applications under [State environmental law]. Nothing in this Agreement shall be construed to limit the authority or the obligation of the City to hold legally required public hearings, or to limit the discretion of the City and any of its officers or officials in complying with or applying Existing Land Use Regulations.

Section 12. *Financing of Public Facilities*.

A. Developer acknowledges and agrees that it shall participate in the ________________ for its pro-rata share of the costs of public improvements to be financed thereby, in accordance with the provisions of this Agreement and the *[State environmental law decision]* issued for the _____________________.

B. At the request of the Developer, the City shall pursue the use of a local improvement district and other similar project-related public financing mechanism for financing the construction, improvement or acquisition of public infrastructure, facilities, lands and improvements to serve the Subject Property, whether located within or outside the Subject Property. To the extent allowed by law, the City shall address any reimbursement mechanism to Developer for expenses incurred by Developer associated with the __________________, subject to the City's ordinances and State law.

Section 13. *Existing Land Use Fees and Impact Fees*.

A. Land use fees adopted by the City by ordinance as of the Effective Date of this Agreement may be increased by the City from time to time, and applicable to permits and approvals for the Subject Property, as long as such fees apply to similar applications and projects in the City.

B. All impact fees shall be paid as set forth in the approved permit or approval, or as addressed in chapter 19.__ of the City Municipal Code.

Section 14. *Phasing of Development*. The parties acknowledge that the most efficient and economic development of the Subject Property depends upon numerous factors, such as market orientation and demand, interest rates, competition and similar factors, and that generally it will be most economically beneficial to the ultimate purchasers of the Subject Property to have the rate of development determined by the Developer. However, the parties also acknowledge that because the Development will be phased, certain amenities associated with the Project must be available to all phases of the Project, in order to address health, safety and welfare of the residents. Therefore, the parties agree that the improvements associated with the Project shall be constructed according to the following schedule:

A. Street Improvements.

B. Potable Water and Fire Flow Facilities.

C. Sewer Facilities.

D. Utilities.

E. Parks and Open Space.

F. ____________________________.

Section 15. *Dedication of Public Lands.* Except as otherwise provided herein, the Developer shall dedicate all public lands required in the permits/approvals within ninety (90) days of the Effective Date of this Agreement. Dedication shall be considered by the City in the following schedule:

A. Parks. With regard to parks within the Subject Property, each park site (or portion of the community park site, which is to be dedicated in phases) shall be dedicated to the City as the maps for the phases of the subdivisions are approved and recorded, as shown in Exhibit __, attached hereto.

B. Rights-Of-Way. Within fifteen (15) days of submission of an application for final plat to the City for any phase of the development, the Developer agrees to dedicate any or all road rights-of-way without expense to the City.

Section 16. *Default*.

A. Subject to extensions of time by mutual consent in writing, failure or delay by either party or Landowner not released from this Agreement, to perform any term or provision of this Agreement shall constitute a default. In the event of alleged default or breach of any terms or conditions of this Agreement, the party alleging such default or breach shall give the other party or Landowner not less than thirty (30) days' notice in writing, specifying the nature of the alleged default and the manner in which said default may be cured. During this thirty (30) day period, the party or Landowner charged shall not be considered in default for purposes of termination or institution of legal proceedings.

B. After notice and expiration of the thirty (30) day period, if such default has not been cured or is not being diligently cured in the manner set forth in the notice, the other party or Landowner to this Agreement may, at its option, institute legal proceedings pursuant to this Agreement. In addition, the City may decide to file an action to enforce the City's Codes, and to obtain penalties and costs as provided in the City Municipal Code for violations of this Development Agreement and the Code.

Section 17. *Annual Review*. The City shall, at least every twelve (12) months during the term of this Agreement, review the extent of good faith substantial compliance by Developer and Landowner with this Agreement. The City may charge fees as necessary to cover the costs of conducting the annual review.

Section 18. *Termination*. This Agreement shall expire and/or terminate as provided below:

A. This Agreement shall expire and be of no further force and effect if the development contemplated in this Agreement and all of the permits and/or approvals issued by the City for such development are not substantially underway prior to expiration of such permits and/or approvals. Nothing in this Agreement shall extend the expiration date of any permit or approval issued by the City for any development.

B. This Agreement shall expire and be of no further force and effect if the Developer does not construct the Project as contemplated by the permits and approvals identified in this Agreement, and submits applications for development of the Property that are inconsistent with such permits and approvals.

C. This Agreement shall terminate upon the expiration of the term identified in Section 7 or when the Subject Property has been fully developed, which ever first occurs, and all of the Developer's obligations in connection therewith are satisfied as determined by the City. Upon termination of this Agreement, the City shall record a notice of such termination in a form satisfactory to the City Attorney that the Agreement has been terminated. This Agreement shall automatically terminate and be of no further force and effect as to any single-family residence, any other residential dwelling unit or any nonresidential building and the lot or parcel upon which such residence or building is located, when it has been approved by the City for occupancy.

Section 19. *Effect upon Termination on Developer Obligations*. Termination of this Agreement as to the Developer of the Subject Property or any portion thereof shall not affect any of the Developer's obligations to comply with the City Comprehensive Plan and the terms and conditions or any applicable zoning code(s) or subdivision map or other land use entitlements approved with respect to the Subject Property, any other conditions of any other development specified in the Agreement to continue after the termination of this Agreement or obligations to pay assessments, liens, fees or taxes.

Section 20. *Effects upon Termination on City*. Upon any termination of this Agreement as to the Developer of the Subject Property, or any portion thereof, the entitlements, conditions of development, limitations on fees and all other terms and conditions of this Agreement shall no longer be vested hereby with respect to the property affected by such termination (provided that vesting of such entitlements, conditions or fees may then be established for such property pursuant to then-existing planning and zoning laws).

Section 21. *Assignment and Assumption*. The Developer shall have the right to sell, assign or transfer this Agreement with all their rights, title and interests therein to any person, firm or corporation at any time during the term of this Agreement. Developer shall provide the City with written notice of any intent to sell, assign, or transfer all or a portion of the Subject Property, at least 30 days in advance of such action.

Section 22. *Covenants Running with the Land*. The conditions and covenants set forth in this Agreement and incorporated herein by the Exhibits shall run with the land and the benefits and burdens shall bind and inure to the benefit of the parties. The Developer, Landowner and every purchaser, assignee or transferee of an interest in the Subject Property, or any portion thereof, shall be obligated and bound by the terms and conditions of this Agreement, and shall be the beneficiary thereof and a party thereto, but only with respect to the Subject Property, or such portion thereof, sold, assigned or transferred to it. Any such purchaser, assignee or transferee shall observe and fully perform all of the duties and obligations of a Developer contained in this Agreement, as such duties and obligations pertain to the portion of the Subject Property sold, assigned or transferred to it.

Section 23. *Amendment to Agreement; Effect of Agreement on Future Actions*. This Agreement may be amended by mutual consent of all of the parties, provided that any such amendment shall follow the process established by law for the adoption of a development agreement (see, __________). However, nothing in this Agreement shall prevent the City Council from making any amendment to its Comprehensive Plan, Zoning Code, Official Zoning Map or development regulations affecting the Subject Property during the next five years, as the City Council may deem necessary to the extent required by a serious threat to public health and safety. Nothing in this Development Agreement shall prevent the City

Council from making any amendments of any type to the Comprehensive Plan, Zoning Code, Official Zoning Map or development regulations relating to the Subject Property five years from the anniversary date of the Effective Date of this Agreement.

Section 24. *Releases*. Developer, and any subsequent Landowner, may free itself from further obligations relating to the sold, assigned, or transferred property, provided that the buyer, assignee or transferee expressly assumes the obligations under this Agreement as provided herein.

Section 25. *Notices*. Notices, demands, correspondence to the City and Developer shall be sufficiently given if dispatched by pre-paid first-class mail to the addresses of the parties as designated in Section 5. Notice to the City shall be to the attention of both the City Administrator and the City Attorney. Notices to subsequent Landowners shall be required to be given by the City only for those Landowners who have given the City written notice of their address for such notice. The parties hereto may, from time to time, advise the other of new addresses for such notices, demands or correspondence.

Section 26. *Reimbursement for Agreement Expenses of the City*. Developer agrees to reimburse the City for actual expenses incurred over and above fees paid by Developer as an applicant incurred by City directly relating to this Agreement, including recording fees, publishing fess and reasonable staff and consultant costs not otherwise included within application fees. This development agreement shall not take effect until the fees provided for in this section, as well as any processing fees owed to the City for the _____________ project are paid to the City. Upon payment of all expenses, the Developer may request written acknowledgement of all fees. Such payment of all fees shall be paid, at the latest, within thirty (30) days from the City's presentation of a written statement of charges to the Developer.

Section 27. *Applicable Law and Attorneys' Fees*. This Agreement shall be construed and enforced in accordance with the laws of the State of ___________. If litigation is initiated to enforce the terms of this Agreement, the prevailing party shall be entitled to recover its reasonable attorneys' fees and costs from the non-prevailing party. Venue for any action shall lie in ________ County Superior Court or the U.S. District Court for ___________.

Section_28. *Third Party Legal Challenge*. In the event any legal action or special proceeding is commenced by any person or entity other than a party or a Landowner to challenge this Agreement or any provision herein, the City may elect to tender the defense of such lawsuit or individual claims in the lawsuit to Developer and/or Landowner(s). In such event, Developer and/or such Landowners shall hold the City harmless from and defend the City from all costs and expenses incurred in the defense of such lawsuit or individual claims in the lawsuit, including but not limited to, attorneys' fees and expenses of litigation, and damages awarded to the prevailing party or parties in such litigation. The Developer and/or Landowner shall not settle any lawsuit without the consent of the City. The City shall act in good faith and shall not unreasonably withhold consent to settle.

Section 29. *Specific Performance*. The parties specifically agree that damages are not an adequate remedy for breach of this Agreement, and that the parties are entitled to compel specific performance of all material terms of this Development Agreement by any party in default hereof.

Section 30. *Severability*. If any phrase, provision or section of this Agreement is determined by a court of competent jurisdiction to be invalid or unenforceable, or if any provision of this Agreement is rendered invalid or unenforceable according to the terms of any statute of the State of _________ which became effective after the effective date of the ordinance adopting this Development Agreement, and either party in good faith determines that such provision or provisions are material to its entering into this Agreement, that party may elect to terminate this Agreement as to all of its obligations remaining unperformed.

IN WITNESS WHEREOF, the parties hereto have caused this Development Agreement to be executed as of the dates set forth below:

OWNER/DEVELOPER:

By ______________________________
Its _______________

CITY OF ____________________

By ______________________________
Its Mayor

ATTEST:

By ______________________________
City Clerk

APPROVED AS TO FORM:

By ______________________________
City Attorney

[Add notary blocks]

APPENDIX B: KEY PROVISIONS IN COMMUNITY BENEFITS AGREEMENTS

A COMMUNITY BENEFITS PROGRAM[46]

I. PURPOSE
II. DEFINITIONS
III. PARKS AND RECREATION
- A. PURPOSE.
- B. APPLICABLE FEES.
- C. PARKS AND OPEN SPACE NEEDS ASSESSMENT.
  1. Needs Assessment.
  2. Funding.
  3. Selection of organization conducting needs assessment.
- D. PARK AND RECREATION FACILITY CREATION BY DEVELOPER.
  1. Park and recreation facility creation.
  2. Timeline.
- E. OPEN SPACE COMPONENTS OF DEVELOPMENT.
  1. Street-level plaza.
  2. Other public spaces.

IV. COMMUNITY PROTECTION
- A. PARKING PROGRAM.
  1. Permit Area.
  2. Developer Support.
  3. Limitations.
- B. TRAFFIC.
- C. SECURITY.

V. LIVING WAGE PROGRAM
- A. DEVELOPER RESPONSIBILITIES REGARDING LIVING WAGES.
  1. Compliance With Living Wage Ordinance.
  2. Seventy Percent Living Wage Goal.
  3. Achievement of Living Wage Goal.
  4. Developer Compliance If Goal Not Met.
  5. Reporting Requirements.
  6. Selection of Tenants.
     - a. Developer Notifies Coalition Before Selecting Tenants.
     - b. Coalition Meeting with Prospective Tenants.
     - c. Consideration of Impact on Living Wage Goal.
     - d. Tenants Agree to Reporting Requirements.
- B. TENANTS' OPPORTUNITIES AND RESPONSIBILITIES.
  1. Living Wage Incentive Program.
  2. Health Insurance Trust Fund.
  3. Reporting Requirements.
- C. TERM.

VI. LOCAL HIRING AND JOB TRAINING
- A. PURPOSE.
- B. CUSTOMIZED JOB TRAINING PROGRAM.
- C. FIRST SOURCE HIRING POLICY.
- D. FIRST SOURCE REFERRAL SYSTEM.

VII. SERVICE WORKER RETENTION

[46] This list of sample provisions are based on the Staples CBA (Gross et. al. 2005).

A. SERVICE CONTRACTOR WORKER RETENTION.
B. WORKER RETENTION FOR HOTEL AND THEATER EMPLOYEES.
C. INCLUSION IN CONTRACTS.
VIII. RESPONSIBLE CONTRACTING
A. DEVELOPER SELECTION OF CONTRACTORS.
B. DEVELOPER SELECTION OF TENANTS.
C. REPORTING REQUIREMENTS.
IX. AFFORDABLE HOUSING
A. PURPOSE.
B. DEVELOPER AFFORDABLE HOUSING PROGRAM.
1. Percentage Affordable Units.
2. Income Targeting
3. Term of Affordability.
4. Location.
5. Unit and Project Type.
6. Relocated Persons.
7. Public Participation and Assistance.
C. COOPERATIVE DEVELOPMENT WITH COMMUNITY BASED ORGANIZATIONS
1. Purpose.
2. Interest Free Loans.
3. Prequalified Non-Profit Development Corporations.
4. Use of Program Funds.
5. Project Selection Process.
D. ADJUSTMENTS TO AFFORDABLE HOUSING UNITS.
X. RELOCATED FAMILIES
A. PURPOSE.
B. MEET AND CONFER.
C. ASSISTANCE.
D. NOTICE OF AVAILABILITY.
E. TIMING.
XI. COALITION ADVISORY COMMITTEE
XII. GENERAL PROVISIONS
A. SEVERABILITY CLAUSE.
B. Material Terms.

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FIRST SOURCE HIRING POLICY

SECTION I. PURPOSE.
SECTION II. DEFINITIONS.
SECTION III. EMPLOYER RESPONSIBILITIES
A. Coverage.
B. Long-Range Planning.
C. Hiring Process.
D. Goal.
E. No Referral Fees.
SECTION IV. RESPONSIBILITIES OF FIRST SOURCE REFERRAL SYSTEM.
A. Receive Employer Notification.
B. Recruit Targeted Job Applicants.
C. Coordinate with Job Training Centers.
D. Screen and Refer Targeted Job Applicants.
E. Maintain Contact with Employers.
F. Assist Employers with Reporting Responsibilities.

G. Prepare and Submit Compliance Reports to the City.
SECTION V. REPORTING REQUIREMENTS.
A. Reporting Requirements and Recordkeeping.
(1) Reports.
(2) Recordkeeping.
(3) Failure to Meet Goal.
SECTION VI. GENERAL PROVISIONS.
A. Term.
B. Meet & Confer, Enforcement.
(1) Compliance with State and Federal Law.
(2) Indemnification.
(3) Compliance with Court Order.
(4) Severability Clause.
(5) Binding on Successors.
(6) Material Terms.
(7) Coverage.

GLOSSARY OF TERMS

Ad valorem – An ad valorem tax is "a tax that is calculated according to value of property, based on an assigned valuation of a piece of real estate or personal property." In general, ad valorem tax increases (e.g., property tax) require much stricter voter approval requirements than those that are not ad valorem tax (e.g., special assessments or tax surcharge)

Availability payment – Regular annual payment to P3 private concessionaire by the public project sponsor for the P3 term conditional on the availability of the facilities at the service level committed by the concessionaire

Brownfield – As used in this Primer, an abandoned, idled, or underused industrial or commercial facility where expansion or redevelopment is complicated by real or perceived environmental contamination

Buffer zone – An area that is impacted by the existence of transit facilities and amenable for transit-oriented developments (TODs)

Community benefits movement – Triggered by the emergence of CBAs and in response to the widespread inequities of urban development, a movement that involves organizing diverse interest groups to obtain a common set of demands and community benefits from public officials and private developers

Downside risk – Financial risks associated with losses

Essential nexus – A test courts have required to establish a direct cause-effect relationship between the proposed project and the exaction imposed on property owners and/or developers to pay for the public improvements needed by the project

Exaction – A financial burden or other requirements a local government places on a developer to pay for all or a portion of the public improvements needed for the developer's project as a condition of project approval

First source hiring – A hiring practice that gives economically disadvantaged or other specially designated individuals the first opportunity to apply for entry-level jobs

General Plan – Comprehensive planning guidelines to a city's or county's future development goals; provides policy statements to achieve those development goals (alternatively referred to as Master Plan or Comprehensive Plan)

Gentrification – Housing, economic, and other factors that affect a community's history and culture and shift a neighborhood's characteristics, often resulting in unfairly displacing poor and disadvantaged individuals

Inclusionary housing – Local policies that tap the economic gains from rising real estate values to create affordable housing for lower income families; e.g., requiring developers to sell or rent 10 to 30 percent of new residential units to lower-income residents

In-lieu fees – Fees paid by a project proponents (developer) to mitigate project impacts; most common being impact fees and linkage fees—impact fees to pay for additional public improvement capacity necessitated by the developer's project and linkage fees to cover the cost of wider negative impacts such the need for affordable housing due to displacement

Police power – The capacity of the States to regulate behavior and enforce order within their territory for the betterment of the health, safety, morals, and general welfare of their inhabitants

Regulatory taking – Occurs when government improperly imposes regulations (such as zoning) that limit the owner's use of that property or exactions or fees on a specific group to pay for improvements that benefit not only the group but the public at large

Revenue risk (or demand risk) – Risk taken by P3 concessionaire dealing with its ability to generate project revenues from third-party users and its need to maintain the user demand levels to generate the revenues

Rough proportionality – A test that proves the need for the exaction amount from developer and/or property owner is roughly proportional to the impact created by the project

Specific Plan – Comprehensive and zoning document for a defined geographic area within a city; implements the city's General Plan by providing a special set of development standards applied to that area

Turnover – A change in property ownership that triggers a reassessment of the property, which can result in assessed value increases that are over the statutory limit

Upside risk – Potential for an asset or investment to increase in value beyond expectation

Vested right – A property owner's irrevocable right to develop his or her property that cannot be changed by future growth restrictions or other regulatory reversals

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FOR FURTHER INFORMATION, CONTACT:

Thay Bishop
Senior Program Advisor
Center Innovative Finance Support
Office of Innovative Program Delivery
Federal Highway Administration
U.S. Department of Transportation
1200 New Jersey Avenue, S.E.
Washington, DC 20590
Tel: 404-562-3695
E-mail: thay.bishop@dot.gov