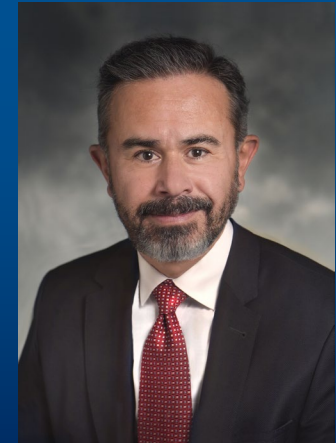


# ***Introduction to Development Agreements and Other Contract-Based Value Capture***



**Rafael Aldrete**

*Disclaimer: The contents of this presentation do not have the force and effect of law and are not meant to bind the public in any way. This presentation is intended only to provide information and clarity to the public regarding existing requirements under the law or agency policies. Value capture techniques and policies are often implemented outside of Federal funding or regulatory requirements.*

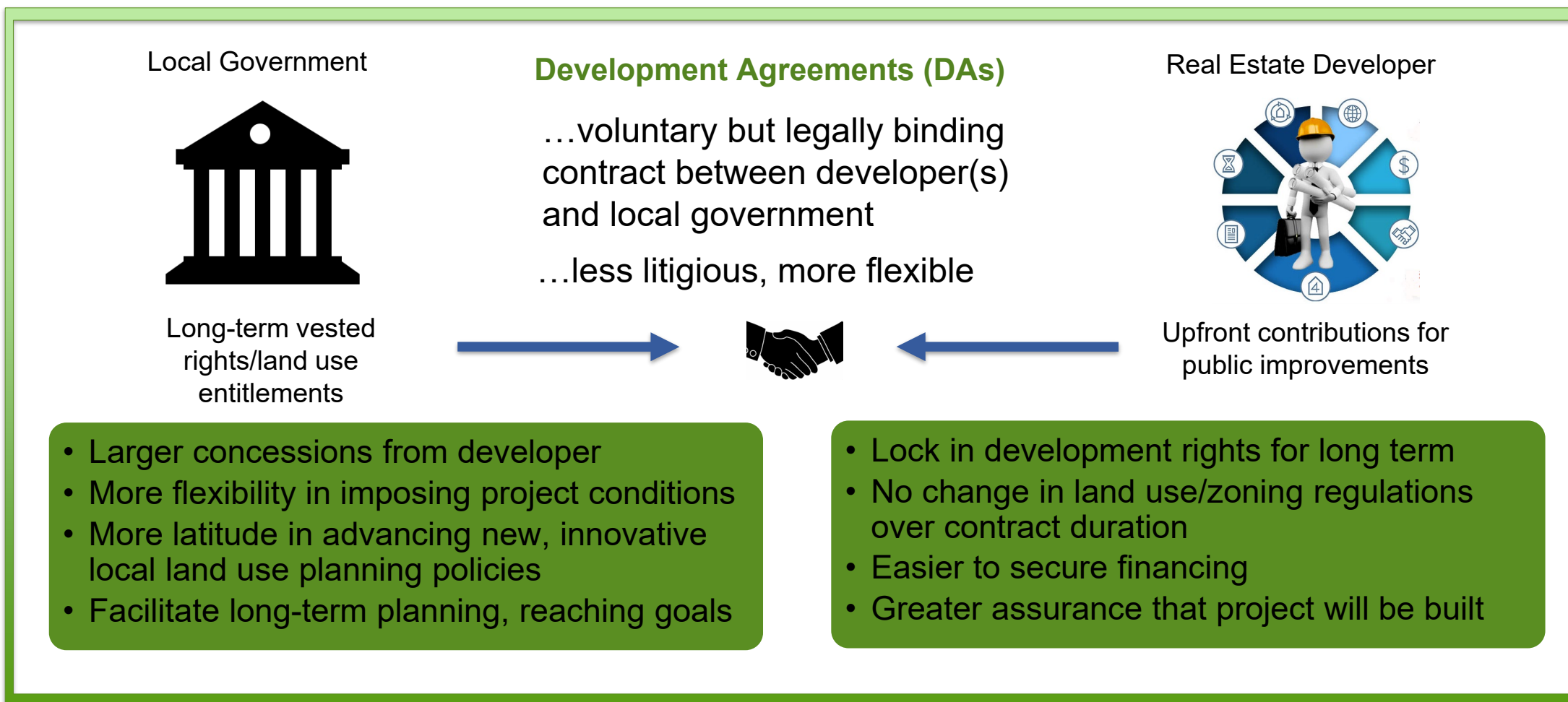
# Presentation Outline

- 1 Overview/History of DAs
- 2 Key Elements of DAs
- 3 DA Implementation Process
- 4 DA Examples
- 5 Community Benefits Agreements (CBAs)
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# Overview: What are DAs?



# Overview: An important legal concept for DAs

Zoning ordinances can be changed at will by government, but DA provides...



## Vested Right

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

First introduced in California in the 1970s, the need for DA was triggered by the new “vested right” requirements set by ***the Avco case (1976)***

# Overview: DA Legislative History

## Developer Exactions

Long legislative history (1950-present)  
Essential Nexus/Rough Proportionality tests  
*[Nollan (1987)/Dolan (1994)/Koontz (2013)]*



## Vested Right

*Vested right after substantial developer liabilities*  
*[Avco vs. CA Coastal Commission (1976)]*



## Development Agreement

**CA Development Agreement Law (1979)**  
First of a kind; VR and nexus test exemption



*...best suited for large-scale, long-term, master planned development projects*

*...should not be confused with Comprehensive Development Agreement  
(long-term concession used for P3 delivery)*

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# Key Elements of DAs

Common provisions covered in DAs include...



- Permitted use
- Density
- Max height, size



- Roads, signals
- Water/sewage
- Park, bikepath



- DA term
- Milestones



- State/Federal laws
- Env. reviews
- Enforceable even if local plans change



## Defaults

- Non-performance
- Remedies/termination
- Amend, cancel



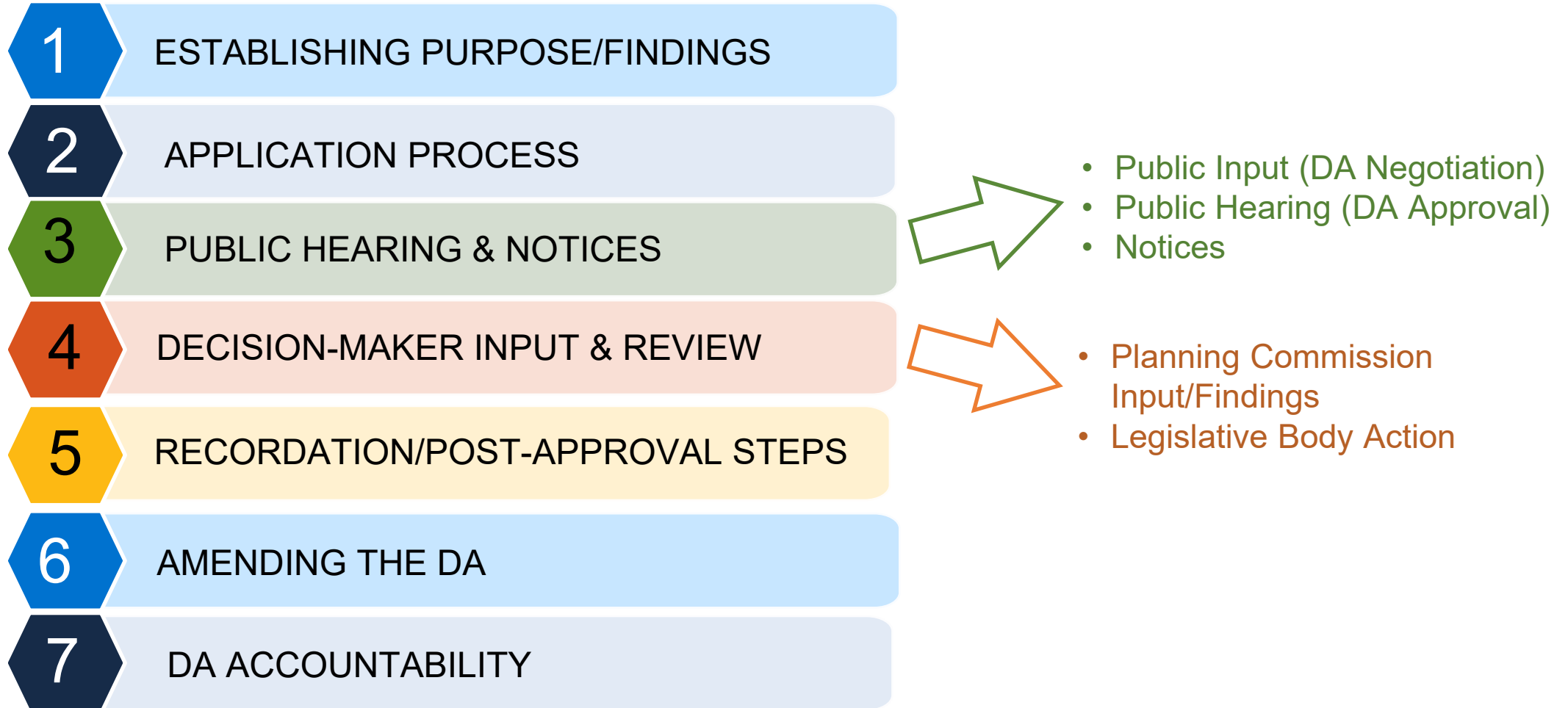
- Annual reviews
- Recordation
- Costs: admin/legal



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# DA Implementation Steps



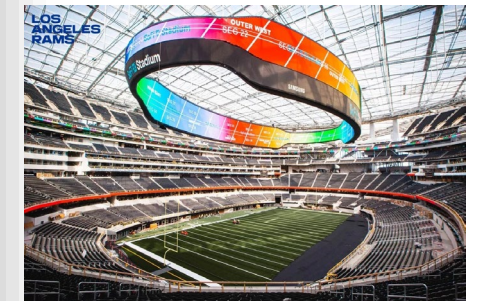
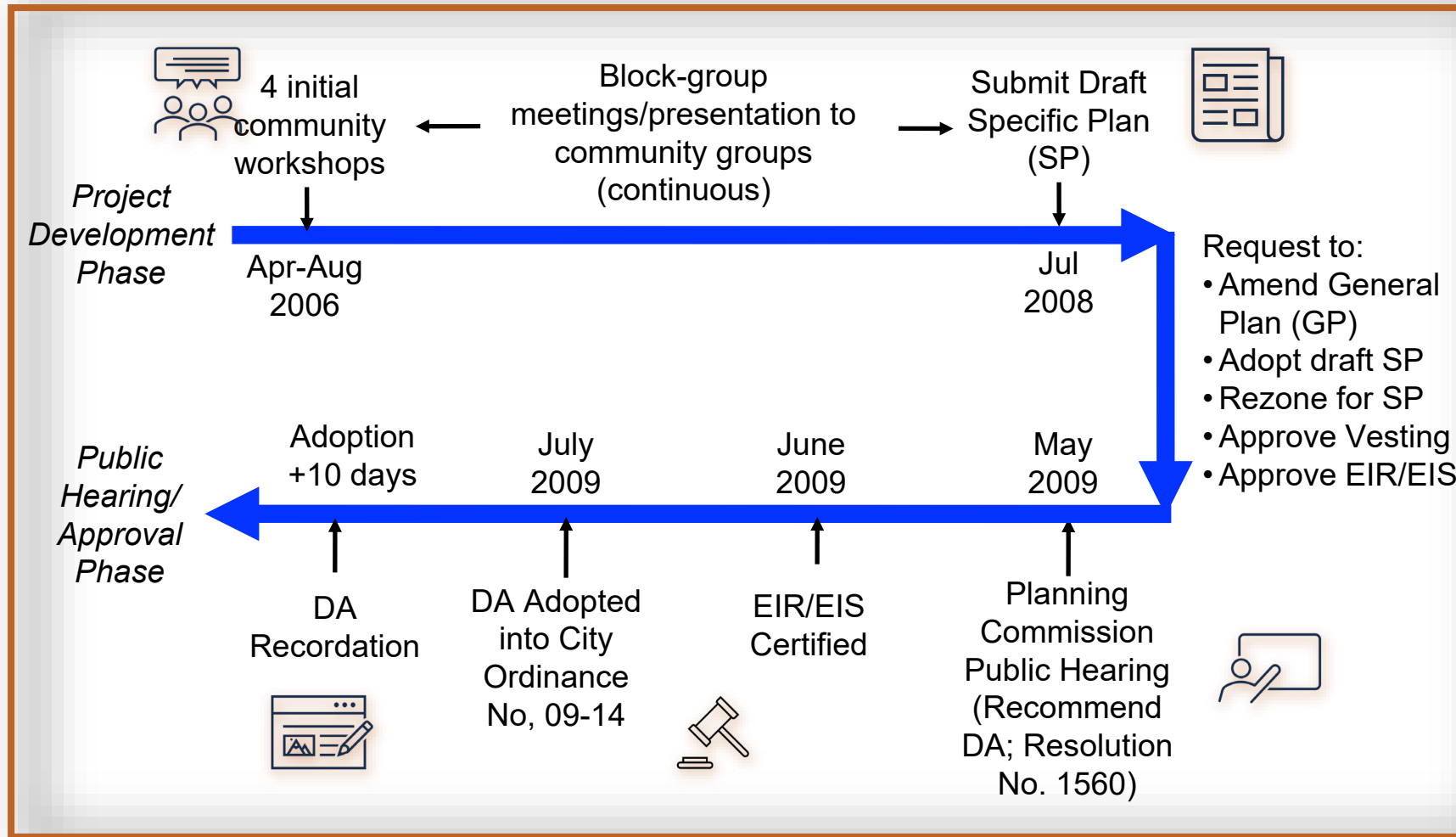
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# DA Examples—Wide Range (Washington)

Location	Year	Term	Size (Acres)	Project Scope	Public Improvements
City of Bellevue	2009	5	Small (36)	<ul style="list-style-type: none"> <li>• Mixed use urban revitalization</li> <li>• Linkage to regional LRT</li> </ul>	<ul style="list-style-type: none"> <li>• Transportation &amp; other infra</li> <li>• Park &amp; recreation</li> </ul>
City of Black Diamond	2011	15	Large (1,200)	<ul style="list-style-type: none"> <li>• Large-scale mixed use</li> <li>• Master planned community</li> </ul>	<ul style="list-style-type: none"> <li>• Transportation &amp; other infra</li> <li>• Park &amp; recreation</li> <li>• Affordable housing</li> </ul>
City of Des Moines	2007	15	Large	<ul style="list-style-type: none"> <li>• Redevelopment of blighted area</li> <li>• Linkage to regional LRT</li> </ul>	<ul style="list-style-type: none"> <li>• Transportation &amp; other infra</li> </ul>
City of Everett	2009	20	Large	<ul style="list-style-type: none"> <li>• Cleanup of riverfront brownfield site</li> <li>• Mixed use developed</li> </ul>	<ul style="list-style-type: none"> <li>• Transportation &amp; other infra</li> </ul>
City of Issaquah	2007	20	Small	<ul style="list-style-type: none"> <li>• Transit-oriented development (TOD)</li> <li>• Zero-energy, demonstration project</li> </ul>	<ul style="list-style-type: none"> <li>• Most municipal facilities &amp; services</li> </ul>
	2012	28	Large (123)	<ul style="list-style-type: none"> <li>• Master planned urban village</li> <li>• Reclamation of mineral resources</li> </ul>	<ul style="list-style-type: none"> <li>• Transportation &amp; other infra</li> <li>• Affordable housing</li> </ul>
City of Redmond	2007	20	Small (27)	<ul style="list-style-type: none"> <li>• New Microsoft campus</li> <li>• Density transfer</li> </ul>	<ul style="list-style-type: none"> <li>• Multi-modal access</li> <li>• TDM, signals, intersections</li> <li>• Water/sewer/stormwater</li> </ul>
Snohomish County	2009	5	Small	<ul style="list-style-type: none"> <li>• 29 station BRT project along Hwy 99</li> <li>• Linkage to regional transport nodes</li> </ul>	<ul style="list-style-type: none"> <li>• Transportation &amp; other infra</li> </ul>

# DA Example—Timeline (Inglewood, CA)



**New SoFi Stadium:**  
LA Rams/LA Chargers

**Hollywood Park:**  
\$5B, 300-Acre  
Mixed Use

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# CBAs: What are they?

Local Community



Community support of  
development project

## Community Benefits Agreements (CBAs)

...voluntary but legally binding contract  
between developer(s) and local community  
...ensure sustained benefits to host  
community



Real Estate Developer



Social  
amenities/economic  
benefits

- CBA signatories—residents, labor/environmental/religious groups, affordable housing advocates
- Monetary and non-monetary benefits
- Increased transparency, accountability

- Timely project approvals
- Easier to get government subsidies
- Easier to secure financing, especially when paired with DA
- Build relationship to avoid legal battles

# CBAs: Community Benefits





# CBA Examples—Wider, More Ubiquitous

- LA Staples Center
- Seattle Dearborn Street Goodwill Project
- Pittsburgh Consol Energy Center Arena
- San Francisco Bayview-Hunters Point Residential Development
- San Diego Ballpark Village Development
- Denver Gates-Cherokee CBA—Brownfield Site on LRT Line
- Atlanta Beltline CBA—LRT Transit Loop
- Los Angeles International Airport CBA
- Detroit—Require City-negotiated CBA for some development projects



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# DA/CBA Issues



## DA/CBA often used in conjunction

- ...relatively new to VC tool box
- ...legal grounds still being tested



- Need greater public participation and transparency
- Concerns about local government relinquishing their ability to change zoning
- Misuse of DAs for unreasonable exactions
- Vested right as currency, sell before built
- Lack good framework for renegotiation

- Legitimacy of community representatives for negotiating on public's behalf
- Enforceability issue, largely untested legal environment
- Use more ubiquitous but overall performance outcome has been mixed
- Often combined with DA for remedy

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# Other Contract-Based VC Techniques

## 1

## JOINT DEVELOPMENT AGREEMENTS (JDAs)

- ✓ Non-private deals where local agencies directly partake in development projects committing public assets
- ✓ Revenue (and/or cost) sharing arrangements

“Public Assets”

Public Land/  
Facilities

Air Rights  
Above

Subsurface  
Rights Below

Rights  
Adjacent to  
Public ROW

JDA

...deals with  
real estate  
development  
projects  
themselves

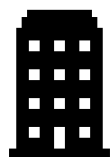
...deals with public  
improvements to  
support real estate  
developments

DA

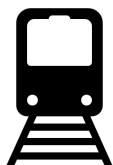
# Other Contract-Based VC Techniques

## 1

## JDA Examples—Transportation



New  
NB HQ



New  
Infill Station

- ✓ New HQ for NB/Mixed-Use Sports Complex—\$500M
- ✓ MBTA commuter rail in-fill station for NB employees—\$20M
- ✓ NB paid:
  - 100% station/track construction
  - Some O&M costs for first 10 years

- ✓ Office Tower Campus for State Farm/KDC—largest corporate office project in Atlanta
- ✓ Direct connection and new access to MARTA  
Dunwoody Station paid by KDC
- ✓ MARTA provided
  - Easement, supervision, O&M



4-Tower SF  
Office Complex



Dunwoody STA  
Expansion



# Other Contract-Based VC Techniques

## 2

## Public ROW Use Agreements

### HIGHWAY CAPS



**The Cap at Union Station  
Columbus, Ohio**



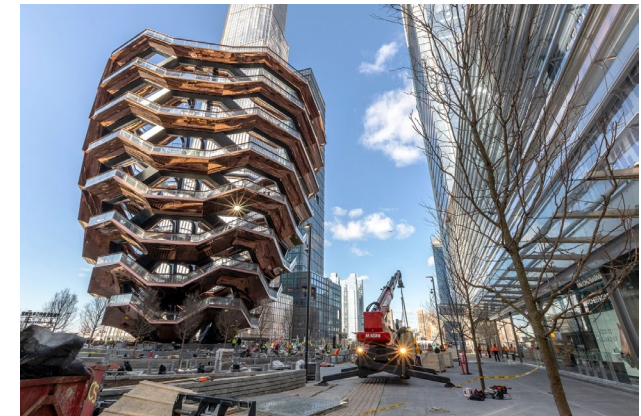
**Capital Cross/3rd St Tunnel  
Washington, D.C.**



### TRANSIT



**Hudson Yards, MTA Tracks  
New York, New York**



# Other Contract-Based VC Techniques

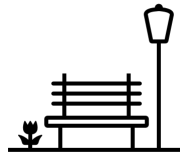
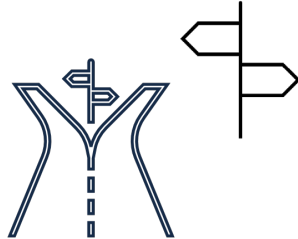
## 3

### Other Public Asset Use Agreements

Naming Rights



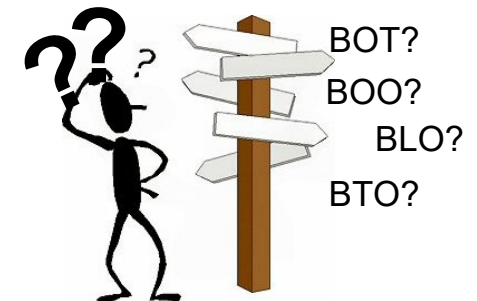
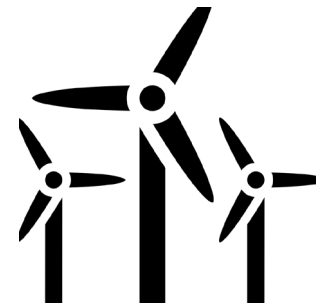
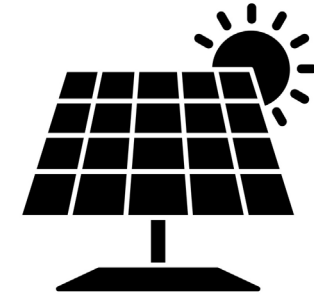
Corporate Sponsorships



Advertising



Third-Party Franchise Agreements



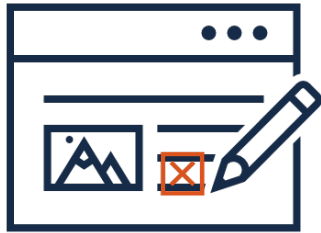


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# Integrating VC Strategy through Contracts

## Integrated VC Framework



- ✓ Start **early**, think **long-term**
- ✓ Local buy-in on “**but-for**” grounds
- ✓ Use **multi-layered** approach
- ✓ **Integrate** and **phase** multiple techniques
  - Based on **risk** and **equity** considerations
  - Using long-term **CONTRACT VEHICLES**

# Questions?

# Contact information

## **Thay Bishop**

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City of  
**Santa  
Monica**



**FHWA Value Capture Webinar  
September 14, 2023**



# Santa Monica Context - DAs

- **City of Santa Monica**

- Development Agreements approved since 1981
- Over 40 DAs, last two approvals March and July 2022

- **Project types**

- Larger scale office campus: ~1M SF (early years)
- Office and hotel development
- Private school and church expansion
- Hospital campus rebuild/expansion
- Biotech
- Housing projects, all sizes

- **DAs as a community development tool**

- *Why, Who, How, What to Keep in Mind*
  - Opportunities and challenges for smaller cities



# What is a DA?

- **Established by California law** (Gov't Code § 65864 – 65869.5)
- **Negotiated contract** between City and Applicant
  - Legislative Act – broad discretion
  - Vested rights for developer
  - Individually negotiated, not precedent setting
  - Shared outcomes – strategic negotiation
- **General Plan/Specific Plan consistency**
- **Voluntary**
  - No need to establish nexus or rough proportionality between community benefits and project, within limits
- **Tailor community benefits**
  - Suit location, context, development proposal
  - Range and magnitude of benefits varies by project
  - Informed by community values/priorities



# Why Pursue a DA?

- Provides highest level of community control over projects

	By-Right	Discretionary	DA
Zoning Code Technical Review	X	X	X
Public Process (Community Mtgs, Public Hearings)		X	X
Environmental Review		X	X
Community Benefits – broad range		Voluntary	X
Ground Level Open Space			X
Coordination between properties			X
TDM Programs	Limited	Limited	X
Transit or Infrastructure Improvements			X
Exceed Zoning Development Standards		Limited	X
Building Mass and Scale		Limited	X
Building Design, Colors, Materials	X	X	X





# Who Should be Involved?

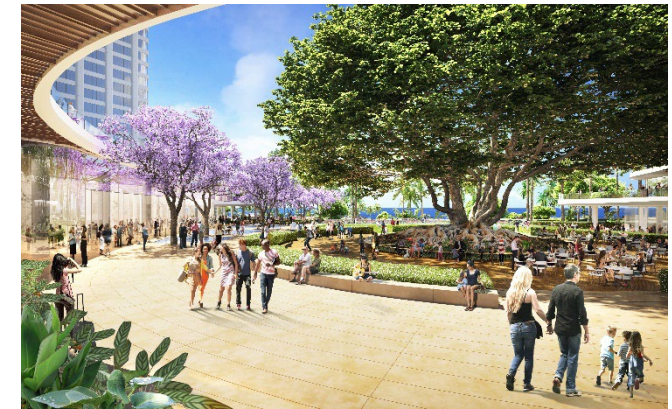
- **Who will lead** negotiations, *set direction*, project manage?
  - Negotiating on behalf of City Council, community
  - Technical expertise – project review
  - Policy depth
  - Political awareness
  - Negotiation skills
  - Consider strengths: should be well-suited for lengthy, intense process
- **City team**
  - Project Manager (Santa Monica: City Planning)
  - City Attorney representative (land use law/CEQA, negotiations, contracts)
  - Internal review groups: PW, Community Services, Sustainability, Mobility
  - Environmental consultant
  - Fiscal/economic consultant
- **Applicant team**
  - Level of interaction will vary based on City/Agency's culture and approach
    - High level of interaction in Santa Monica



# How to Start Negotiations

- **Shape project proposal**

- Applicant's project concept + City's land use policies
- What mix of uses and where?
- What development parameters will be modified?
  - Santa Monica has been focused on building height & density
- *Project value + community benefits*
- Early community feedback
  - Anticipate potential controversy, city staff & applicant must make meaningful adjustments during early and later stages of review
- Seek Council authorization to proceed with negotiations
- Expect significant, comprehensive project review - multiple rounds:
  - site planning, design, historic preservation, mobility, public works utilities/engineering, sustainability



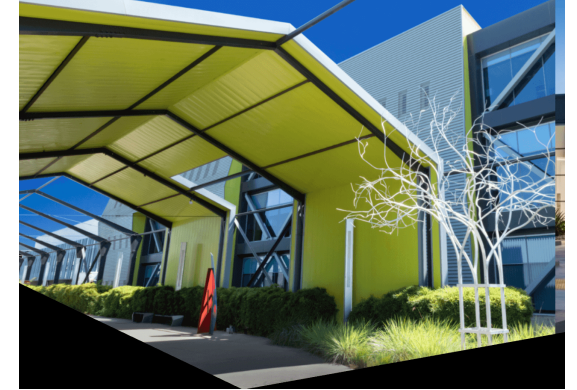
# How to Identify Community Benefits

- **Start with baseline requirements**

- General Plan/Specific Plan priorities
- Impact fees & code
- Inclusionary housing
- *Starting points for negotiations, will need to weigh trade-offs*

- **Identify other community priorities**

- Difficult-to-fund infrastructure
- Programs that impact fees do not fund (e.g., child care facilities vs. child care subsidies)
- Unmet community needs
  - Current needs for Santa Monica, include: affordable housing, homelessness, addressing economic recovery





# Community Benefit Examples

- **Deed-Restricted Affordable Housing**
  - On-site/off-site above base requirement
- **Congestion Management**
  - New vehicle, ped, bike linkages
  - Land dedications
  - Transp. Infrastructure contribution
  - Enhanced TDM programs
  - Shared parking
- **Historic Preservation**
- **New cultural facility (museum) & community programming**
- **Social/Health Services: in-kind & grants**
- **Sustainability**
  - EV chargers & stub outs
  - LEED Platinum or equivalent
  - Solar and Purple Pipe
  - Rainwater/grey water capture/re-use
- **Child Care**
  - Tuition or operating subsidies
  - Physical facility
- **Arts Programming funding and Public Art Installations**
- **Open Space**
  - Park w/courts open to public
  - Publicly-accessible private open space
  - Wider sidewalks, courtyards, landscaping
- **Education and Training**
  - Internships & job training programs
  - First Source Hiring
  - Economic equity funds
- **Enhanced revenue/TOT payments**
- **Community meeting space**
- **Community programming**



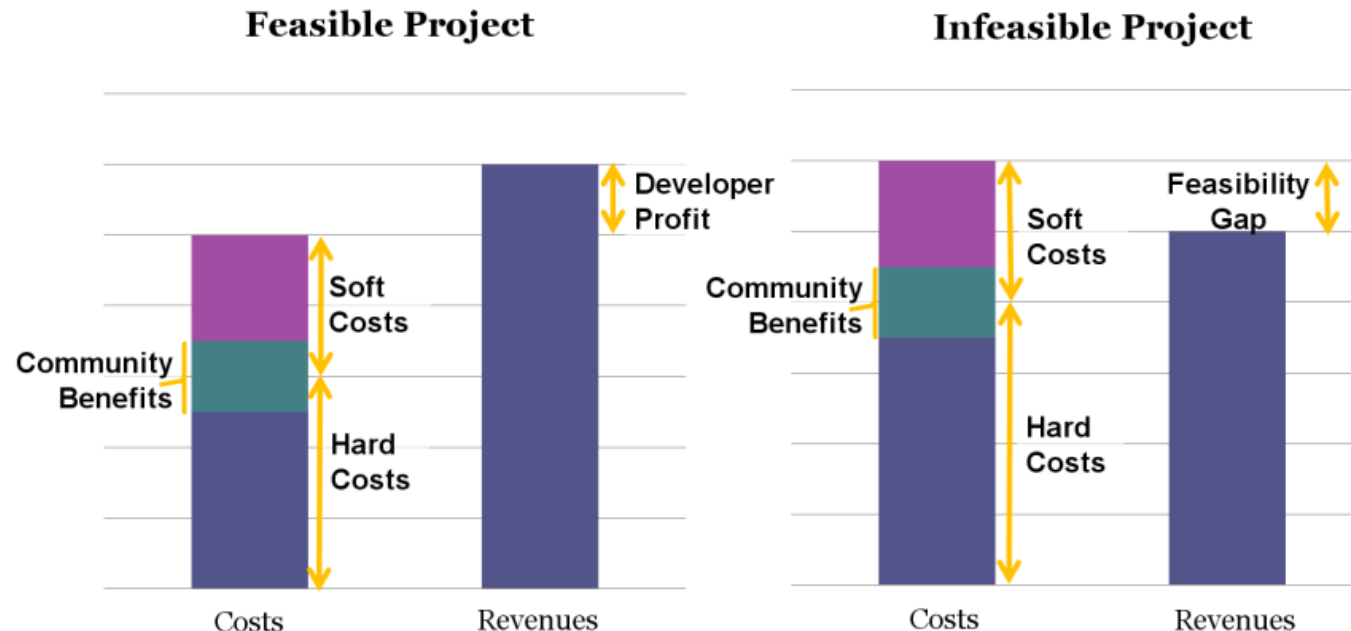
# How to Evaluate Community Benefits

- **Be clear about what value project creates**
  - Consider value of additional development potential (vested rights and/or bigger development envelope) vs. project's *overall value* to City
- **Prioritize & address community needs**
  - Set by community, decision-makers, land use policy/plans
  - Have realistic expectations about magnitude of benefits
  - Combine other financing mechanisms and individually-negotiated DAs to achieve City's overall vision
    - e.g., new light rail station upgrades, new streets
  - Term of community benefit obligations vs. term of DA
- **Use economic analyses to inform decisions**
  - Expect to spend substantial time on this step
    - Complex analysis; data collection, vet assumptions/metrics with applicant



# Economic Analyses

- **Fiscal Impact Analysis & Economic Impact Analysis**
- **Value Enhancement Analysis** – Santa Monica customized to inform negotiations
  - assess ‘value’ of additional development potential derived from DA
- **Feasibility Analysis** – Project + community benefits vs. cost and reasonable rate of return
  - Regardless of measurement technique, a project is feasible, or achieves enhanced value, only if completed project value exceeds development costs





# Case Study DA

## Providence Saint John's Health Center DA & Phase Two Master Plan

### Health Center Campus Master Plan

#### Phase Two Master Plan: 660,150 SF / 1.86 FAR

- Vested rights for 17-year period + extension
- 35% open space on south campus
- Continuation & expansion of community benefits program
  - **Current Zoning Code:** *33% more floor area*
  - 881,850 SF allowed / 2.5 FAR
  - Open space not required
- *Master Plan manages growth for 17+ years; requires substantial open space; requires coordinated infrastructure & utilities*



## Case Study DA

## Providence Saint John's Health Center DA & Phase Two Master Plan

### Guiding Principles for City Review & Negotiations

#### *Community Priorities*

- Preserve/expand community access to high-quality healthcare provided by Saint John's
- Promote economic investment in Santa Monica
- Protect the surrounding community from impacts
- Negotiate enhanced community benefits that support City priorities to address critical community healthcare needs

#### *Land Use Objectives*

- Require orderly, phased, and cohesive buildout of health care and community-focused uses
- Establish vested rights & development maximums
- Address open space, infrastructure, parking, safe/efficient mobility
- Support innovations in medical research & patient care
- Provide flexibility to respond to changing health care needs during 17-year period





## Case Study DA

## Providence Saint John's Health Center DA & Phase Two Master Plan

### Key Community Benefits

- Homelessness services & services to other vulnerable population – annual cash grants and in-kind services, minimum \$29M through 2053
- \$10M Monetary Contribution for Santa Monica Behavioral Health Initiatives
- Operate child care facility for 60 children; tuition subsidy requirement
- 10 units of deed-restricted affordable housing, 99-year term
- Vehicle, ped, bike infrastructure improvements
- 35% open space
- Internship/Nurse Residency Program
- Local hiring and equal opportunity subcontracting provisions
- Community discounts and meeting room use



## Key Points & Policy Considerations

- **Managing development interest, community benefits & future changes**

- Flexibility on project specifics/community benefits
- Ability to plan for future changes

***Policy Considerations:***

- Flexibility = lack of predictability for developers and community
- How to draft contract terms for regular changes + unforeseen circumstances (economy, pandemic)? What level of review?
- How to effectively address needs of underserved communities?
- How to respond to changing community priorities?
- Seek decision-maker and broad community input
- Use whole city/organization's expertise, seek outside support for specific areas
- Staff's best judgement in negotiations
- Think long-term; draft contract to be clear and understood by future staff

## Key Points & Policy Considerations

- **Complex economic analyses**

- May dominate discussion at public hearings; analysis will be disputed
  - do not spend all your time defending the numbers

***Policy Considerations:***

- How much should feasibility analysis matter? Value to community and developer doesn't always translate to dollars/revenue

- **Time-consuming process**

- Intense, lengthy process: *do not lose sight of shared outcomes*
- Negotiate best deal on community's behalf; remember both parties must agree on terms
- Controversial projects may be litigated

***Policy Considerations:***

- Is there a more equitable, predictable, easily-administered alternative to DAs?

- **Monitoring**

- Demonstrate 'good faith compliance' annually; recoup costs for staff time
- Transparency, maintain community trust in process





City of  
**Santa  
Monica**

**Thank you!**



# Working with Development Agreements on Transportation Projects

Observations on best practices  
Value Capture and Development Agreements Webinar  
September 14, 2023

Jeffrey Mullan  
Partner, Foley Hoag LLP  
Boston, Massachusetts



- Preliminary Observations
- A Note on Value
- A Framework for Consideration
- Step 1: Agreement Formation
- Step 2: Approach to Negotiation
- Step 3: Post Agreement Considerations
- Case Study 1: Allston Landing Commuter Rail
- Case Study 2: South Station Air Rights
- Case Study 3: Woburn Park and Ride

- They come by different names, but what I am going to talk about are the characteristics and observations concerning agreements pertaining land and development reached with property owners in lieu of more traditional condemnation for transportation projects.
- They represent a value-based exchange, but don't always result in the vesting of development rights for the developer.
- They always need to reflect the authority in your jurisdiction and therefore, I will focus on themes and advice that I hope will be helpful in multiple jurisdictions rather than the actual techniques and law that have been used in Massachusetts.

- [FHWA's Center for Innovative Finance Support](#) refers to “[value capture](#)” as “*mechanisms that may be used to derive monetary value from transportation improvements to help defray the cost of their implementation.*” It can be defined as “*a fair return in goods, services, or money for something exchanged*” (Merriam Webster).
- Value is not cost - these are different concepts, are different for each party, and are often not completely understood by the parties.
- We tend to think of “value capture” as taking advantage of the future value that is created by the project on which we are working, and it does include that. But, consistent with FHWA’s use of the term, it includes money, time, certainty, achievement of policy objectives, limiting or sharing of risk, economic development, effectively using human capital, and other items that offer value to the agency or the community.

- **Consider the Development Agreement as a project, just like any other project.**
- Begin with the end on mind. How do you define success?
- Develop a statement of purpose and need, an understanding of agency goals and objectives, a summary of the key considerations of the counter-party, and an evaluation of key risk issues sought to be avoided, minimized or shifted. These should be written out, vetted and endorsed by key personnel, and returned to often.
- Do not confuse cost and value. It may cost \$X to provide, but what is it worth?
- Visit the balcony often – understand the perspective of the counter-party.
- It's not always “win-win,” but we must avoid zero-sum thinking.

- **Spend time getting ready and organized before you negotiate.**
- Try to leverage and build on past experience and examples.
- Develop an agreement schedule that includes pre-conditions to action.
- Make certain that every action to be undertaken by both parties is lawful and authorized (each action must “rest on its own bottom”).
- Use term sheets, letter agreements, statements of preliminary intent and understandings to make and measure interim progress. Do not pre-negotiate.
- Develop a benchmark approach for comparison and to keep agency options open – you always need to be able to walk away from the deal.



- **Discipline yourself and your team to an approach with the counter-party.**
- Spend time understanding the counter-party's goals and needs.
- Do what works for you and the agency.
- Designate a spokesperson/key negotiator or a small team for this task.
- Work within, not apart from, the project team. The best agreements adopt an “operations first” approach.
- Document and justify actions and expenses.
- Manage leadership expectations (avoid surprises).

## Step 3: Post-Agreement Considerations

- **Don't just put the agreement in the file.**
- Document what has been agreed to in ways that people can understand and use, just as you would in any asset management system.
- Inform project staff of the agreement terms.
- Perform after-action review. Learn from what has gone right and what has gone wrong.
- Anchor the progress into the organization.
- Do it again.

## Project Highlights

### Key Points

- Initiated by New Balance.
- The City of Boston and the community wanted, to varying degrees, the development and increased transit access from the new commuter rail station.
- The developer needed the station to assist with its permitting for a much larger project that has been well received.
- The MBTA accepted the station on the condition that it was paid for by others.

### Legacy Items

- Project is often cited as an example of how future stations will be built.
- Commuter rail is not urban transit, but it is evolving.
- The station has increased access to the area and has helped leverage other projects.
- Station has added trip time between Boston and Worcester.
- Station is very close to other stations.



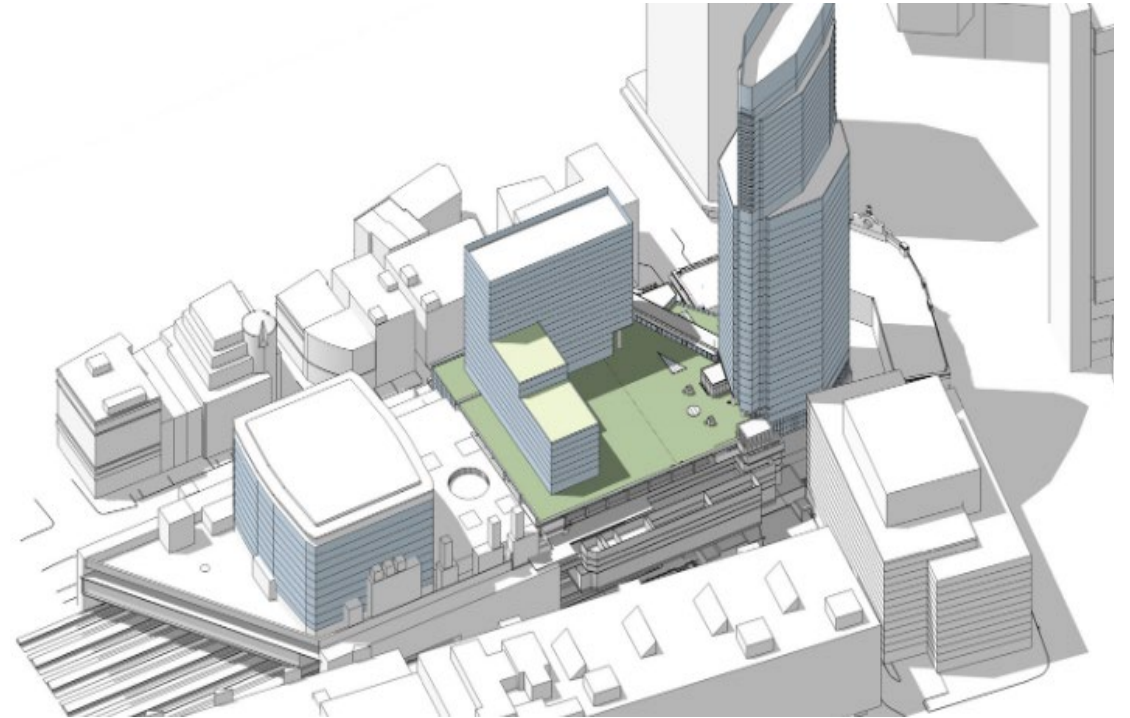
### Project Highlights

#### Key Points

- Initiated in the 1960s by the Boston Redevelopment Authority.
- The BRA sold South Station to the MBTA, reserving to the BRA the air rights behind the station, and obligating the MBTA to build a bus station, subject to availability of funding.
- Part of the bus station was built in the 1990s.
- The MBTA is receiving, as consideration for the conveyance of some of the air rights, the bus terminal. The BRA is receiving monetary consideration for its conveyance of the air rights that were reserved in the original sale of the station.

#### Legacy Items

- Project has a unique set of facts.
- Project is only possible because of its location and the large relative value of the air rights.
- Project will complete the transportation elements of the station over 50 years after they were first envisioned.

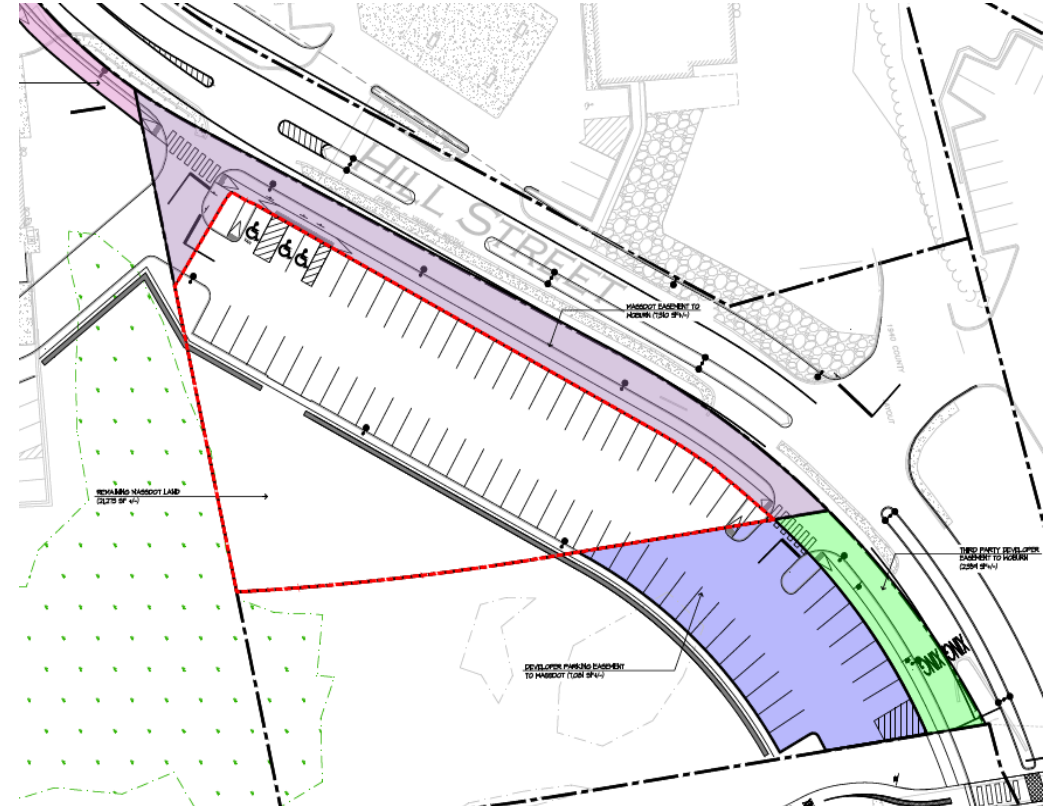


### Key Points

- MassDOT owns a lot near I-95 that is used informally as a park and ride.
- The City of Woburn and the developer of adjacent land needed to widen the street on which the park and ride is located.
- MassDOT is permitting a part of the park and ride to be used for the street in exchange for rights over adjacent property that keeps the size of the park and ride whole, and an agreement by the developer to both rebuild the park and ride to MassDOT's standards and agrees to perform routine maintenance on the park and ride.

### Legacy Items

- Value capture comes in many forms – doesn't always have to be a large project.
- Leveraged simple agreements that were used before.
- Highlights the importance of using land in the negotiation.
- Developer was proud to make these improvements.





**Thank you**