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Understanding & Crafting Development Agreements in Massachusetts

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Understanding & Crafting Development Agreements in Massachusetts

May 21, 2013

Edward J. Collins, Jr. Center for Public Management

McCORMACK GRADUATE SCHOOL OF POLICY AND GLOBAL STUDIES



This report has been funded by the Massachusetts Gaming Commission for the purpose of providing general information regarding development agreements to municipalities that may be considering a proposal from the developer of a gaming establishment. The information provided in this report was developed by the staff at Edward J. Collins, Jr. Center for Public Management at the University of Massachusetts Boston. The opinions or views expressed herein are the opinions or views of the authors of the report and the Massachusetts Gaming Commission is not responsible for the content of this report.

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INTRODUCTION

Part vision statement, part road map, and part contract, a development agreement is more than just a legal document, it is arguably the most important and complex relationship a municipality and a property owner can enter into. The word “relationship” is used here to reflect the long term nature of the agreement and working partnership that is to be developed through the agreement.

A development agreement describes a vision for the future – vision of what a community and a developer have agreed upon through negotiations that take each party’s goals and needs into consideration. In most agreements, the vision, represented through text, plans, and renderings, will be expressed in a manner that provides an average community member with a clear understanding of what is about to be undertaken.

A development agreement maps out the process by which the municipality and developer will realize their shared vision. It establishes a timeline when tasks are due and assigns responsibility for each task needed to achieve those deliverables. Ultimately, a development agreement is a contract that provides assurances to parties, commits resources, and establishes mechanisms to address either party’s failure to live up to its responsibilities.

To reach an agreement that is durable over an extended period of time, a process of fact finding and deliberation must occur. If the fact finding is not thorough or the time to reach agreement is overly compressed, mistakes can be made and needed components of the agreement missed. This will not benefit either party as the agreement may need to be reopened and the relationship may be strained. Or, if the municipality does not have the technical assistance needed to make an informed decision, the entire project can be challenged by the community at large, where their displeasure may be evidenced by opposition during the permitting process or through litigation.

This document provides information that can be useful to municipal officials, community members, and developers involved in large scale or particularly complex developments in Massachusetts. In most situations, similar questions arise and need to be answered in the agreement:

- What are the uses, in what quantities that can be accepted by all parties? What design quality is to be expected?
- What infrastructure investment is needed? Who will fund the infrastructure? Who will build it?
- What are the potential negative impacts of the project and how will they be mitigated?
- What additional contribution to the community will the developer make to show it intends to be a long term partner?
- Who are all of the actors in the development and what will they contribute to moving the project forward?
- What types of guarantees will be put in place to ensure the development moves forward to completion once all required permits are secured?

How to use this document

The report first briefly explains the real estate development business from the developer's perspective. It then identifies the components of a typical development agreement. Following this, it describes how agreements change and grow over time and offers an outline of the negotiation process. The appendices provide an overview of five development agreements and highlights interesting provisions that may be food for thought during negotiations on future development agreements. Two of these agreements are for gaming-related projects and three do not include gaming as a potential land use. Copies of the actual agreements can be accessed via links found within the appendices.

This document is merely a primer, it cannot take the place of the advice of qualified legal counsel and technical experts and is not intended to do so. Municipal officials considering entering a development agreement for a particular project are strongly encouraged to surround themselves with a team of qualified professionals that can guide them through the process and make sure any agreement entered into is in the best interest of the community at large.

A note to municipalities considering entering into Host Community Agreements with gaming providers:

This *Primer on Development Agreements* addresses issues common to most large scale developments. The same questions that apply to all developments – traffic, infrastructure, use mix, design, etc., will apply to a gaming facility, as well. Where negotiations may differ when considering a gaming facility may relate to the extent of project mitigation and community benefits to be made to offset the impact of this particularly unique land use, including the long term financial contribution to be made by the developer to the community, in addition to the specific statutory requirements that pertain to host and surrounding communities.

Comments that relate specifically to gaming facilities will be highlighted in boxes throughout this document.

REAL ESTATE DEVELOPMENT

Real estate development is a complex business with a lot of moving parts. Like all businesses, it is dependent on and affected by global and local conditions, over which the developer has little or no control. When embarking on development agreement negotiations, it is important for public officials to have an understanding of the real estate development business and the developer's needs and interests. By showing the developer a level of business savvy, municipal officials can come to be viewed as collaborative partners, as opposed to obstacles to be overcome.

Among the many global factors, first and foremost is the general state of the economy. What is the condition of the economy? Is it expanding or contracting? If it is expanding, there will likely be overall demand for new housing, offices, and factories. Contracting economies will experience the opposite effect, with buildings sitting vacant or abandoned. Another factor is labor supply – do area workers have the requisite skills, are they available in sufficient numbers, and do they exhibit high levels of worker productivity? Higher worker productivity in a particular location can be more beneficial than a lower labor cost in another location. The balance between productivity and labor costs is becoming an important factor in deciding whether a company expands in the US or overseas.

Among the multiple local factors that affect real estate development, space availability is of primary importance. What is the supply and demand for a particular real estate product (for example, Class A office, flex space, multifamily housing, etc.)? Rents and vacancy rates are often used to measure demand for space. Of secondary significance is timing. How long will it take a developer to get local approvals and construct the project? Timing is critical - a developer who gets its product on the market fastest can take advantage of demand, whereas a developer who is slow to market may miss the window of opportunity. Third is raw land availability. What is the availability of land in the appropriate size and condition? A developer who can secure a parcel with the right location, entitlements, and infrastructure expeditiously wins out over one who has to assemble several parcels into an appropriate site, lay in new infrastructure, and secure special zoning permits.

Like all business people, developers want to reduce the amount of risk and minimize uncertainty in the development process. Developers are betting their time and money that they can deliver the right product at the right time to maximize their return on investment. Municipalities can help in this regard by establishing clear and concise community plans, instituting fair and consistent procedures, and embodying a willingness to negotiate development agreements to advance individual projects.

The following series of topics are just a few of the activities that a developer will need to undertake. It is intended to be illustrative of the real estate development process, but it is not an exhaustive study of the subject.

Site Control

A developer is not going to want to invest time and money preparing studies and making plans for a site that someone else could steal away. Therefore, the developer is going to want to find a way to secure the site.

If a developer does not already own the site, the most common forms of site control will be:

- a. Option to Purchase – the right to purchase the land at an agreed upon price one or before a specified date;
- b. Right of First Refusal – the right to match the best offer; or,
- c. Purchase and Sale Agreement with contingencies – a written contract that requires the seller to sell and the purchaser to purchase real estate at a specific price and time, provided that the stipulated contingencies (required acts or actions of the buyer or seller) are satisfied; and,
- d. Long Term Land Lease – an agreement between the owner of real property and an entity wishing to use the real property for a described use for an extended period of time, for example, 99 years, in exchange for regular rent payments to the owner of the real property.

Financial Due Diligence / The “Pro Forma”

Financial due diligence is the financial evaluation that a developer must undertake to show the bank that the project will cover its debt and return a required profit. It is most often depicted through a financial spreadsheet or “pro forma.”

A pro forma is a financial report used to model the financial outcomes of a particular real estate development project. The pro forma weighs the anticipated expenses and revenues against each other to determine the cash flow available for distribution back to owners.

The pro forma will generate the following information essential to decision-making:

- a. Gross Effective Income (GEI): total expected income from rents less expected vacancies;
- b. Net Operating Income (NOI): total income after all operating expenses have been paid. (Note that utility and property tax payments are operating expenses, while income tax and debt payments are not.) NOI will be used to pay debt service;
- c. Debt Service: the amount of principal and interest to be paid for construction or permanent financing;
- d. Total Project Cost: the total of all acquisition, hard construction, and soft construction costs;
- e. Operating Cost: total annual amount spent on operations (for example, cleaning, utilities, management, insurance, etc.) and real estate taxes;
- f. Capitalization Rate or Cap Rate: the ratio of Annual Net Operating Income to cost (or value). Here the cost is either the purchase price paid for the asset already in place (i.e., an existing building) or the total of debt and equity funding to construct and put the asset in place. The ratio can also be used to roughly determine the value of a property by dividing the Annual Net Operating income by the capitalization rate (expressed as a percentage) of similar properties in the local market.

Five basic ratios derived from the pro forma determine project feasibility:

- a. Return on Investment (ROI): the ratio of annual Net Operating Income to Total Project Cost;
- b. Return on Equity (ROE): the ratio of annual Net Operating Income to owners' equity invested, also called "cash on cash";
- c. Debt Coverage Ratio (DCR): the ratio of Net Operating Income to Debt Service;
- d. Default Ratio: the ratio of Operating Costs to Gross Effective Income; and,
- e. Internal Rate of Return (IRR): the sum of discounted cash flows (annual ROEs) plus Revision. (Revision is the profit after sale less the capital gains tax and for feasibility purposes is assumed to take place at the end of year five.)

A developer will compare the returns projected from the pro forma of a project under consideration to the average returns from other real estate projects in the same market and to the returns available from other forms of investment. Individual developers will have a required rate of return that reflects the risk for each investment. Only after the developer is reasonably confident that the project will meet or exceed the returns on other investment opportunities will the project move forward.

For example, on November 1, 2012, the 10-year rate on a U. S. Treasury Bill, considered one of the safest investments around, was 1.75%.¹ The average rate of return over the past 10 years of the S & P Index was 6.91%,² while Real Estate Investment Trusts have generally exceeded 10% over the same period.³

Project lenders will be particularly interested in the debt coverage ratio and the default ratio. Most banking institutions establish a minimum debt coverage ratio of at least 1.2, meaning that for every \$1 in debt service there must be \$1.20 in net operating income. Similarly, banks have set minimum default ratios, which are the inverse of the debt coverage ratio of 0.8.

Although it is highly unlikely that a developer would share its particular business processes and pro forma analyses with representatives from a municipality, municipal officials can elect to prepare their own "back of the envelope" analyses to ascertain project viability and to get an idea of the project's capacity to deliver community benefits.

The following studies provide information that will contribute to the pro forma:

- a. Market Study: The Market Study will establish the feasibility of the project by determining the supply and demand for a specific product around that site.
- b. Site Plan and Schematic Plans: Site plans and schematics will show conceptually how the site will be built out, including location of structures and parking on the site, areas for landscaping, and access and egress points. These plans will generally include information required to determine whether the project meets zoning requirements (e.g., proposed uses, floor area ratio, minimum lot area per dwelling unit, parking, usable open space, etc.)

¹ US Department of Treasury (www.treasury.gov/resource-center/data-chart-center/interest-rates/Pages/TextView.aspx?data=yield)

² The Quant Monitor (www.quantmonitor.com/the-bigger-picture-sp-500-rolling-10-year-annual-returns/)

³ Updegrave, W. (April 24, 2012). Are REITs a Safe Investment for Retirement? *Money* (<http://money.cnn.com/2012/04/24/pf/expert/REITs-retirement.moneymag/index.htm>)

- c. Transportation Study: The transportation study will analyze existing pedestrian and vehicular traffic patterns and project future demand by transportation mode, and make recommendations for mitigating the impacts of the demand or improvements to the existing transportation network to meet that demand.
- d. Utility Study: The developer will need to work with the city or town engineer to determine if adequate potable water, waste water, and storm water drainage capacity is already available at the site for the projected build out and expansion phases. If not, a series of utility studies may be necessary to determine the required improvements.
- e. Environmental Assessment: The Environmental Assessment will help determine if there is a potential for hazardous materials on the site or if the site could be impacted by releases of hazardous materials in the surrounding area. Diligent fact finding will be important as the cost of an environmental cleanup could derail the development. Additional testing will be needed to understand the soil compaction capacity and other geotechnical information. In Massachusetts, these studies are commonly referred to as Chapter 21E Phase I Initial Site Investigation Report or ASTM Phase I Site Assessment Report.
- f. Site Survey and Title Report: The site surveys and title report will help define the property and its ownership history and encumbrances. Components include:
 - A *boundary survey* defines the perimeter of the property and establishes a reference point to locate the property in relation to adjacent properties. It will generally show all structures and improvements on the site, and may show those within a predetermined distance from the site.
 - A *topographical survey* shows the elevation contours on the property. Boundary and topographical surveys are sometimes combined into one document.
 - A *title report* that identifies all the previously known owners of record and what their claims are on the property. It also identifies encumbrances of record like long term leases, deed restrictions, and easements.
 - An *Alta (American Land Title Association) Survey* shows boundaries, structures, tangible physical elements (e.g., utility poles, railroad tracks, drains, etc.), and certain encumbrances on the property such as easements of record.
- g. Materials Standards: Design and material standards build upon the site plan and schematics work mentioned earlier. The quality of materials can vary greatly and actual product samples are the best means to determine the quality offered for exterior cladding, and finishes.

Entitlements: Zoning Permits, Other Permits, and Licenses

From a developer's perspective, securing state and local permits is a costly, time intensive, and seemingly never-ending process. A developer will need to create an outline of the various application and review steps, and estimate the amount of time required to navigate the process. Although permitting is almost never easy, municipal officials will do well to encourage developers to welcome the public process, in recognition that local community members will likely be some of the best customers/advertisers of a project. Permitting boards and members of the public can also offer valuable insights into how to improve the design.

Financing

The typical project is financed through a combination of developer equity and private sector debt. Developer equity is the cash or other consideration, such as real estate, that a developer puts into the deal; it represents the developer's capital investment in the project. Debt is the money that a developer borrows from others that must be repaid. The debt structure of a project can be very complex, sometimes with multiple lenders.

There are generally three phases when the developer will need financing:

- a. Phase I Predevelopment: During the predevelopment phase, a developer will need financing for site control, due diligence, and permitting. This generally comes in the form of cash equity from the developer.
- b. Phase II Development: As part of the development phase, available funding will be used for final site acquisition, construction, infrastructure improvements, and stabilization. This is short term debt financing required to reimburse the developer for some expenditures made in the Phase I and to complete the development to a point when it is usable and can be occupied. It sometimes requires additional equity from a developer to maintain a prescribed loan to equity ratio. The term "stabilization" generally refers to the time from when a building has been completed to when it is generating enough cash flow to cover its operating costs.
- c. Phase III Post Development: After development has occurred, financial resources will be used to retire the construction loan, often called "Take Out" or "Permanent Financing." This medium term debt financing literally takes the construction lender out of the deal, hence one of the names of this type of financing. The term "permanent financing" is a bit of a misnomer since even the permanent loan will have a term at the end of which the loan will have to be repaid or refinanced.

In some cases the private equity and debt are insufficient to pay all the pre-development, acquisition, construction, infrastructure, and stabilizations costs without jeopardizing the developer's expected return on investment and it is increasingly common for developers to seek public financing from a city or town or from the Commonwealth. If the project supports a greater public good, such as generating increased tax revenue or providing jobs, the Commonwealth or a city or town may choose to provide some public financing to the project. Public financing can take many forms, including general obligation bonds, revenue bonds, grants, loan guarantees, tax abatements, or construction by a government of key infrastructure elements.

The Massachusetts Gaming Act precludes the use of several State programs for public infrastructure including Tax Increment Financing (TIF), District Improvement Financing (DIF), and I-Cubed (Infrastructure Investment Incentive Program), as well as several tax credits or deductions. A gaming establishment is also precluded from being designated as an economic opportunity area or a designated development district, and therefore is not subject to the benefits that may be incurred by these designations.⁴ However, the Expanded Gaming Act's list of prohibited public financing and tax credits does not preclude the use of Title VII Public Welfare, Chapter 121A Urban Redevelopment Corporations, which allows for public borrowing of funds for infrastructure that will be paid back by the developer.

⁴ M.G.L. c. 23K, § 49(a) and M.G.L. c. 23K, § 49(b).

Architectural Design and Engineering

After needed land use permits have been issued, but before construction can begin, the developer will work with architects and engineers to refine the initial schematics developed earlier in order to secure a building permit and select a master contractor. The design stages can be described as follows:

- a. Design Development Phase: The architect, with the project's engineers and landscape architects, will prepare plans showing architectural, mechanical, electrical, plumbing, structural, and landscaping details. The plans will also include descriptions of materials.
- b. Construction Documents Phase: The design development documents are further refined within plans and written specifications and a cost estimate is prepared.
- c. Bid Documents: Construction documents and bid forms will be sent to contractors to solicit price proposals.

The Construction Documents referenced above are those that will be reviewed by a municipality in order to secure a building permit.

Construction

Prior to the start of construction, the developer will choose a construction manager or a general contractor and subcontractors to build the project. This decision will determine whether the project is a union shop, open shop (no union representation) or a blended shop with both union and non-union trades. A blended shop will generally require a negotiated labor agreement between the developer and the various trade unions. If the developer is considering an open shop, there will be several factors that need to be considered. If there is any public money in the project, the developer will need to comply with Prevailing Wage laws. Additionally, the developer may also need to comply with local hiring and training requirements, or local Living Wage ordinances, depending upon the results of negotiations with the municipality, especially if a local financial contribution is to be made.

Site management considerations can include:

- a. Hours of Operation: Some municipalities prohibit construction when inspectors are not available and therefore restrict work to 7 am to 5 pm, Monday through Friday. However, a developer may wish to make sure construction managers and workers can arrive on the site earlier for coordination or meetings. Given this, they may wish to negotiate some flexibility in hours of operation provided that municipal ordinance or bylaw allows for some level of discretion.
- b. Site Access: The National Labor Relations Board allows for the creation of separate gates for union and non-union workers to prevent labor actions from completely closing down a construction site. The location of the gates and appropriate parking areas will need to be identified.
- c. Subcontractor facilities: Subcontractors will want secure areas where they can fabricate structural elements and store their tools and equipment.
- d. Deliveries and Laydown: Suppliers will need to make deliveries and have building materials stored securely on site.

- e. Performance Bonds: More and more communities are requiring Performance Bonds from the Developer to make sure that the project can be completed on time and as designed should the Developer default. The bonds also insure that the site and public areas around it are cleaned up daily and at the end of the construction.
- f. Public Elements: If the Developer is building any public improvements, like parks or infrastructure, the elements will need to be built to community standards and the method for procurement of services, inspection, acceptance, and delivery clearly defined.
- g. Relationship Management: Finally, the municipality and developer will need to work cooperatively to schedule public ceremonies like ground breaking, topping off, ribbon cuttings, and grand opening.

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DEVELOPMENT AGREEMENTS

Components of a Development Agreement

A development agreement is a contract between a municipality and a person or entity that has ownership or control of a property within the municipality's jurisdiction. A development agreement is not needed for all projects, but one may be written when a project is particularly large, transformational in nature, and/or requires significant mitigation. A written agreement is also warranted when a municipality is contributing in some tangible way to the project, such as selling or acquiring property, investing in public infrastructure, or offering special tax incentives.

A development agreement spells out the terms, standards, conditions, roles, and responsibilities of each party for a proposed development, as well as the development's scale and uses. While that may sound relatively straight forward, it tends to be a lengthy and complicated legal document. It is also a document that will need to evolve over time as information becomes available, conditions change, and/or unforeseen circumstances appear. A development agreement may not survive the term of the Chief Municipal Officer (Mayor or City Manager) or Board of Selectmen, depending on the form of government, unless it has been adopted by a legislative body or incorporated into a permit issued by a Special Permit Granting Authority.

The following is a broad outline of the key elements of a development agreement. It goes without saying that this is an important legal agreement and that competent in-house counsel or experienced outside counsel should be involved from the outset helping to craft the provisions of the agreement. If the municipality is of the opinion that outside counsel is required, it is not unusual for the developer to pay the municipality's legal expenses. Later in this document, the evolution of a development agreement is discussed.

In general, the sections commonly found in development agreements include:

1. Introductory paragraph: This narrative generally states the date of the agreement, the correct legal names and forms of legal entity of the signatory parties and their addresses. It also includes each signatory's successors and assigns by reference (e.g., Brown Development, LLC, a duly organized Delaware limited liability company with a usual address of..., its successors and assigns... and the City of Eastover, a Massachusetts body corporate and politic, with the usual address of..., its successors and assigns...).
2. Background paragraphs or recitals: Background paragraphs provide an explanation for the agreement. They address the "who, what, where, when, and why" of the deal.

Recitals are more formal statements providing the same information and usually begin with the phrase, "Whereas." Common examples include:

Statement of ownership or control, such as:

- Whereas, Brown Development owns 120 acres at the intersection of...

- Whereas, Brown Development has a purchase option for 10 acres...

Statement of status, such as:

- Whereas, the City of Eastover has designated Brown Development as its designated developer under the City's Urban Renewal Development Plan...
- Whereas, Section 15(8) of Chapter 23K of the Massachusetts General Law requires that...

Statement of purpose, such as:

- Whereas, Brown Development proposes to construct a 250,000 square foot mixed use development...
- Whereas, the City of Eastover wishes to expand its commercial tax base...

3. The body of the agreement: Although agreements may differ, they typically include the following:
- a. Project description: A thorough project description includes, at a minimum, the number of buildings comprising the project, a breakdown of the estimated square footage of various uses to be included in the project, and the number of parking spaces. Illustrative maps, plans, and/or drawings will be included, as available.
 - b. Project timeline: A project timeline will include a breakdown of project phasing and identification of key milestone dates such as:
 - the date when due diligence is anticipated to be completed;
 - the date by which a firm commitment of financing must be secured;
 - the date by which the property is to be acquired (if not already acquired);
 - the dates when various permits are anticipated to be applied for and issued (tentative); and,
 - the dates when construction is anticipated to commence and reach completion (including estimated dates for substantial completion, occupancy, and stabilization).
 - c. Statements regarding public infrastructure: If a developer is constructing public improvements, such as roadways or water and sewer lines, for the municipality, this section will establish the standards to which they must be built, who will be the final arbiter of satisfactory completion (i.e., city engineer), and any other terms for delivery and acceptance of the public infrastructure.
 - d. Conditions from other municipal agencies that do not have discretionary permit-granting authority: A fire department may see the need for additional vehicles as a result of a large development, but not have the authority to require funding for the acquisition since the department may only get involved at the building permit stage. To ensure that municipal needs are identified, it is typical for police, fire, and DPW departments to be convened to discuss how a project is likely to affect ongoing operations and to identify capital expenditures for which the developer may need to provide a financial contribution by way of mitigation for the project. Depending upon the project, the chief assessor, treasurer/collector, public health director, recreation director, and others may also provide valuable early input into the development agreement.

In particular, if a gaming establishment agrees to provide a percentage of its revenues to a municipality (in addition to property tax), the city auditor or town accountant may wish to require preparation of certain reports or have access to certain financial records which could be described in the development agreement.

- e. Project mitigation: Mitigation consists of things the developer must do, at the developer's expense, to alleviate potential negative impacts of a project on the site and its surroundings. Permitting authorities typically include a set of conditions requiring a developer to provide mitigation of various kinds which may be required prior to or during construction of the project, or which may even take effect after the project is completed and operational. The development agreement may reference the foregoing type of mitigation but may also impose additional mitigation requirements.
- f. Public benefits: Public benefits can be defined as contributions from the developer toward programs or improvements that benefit the community. These are distinct from mitigation in that they may not have a direct link to the construction or operational impacts of the project.
- g. Sources and Uses Statement: This section of the agreement would include, in addition to any narrative, a table showing a breakdown of the sources and amounts of funding and a breakdown of the costs of the project, including both hard and soft costs (e.g., architectural design, engineering, legal services, insurance, interest, contingency, etc.). The sum of all the sources of funding should be equal to the sum of the costs.
- h. Municipal actions: In this section, the municipality will outline activities it will undertake in support of the project. Some actions can be undertaken via executive authority and/or committed to by the board of selectmen or councilors. However, other actions may require decisions by independent planning or zoning boards or participants at town meeting. In these instances, the development agreement cannot commit to their approval. Instead, the development agreement could use statements such as, "facilitate review of proposed rezoning for parcel X" or "apply for infrastructure financing from the Y program". At times state agencies, such as MassDOT or the state legislature, may need to take actions such as review a roadway design plan or approve a home rule petition. In these instances, the municipality can commit to forwarding the required materials to the respective entities in a timely manner.
- i. Representations, warranties, indemnifications, covenants, and similar provisions:
 - Representations are statements of fact⁵. They can convey the authority under which the parties are acting. Additionally they can state other important background information. For example:
 - "The City is a Massachusetts municipal corporation duly formed, validly existing and in good standing under the laws of the Commonwealth of Massachusetts";
 - "Company X is a Delaware limited liability company duly formed, validly existing and in good standing under the laws of the state of Delaware and duly qualified to do business and in good standing under the laws of the Commonwealth of Massachusetts";

⁵ Black's Law Dictionary

- “This Agreement has been duly authorized by a vote of the Board of Company X and constitutes a valid and binding obligation of it”;
 - “Company X owns in fee simple title the property at 123 Main Street.”.
- Warranties are assurances made by the parties that specific facts and conditions are true and will remain so during the term of the agreement.
 - Indemnifications are pledges made by one party to protect the other against loss⁶, such as through third party legal action. Many indemnifications include a provision for the developer, its successors and assigns, to either represent the municipality in court at its own cost or reimburse the municipality for its own legal representation. An example of an indemnification would be a “hold harmless” clause where the developer will not hold the municipality liable for losses or damages; or will reimburse the municipality for court costs and damages awarded by a court or through a settlement resulting from legal action brought by someone who is not a party to the contract.
 - Covenants are pledges to do or not do specific actions. The developer may pledge not to challenge the tax assessment. The municipality may pledge to provide certain infrastructure or fast track permit review and approval.

The above provisions are typically legal boilerplate supplied by in-house or outside counsel.

- j. Default and remedies: A default is a failure by one party to do something that was promised in the agreement. A municipality is often concerned about the developer’s defaults, which may include failure to submit a permit application by a specific date, failure to pay real estate taxes, failure to pay prevailing wages (if there are public monies in the project), or failure to complete construction on time and a host of other potential defaults. Typically, the development agreement provides that a notice of default be issued to give the developer a period of time to correct (aka “cure”) the default. If a developer fails to cure the default within that period of time, the agreement gives the municipality remedies. Remedies are the agreed upon methods for correcting the default.
- k. Miscellaneous information: This may include statements as to the governing law, how notice is to be made (i.e., certified mail, overnight mail, etc.), whether or not the agreement is to be recorded, etc.

4. Possible Exhibits and Addendums:

The following documents can be added to the development agreement by reference, if desired. However, care should be taken because they may be modified over time and the development agreement is intended to extend beyond completion of construction and into the ongoing operation of the project.

- a. Definitions of key terms
- b. Regional Map
- c. Local Map
- d. Site plans

⁶ Black’s Law Dictionary

- e. Site renderings
- f. Local Area Master Plan
- g. Transportation Studies and Plans
- h. Environmental Studies and Plans
- i. Required amendments to Zoning Text or Map
- j. Site specific Design Guidelines
- k. Special Legislation required
- l. Copies of documents referenced in the Agreement
- m. Developer's biography and financial statements.

Development Agreements Over Time

Rather than considering a Development Agreement to be a monolithic document, a Development Agreement may be viewed as one that will advance or evolve over stages. Each stage will build upon the previous one, incorporating new elements as they are negotiated.

1. Stage 1: Initial Agreement:

At the time the initial agreement is developed, all due diligence may not have been completed and all facts regarding the proposed development site may not be known. The purpose of the agreement at this stage is to define the general concept of the project, lay out the roles and responsibilities of the parties during the investigatory process, and establish an agreed upon timeline. Elements may include:

- a. Concept: A description in general terms, what is being proposed by the developer that the municipality is willing to consider. How many acres, estimated total square footage, proposed uses, etc.
- b. Technical Assistance: An acknowledgement by the municipality that it does not have the resources or technical expertise to deal with project as conceived, and a commitment by the developer to provide funds up front for the municipality to secure the necessary resources and expertise.
- c. Critical Path: An identification the key milestones in the due diligence and permitting process, including any milestones relating to obligations of the municipality (e.g., to rezone the property).

In this stage, the municipality is agreeing to work with the developer to explore the idea of the project – to determine what challenges may exist and how to overcome them and what benefits the project may offer the community.

2. Stage 2 – The Big Picture:

Most of the developer's due diligence will be complete at this point, with permitting yet to come. If a developer is satisfied with its due diligence and elects to proceed with the project, an expanded agreement may be drafted.

a. Project Description:

At this point, the original concept has been vetted and refined even though no permits or licenses may have been issued. The updated description will summarize the project with enough detail that it is recognizable to all involved. If a Master Plan is not incorporated into the agreement through specific affirming language, the project description may include the general square footage, height, and bulk of all the buildings, as well as the general dimensions, materials, and design standards for the infrastructure and utilities that are to be included as part of the project. Examples of these types of descriptors include:

- a six story, 300 room hotel;
- a 2,500 seat theater;
- a 20,000 square foot conference center;
- a 1,500 foot, 36 inch concrete separated sanitary sewer line; and,
- improved signalized intersection as designed by [project engineer name here] and approved by MassHighway, etc.

To offer some flexibility for changing conditions, the square footages, numbers of units, numbers of rooms, etc., that describe the project can be expressed as ranges. For example, “no less than x but no more than y.” It should be noted, however, that using figures that are just the absolute maximum does not require that anything be developed, since zero is an option. A hotel of “up to 300 rooms” means it can be 10 rooms or even no rooms. If the municipality is counting on real estate tax revenue, it may be in its best interest to provide for a minimum as well as maximum development. (With regard to parking, it may be beneficial to identify the maximum number of spaces allowed since the applicable zoning will define the minimum.)

b. Phasing:

Most large projects are constructed in phases. This is important, because the commencement of one element may be contingent upon the completion of another or the execution of a specific document, or some other contingency. Responsibilities for certain actions may shift back and forth between the developer and the municipality. Since their work efforts may, in effect, be interwoven, this complex pattern needs to be defined and put in writing in advance. For example, a municipality or state agency may need to make improvements prior to the developer building certain phases, but the developer may need to make a mitigation payment to the municipality before the improvement can even be started. The sequencing of these obligations and their effect on construction start and expected completion dates will be critical to delivering the project on time.

The municipality and developer will need to work together to determine which components (e.g., infrastructure and buildings) comprise each phase. The municipality will want to make sure that the off-site improvements that support the project as a whole are in place before the first phase opens (or a performance bond equivalent to the cost of the remaining improvements has been posted) to prevent disruption to the community or, in the worst case scenario, failure to provide the needed improvements. Furthermore, it is important to understand how construction of future phases will affect existing operations, transportation, and utility systems.

With regard to the phasing of infrastructure, gaming establishments are required to submit the Gaming Commission a construction staging plan and as part of the Commission’s approval, they will “determine at

what stage of construction a licensee shall be approved to open for business; provided, however,... that total infrastructure improvements onsite and around the vicinity of the gaming establishment, including projects to account for traffic mitigation as determined by the commission, shall be completed before the gaming establishment shall be approved for opening by the commission.”⁷

c. Mitigation:

Mitigation consists of those improvements, both on and off site, that support the specific development, as well as those that are required by regulation. Mitigation items will be identified in infrastructure and transportation studies. Economic analyses of the impacts on the municipal revenues and expenditures, such as the anticipated increase in public school students or potential impacts on existing business, may identify other areas for mitigation. A developer’s responsibilities may include new or improved public utility systems (i.e., water, sewer, and storm water), private utilities (i.e., gas, electrical, and communications); and transportation resources including roadways, bridges, sidewalks, and bike paths. In addition, some municipalities have municipal ordinances requiring project mitigation such as affordable housing linkage or public open space requirements that are linked to the size of projects and their mix of uses.

Mitigation may also include design features that minimize the project’s impact on the existing infrastructure. For example, the retention of storm water and its reuse for landscaping may be required on site to minimize the impact on the community’s limited potable water resources; a shared use path may be built to encourage bicycling and pedestrian activity and thereby reducing future traffic congestion; night-time lighting may be dimmed in order reduce light pollution, especially in more rural areas. Many examples can be found across the country of sustainable design techniques that reduce environmental or infrastructure impacts while also reducing a project’s long term operating costs. More and more frequently these are included as required project mitigation.

Other mitigation items will be identified by the Department of Environmental Protection via the Massachusetts Environmental Policy Act (MEPA) Environmental Impact Report and the Secretary of Environment’s Certification. At times, communities may simply reference the Secretary of Environmental Affairs Certificate relative to project mitigation. However, for transparency and ease access, it is recommended that specific detail be provided in the municipality’s own development agreement.

d. Public Benefits:

Public benefits include those investments the developer is willing to make in the community as a good corporate citizen and which are not directly tied to impacts stemming from the development. When working together, developers and municipal officials can be quite creative in identifying ways the project can benefit the broader community, while also remaining within the allowances of the project’s pro forma. Public benefits may include:

- Employment agreements – this could include goals for the hiring of local, women and minority firms or individuals during construction, goals for permanent hiring by the operator or future tenants, or, commitment to particular outreach processes during recruitment;

⁷ M.G.L. c. 23K, § 10(c).

- Investments in parks and open space – this could include renovating or providing funds to renovate an existing park or providing publicly accessible open space in excess of what is required by ordinance;
- Investment in expanded infrastructure - in some instances, if the infrastructure planned by the developer was upsized, other development opportunities could open up to benefit the city or town. In this case, the developer and municipality could work together to install the larger infrastructure. The developer could provide the larger pipe, widened road, etc. at its own cost as public benefit, the developer and municipality could share in the proportionate cost of the improvement, or municipality could enter into a recapture agreement where the developer pays for infrastructure up front but is reimbursed by the community as additional development occurs. The developer would carry the cost until that took place;
- Acquisition of needed equipment – at times, project mitigation can justify the acquisition of part of a piece of municipal equipment, such as a fire truck, based upon the number of units added, but not an entire truck. A developer could elect to pay the outstanding balance as a contribution to the community;
- Community space - providing a “community room” within the development for public meetings or funding for the construction of new or rehabilitation of existing community spaces;
- Participation in community events and marketing opportunities – such as sponsoring festivals and special events or preparing marketing materials that highlight other areas of the municipality or other local businesses;
- Providing opportunities for local businesses to lease space within the development.

e. Financing:

This section will specify what the developer is paying for and what, if anything, the municipality is paying for. Further, it would be wise for the municipality to satisfy itself that the developer has adequate financing to complete the project. The municipality will often be dealing with a subsidiary entity that has been specially created for the particular development project and has no assets of its own. In that case, the most important assurance that the municipality can get is a guarantee from the parent company that owns the assets. If financing is provided by an investment bank or institutional lender, the municipality may want to insist on being privy to the general terms of the financing, including anything that would be of record and is not confidential.

For items for which the developer is responsible, language in the development agreement will include phrases like “The Developer, at its sole cost, will” If the municipality is participating in the financing, the agreement will need to be specific about what kind of bond (e.g., general obligation or revenue) is to be authorized, what votes will be needed and when, and what will happen should they not materialize. If there is public infrastructure to be acquired by the municipality, the agreement will include the standards with which the infrastructure must comply, the person (e.g., city/town engineer), who will determine whether the infrastructure should be accepted, when and how payment will be made, and when the infrastructure will be deeded to the municipality and whether the conveyance will be in fee simple or by easement.

At times, the developer and municipality may agree to partner in the pursuit of funding for public infrastructure. For example, Massachusetts’ I-cubed (Infrastructure Investment Incentive) Program, requires active collaboration between a developer and a municipality as they apply for funding from

the Commonwealth.

As noted above, by law some types of public financing are not available to gaming establishments in Massachusetts. Programs that specifically may not be accessed by gaming establishments include Tax Increment Financing (TIF), District Improvement Financing (DIF), and I-Cubed (Infrastructure Investment Incentive Program)), as well as several tax credits or deductions. A gaming establishment is also precluded from being designated as an economic opportunity area or a designated development district, and therefore is not subject to the benefits that may be incurred by these designations.⁸ However, the Expanded Gaming Act's list of prohibited public financing and tax credits does not preclude the use of Title VII Public Welfare, Chapter 121A Urban Redevelopment Corporations, which allows for public borrowing of funds for infrastructure that will be paid back by the developer.

f. Rezoning / Discretionary Approval Processes:

This section will identify whether rezoning of the property is needed, what the process will be, and what the municipality would be willing to consider in terms of amendments to the zoning. Again, depending on the process to amend the zoning bylaw, the signatories to the development agreement may not be able to commit to approving the amendment to the zoning, but they can commit to facilitating the process. Likewise for discretionary permits needed from a Zoning or Planning Boards, Conservation Commission, Historic Preservation Commission, Design Review Committee or other permit granting authority.

g. Roles and Responsibilities:

Although this section may repeat some of what has been outlined earlier in terms of project phasing and entitlements, it can be used to clearly articulate what the municipality will be responsible for, and when, and the same for the developer. Missteps can easily arise if one party thinks the other party is taking a needed action and budgets can be seriously impacted if the allocation of responsibilities, such as ongoing maintenance, has not been clearly defined.

A series of questions will likely need to be asked and answered. For example, will the municipality take fee simple title to a new park or will public access be provided by easement? Will the developer have any responsibility for landscaping after the park is accepted by the municipality? For large projects and even for smaller projects, the development agreement may reference a maintenance agreement and/or an open space agreement to be entered into between the municipality and the developer once the project is near completion.

h. Worst Case Scenarios:

While no one wishes for a project to fail, planning for the worst and reaching agreement about the steps to be taken before they need to be exercised, can reduce conflict and allow everyone to respond more quickly during adverse circumstances. (See *Planning for the Worst Case Scenario*, page 31).

⁸ M.G.L. c. 23K, § 49(a) and M.G.L. c. 23K, § 49(b).

3. Stage 3 – More Focus:

In the final stage of a development agreement, additional detail and focus are provided. At this point, the Developer's due diligence will have been completed, as well as any independent studies that the municipality has commissioned to analyze the developer's data or address its own concerns, and the developer will have begun the process of securing discretionary permits. With this work complete, all parties may wish to review what was agreed in Stage 2 and redraft the language where necessary and/or appropriate.

a. Final Project Description:

This will be the final description of the project. The description could still have ranges of square footages and a list of potential uses, but they should be more refined than in any other version of the development agreement. If permits have already been secured, then the language of the approved permit(s) could be included in an addendum.

b. Labor and Sourcing Considerations:

In most instances, the development agreement will identify whether the project will be a closed shop (union labor) or an open shop. If there is public money in the project, prevailing wage requirements will apply and for clarity can be included in the development agreement. Local hiring, living wage, and worker safety issues can also be detailed. Additionally, if the developer has committed to procuring a percentage of goods and materials from local businesses, then that commitment, including the definition of "local market," will be needed in writing. (Issues of local hiring and purchasing may have been pursued by the municipality earlier, but if agreement had not been reached then, the topic could be broached again now that the developer is closer to initiating construction.)

c. Hours of Work/Days of Work:

Insensitive contractors engaging in noisy work at all hours of the day and accepting deliveries at night or in the early morning, will with certitude upset nearby neighbors. So that everyone, including residents of the area, knows what is expected this section can address the hours and days the construction crews be allowed to work, times for deliveries, and requirements for public street closures or disruption of local utilities, if necessary. While some municipalities have noise ordinances that constrain the hours of construction, others do not and language in the development agreement can help everyone understand what activities are acceptable during different hours of the day and days of the week. Even if a municipality has a noise ordinance, it could ask for greater restrictions in construction activities, if appropriate (e.g., in proximity to hospitals, churches, schools, etc.).

d. Site Access by Contractors during Construction:

In this section of the development agreement, the municipality and developer will identify the union and non-union gates and respective parking areas.

e. Performance and Payment Bonds:

If there is public money in the project, the municipality could require that the developer procure 100% performance and payment bonds from the general contractor. Even if there is not public money in the project, the municipality may consider this as a mechanism to guarantee that the project (or components of the project) is completed.

4. Agreements regarding Ongoing Operations (Stage 2 or 3):

While considerable attention may be paid in a development agreement in getting the project to the point that it is ready to open, less time may be spent considering how it will operate once open and what the relationship will be between the operator and the local government. This is typically the inverse of how time is actually spent – most successful projects will be open many more years than they took to design and build. Therefore, time would be well spent considering how the developer and municipality will interact after the grand opening.

Considerations may include:

a. Minimum Property Tax:

This is where the municipality is guaranteed the revenues expected from the project and when those revenues will begin to be collected. One option is that the developer could pledge not to challenge the real estate assessment or tax rate either for the lifetime of the project or for a defined period of time. Going further, some municipalities have established a minimum expected property tax payment, adjusted over time by inflation that the developer will guarantee at particular points in time regardless of whether construction is complete or occupancy has taken place. This provision has a secondary benefit of encouraging the developer to complete construction in order to have revenue coming in.

Such a provision is particularly important where a property is changing use and buildings that previously were generating property tax revenue are to be demolished. The longer the period between the demolition and the opening of the new project, the greater the adverse impact to municipal revenues. A collaborative developer could agree to make a payment in lieu of taxes (PILOT) to the municipality during this period.

b. Minimum hotel or meals tax:

An increasingly important municipal revenue source for some municipalities is the hotel and meals tax. The developer could guarantee a minimum payment in the event that various tenants do not open on time so that the municipality receives the revenues anticipated.

c. Annual Payments:

In addition to tax payments, municipalities have negotiated ongoing payments for specific services like police, fire, courts, etc.

In Detroit, MI, State legislation guaranteed the City a percent share of the casino's gross receipts. The City subsequently negotiated a one percentage point increase once an operator's annual winnings exceeded \$400 million. At the time of writing, two of the three casinos had reached this threshold.

d. Minimum Maintenance Standards:

The Massachusetts Board of Building Regulations and Standards has not adopted the International Code Council's Property Maintenance Code. Nevertheless, the developer could pledge to comply with the code. Furthermore, the developer could pledge a percent of revenue to be reinvested into the property each year for non-structural interior and exterior renovations.

e. Inspections:

The fire marshal and health inspector will likely need at least annual access to a property to ensure no violations are taking place or that a license should be renewed. For many development sites, this is standard operating procedure and may not necessarily be included in a development agreement.

However, with gaming facilities, given their high level of security and cash handling operations, the types of regular, ongoing inspections may need to be discussed and protocols developed to allow municipal officials to perform their duties while taking into account on site security measures. In addition, the auditor or treasurer/collector may need to make on-site inspections depending on the type of revenue sharing agreement reached.

HOW TO NEGOTIATE A DEVELOPMENT AGREEMENT

This section offers thoughts on a process to follow when negotiating a development agreement. Of course, municipal officials will need to undertake those steps that meet their unique needs and the circumstances of the project in consultation with legal counsel and their negotiating team.

Preliminary Schedule of Meetings

Negotiating a development agreement can begin as soon as the developer has site control. The tone of the relationship going forward will be set at these early meetings. In negotiations where all parties act with respect and listen to each other's perspectives, a win-win agreement can be reached; one in which everyone benefits from the new development and no one is taken advantage of. To have such a successful outcome, it is recommended that all parties recognize they are entering into a long-term relationship, and further, if one party feels it has been taken advantage of during the early negotiation process, that ongoing relationship may be unnecessarily challenging.

1. Prior to meeting:

Municipal leadership will want to consider in advance who they will have on the negotiating team. Not everyone may be needed at every meeting, but it may be worthwhile to consider the skills and expertise available in house, while also considering how to supplement that expertise with outside consultants. Most commonly a municipal team will include an experienced attorney, planning staff, engineers and transportation planners, a financial advisor, and someone who can speak on behalf of the mayor, town manager, or board of selectmen. Gathering these individuals and consultants together and taking them away from their other duties will likely represent a significant cost to the municipality, so municipal leaders may want to be direct about asking for funding from the developer to get the necessary experts together and committed to reviewing and negotiating the development agreement.

2. First Meeting:

The first meeting can start with a round of introductions where everyone present summarizes their background and experience. If the development team is lacking key expertise, there is nothing wrong with suggesting, politely, and at the end of the meeting, that they add an entity to their team that offers what is missing.

The developer should have an opportunity to present the project in general terms. How many acres is the site? Roughly how many square feet of each land use category are being considered? How many residential units or hotel rooms are planned? The team should also ascertain whether the developer thinks it is going to need regulatory or financial assistance from the municipality and in what form (e.g., rezoning, tax incentive, etc.). This information will be refined later, but for now it will provide an idea of the scale of the project and the anticipated level of community contribution.

Gaming legislation in Massachusetts prohibits the use of State grant programs like I-Cubed or local funding initiatives like District Improvement Financing (DIF) and Tax Increment Financing (TIF). The
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Gaming Act does not preclude the use of Title VII Public Welfare, Chapter 121A Urban Redevelopment Corporations which allows for public borrowing of funds for infrastructure that will be paid back by the developer.

The municipal team may wish listen to what is presented and take notes for further (internal) discussion, rather than reacting immediately to individual points. However, before closing the meeting, the municipal team could take time to explain the community's vision, plans, and goals for the general area where the project will be constructed, and for the city as a whole so that the developer has a better understanding of the community's aspirations. From this initial discussion, the developer may be able to make a self-assessment whether the proposed project is likely to gain community support. (Similarly, the municipal team should quickly determine if the proposed project advances the community's vision and if further discussion could be productive. If it the project is likely to face significant hurdles, whether these be technical issues such as zoning and infrastructure or whether it be past opposition to similar projects, it would be appropriate for the municipal team to let the developer know expeditiously.)

If the proposed project merits further consideration, additional details will need to be discussed:

Technical Assistance: Large and complex projects will often require more attention and technical experience than most communities can provide. If this is the case, municipalities regularly inform developers that they will need to provide funding for additional support during the planning, permitting, and construction phases. Services may include planners, landscape architects, designers, civil engineers, transportation planners, real estate attorneys, financial advisors, and similar professionals. Additionally, the municipality may need to hire a project manager to assist municipal officials during the course of development.

Timeline: If the developer has a target opening date, the team will want work backwards from that date to see if all the public meetings, hearings, and review periods can be accommodated in that window. If that schedule is not realistic, the developer should be so informed. Together, all can then project forward using both statutory deadlines and worst case estimates to ballpark a more realistic date, taking into account the need for community participation in the process.

Point of Contact: Establish a single point of contact or project manager for the municipality and the developer. If no single person on the municipal team has been given overarching responsibility to keep track of deliverables and know all that is going on, potential exists for pieces to be missed and deadlines passed. The same is true for the developer's team.

Next Meeting: As the second meeting is being scheduled, it would not be inappropriate to ask the developer to have two things available for that meeting. The first would be a written narrative and conceptual drawing(s) that can be used internally when communicating to various municipal departments and partners. The second would be a signed letter of agreement stating that the developer will provide funding up front for the municipality to secure the needed technical assistance, the terms of which will be documented in the development agreement.

Shortly after the conclusion of this first meeting with the developer, the municipal team will want to have an internal meeting. It is important to gauge the team members' reaction to the project and identify any issues regarding the project concept. Quickly identify areas that will need further and more detailed examination. For instance, the municipal engineer may want to look at the existing sewer and

potable water service in the area or the planner may want to quickly determine whether the project generally complies with the zoning bylaw or whether modification may be needed. This review will give the team an idea as to what existing plans/regulations will need to be updated and what additional studies and analysis will need to be done. The lead municipal official will also likely want to begin research on the developer, where they have worked before, what are the experiences of those communities, who the developer's partners are, and what are their reputations.

3. Second Meeting:

The team may wish to start the second meeting by asking for the signed letter agreement from the developer to provide funding for technical assistance. If the developer is not forthcoming with such an agreement, the meeting is a good time to address these concerns. Most municipal purchasing and financial officials will require the funding to be encumbered before a contract can be executed. While the municipality could fund the expense out of its general operating budget and then wait for a reimbursement, forward funding from a developer will ensure that the project will not affect the operating budget or municipal cash flow.

In addition to funding being provided directly from the developer/gaming applicant, funding for technical assistance for the review and consideration of gaming establishments is available to host and surrounding communities through the Massachusetts Gaming Commission via three different mechanisms:

First, under M.G.L. c. 23K, § 15(11), the Massachusetts Legislature has required that, "not less than \$50,000 of the application fee shall be used to reimburse the host and surrounding municipalities for the cost of determining the impact of a proposed gaming establishment and for negotiating community mitigation impact agreements".⁹ The Gaming Commission's Community Disbursements program does not limit the amount of assistance to \$50,000 (<http://massgaming.com/wp-content/uploads/memo-on-community-disbursements-1-29-2013.pdf>). If a host community or surrounding community reaches agreement with a gaming applicant on funding to be made available for technical assistance, the community and gaming applicant can jointly sign and send a Letter of Authorization to the Commission. After the Commission processes a Grant Agreement with the community, the Commission will then provide the amount requested to the municipality via a grant agreement. If the amount requested is greater than the \$50,000 reserved, the Commission will require the applicant to provide additional funds prior to disbursing them to the community. By issuing the funds in the form of a grant, towns will not need to wait until Town Meeting to appropriate and begin utilizing the funds.

Second, the Gaming Commission has established a system whereby gaming applicants and potential surrounding communities can use the state's Regional Planning Agencies (RPAs) to help evaluate the potential impacts of a gaming facility and advise potential surrounding communities. If an applicant agrees to participate in the RPA process, the RPA or RPAs will convene nearby communities to review the proposal for a gaming facility and will provide technical assistance to those communities. Participation by potential surrounding communities is voluntary by such communities. A community does not need to be deemed a "surrounding community" to be able to participate in the RPA process. One of the main purposes of the RPA process is to help communities understand any impacts from the gaming facility in advance of the filing of the gaming application with the Commission.

⁹ M.G.L. c. 23K, § 15(11)

Lastly, if necessary, potential surrounding communities can petition the Commission to require applicants to provide technical assistance funding. Such a petition can occur no earlier than 21 days after the execution of a host community agreement. According to the Commission, “[t]his [21] day limitation is included...partly in recognition that unless a host community agreement can be executed, there would be little reason for an applicant to execute agreements with surrounding communities.”¹⁰

The municipality will likely want to provide the developer with an understanding of the requirements for entitlements and permitting. It will be important for the developer to understand the sequence involved. For example, the municipality may need to amend the zoning bylaw and/or zoning map before an application can even be submitted. The rezoning process will likely require one or more public hearings before the planning board and may need to be sent to Town Meeting for approval. Each of these steps has unique deadlines, and public notification and hearing requirements. Since no one can know the exact length of time required, it may be advisable to present best and worst case timing scenarios. That said, it is ultimately the responsibility of the developer to know what needs to be done and when it needs to be done. This document is not suggesting that the municipality should take on that responsibility for the developer.

The second meeting is a good time to start outlining the development agreement. Both parties will hopefully understand that the development agreement is an evolving document which will need to be amended. This first outline could identify the project concept in terms of total square feet of the site, key components and uses with their size, and number of rooms/units. At later meetings the outline will grow to include responsibilities, timelines, financing, and other items. The municipal attorney could also schedule a series of weekly or biweekly meeting with the developer and appropriate team members to negotiate the terms of the development agreement.

It is recommended that the municipality’s project manager, working in consultation with the municipality’s attorney, be the principal author of the development agreement, taking time to discuss the draft agreements with department directors and other officials before providing it to the developer. If the project manager uses simple language to outline the terms of the deal, the municipal attorney can then turn it into a legal document.

4. Additional meetings:

Additional meetings will likely be required to finalize the development agreement and regular standing meetings could be established until the document has been finalized. At each meeting revised copies of the agreement could be reviewed. For a large, complex project to move forward expeditiously, all parties will need to be clear on their responsibilities and be timely in their duties whether this be preparing technical analyses, drafting an update of the agreement, or reviewing the agreement and providing feedback.

¹⁰ “An important message to potential surrounding communities about licensing timelines and technical assistance”, MA Gaming Commission blog, accessed on May 10, 2013, <http://massgaming.com/blog-post/an-important-message-to-potential-surrounding-communities-about-licensing-timelines-and-technical-assistance/>, revised to reflect regulatory changes proposed by the Commission on May 16, 2013 .

Mitigation & Public Benefits: Additional Considerations

The project mitigation and public benefit components of a development agreement are sections elected officials and community members will likely examine meticulously in order to see if their interests are being addressed. They will want to know that all requisite technical studies have been completed to the highest quality and that municipal representatives have sought protections for the community that will prevent potential negative impacts from occurring (mitigation) and/or that the developer is becoming a supportive member of the community by offering some contribution that may not strictly be part of project impacts (public benefits). This is also a point in the negotiation where the developer may feel that a municipality is making unrealistic demands that cannot be met within the project pro forma.

Although the mitigation and public benefit sections of the development agreement will not be finalized until various studies have been completed, a few steps can be taken early to help make the discussion productive:

1. Vet each other's consultant team:

While neither party has the authority to dictate who the other will use as technical experts, if both sides are comfortable with the qualifications of the other's experts, each will be more likely to be comfortable with the results produced. Perception will be important here. If community members feel that a particular consultant has not addressed their needs in the past on a prior project, they may treat that consultant's results with suspicion. A consultant team's ability to communicate to non-technical people is also an important aspect of their skill set.

2. Establish a process to be followed if the experts make different findings:

What will happen if the consultants do not agree? Will the parties select a third consultant to evaluate both results? It is best to define the process in advance in order to not lose time negotiating the process after conflict has already arisen.

3. Make sure the municipality has a great negotiator on their team:

Municipal officials should recognize that they often approach a negotiation seeking a "win win" solution, whereas private interests may come with a "me win" attitude. If this is potentially the case, it will be important to seek a lawyer or other expert familiar with the other side's type of business enterprise, so he or she can help define what should be expected in a mitigation and community benefit package. A sophisticated developer should also want the municipality to be adequately equipped, because if community members feel that a negotiation has been stacked against them, they can seek to halt the project by voting negatively on a rezoning proposal, dragging out the land use permitting process, and/or potentially entering into litigation to stop the project.

The Massachusetts Gaming Act includes important provisions to enhance the bargaining power of a host community, beyond their statutory land use authorities. First, an applicant will have to work with local officials of the host community to negotiate and agree upon the terms of a site specific proposal. The applicant will also be required to negotiate with surrounding communities to ensure that the proposal takes into consideration and mitigates the impact that such a development would have on surrounding communities. Further, the site specific proposal must be approved by the host community through a

town referendum or, if in a large city, a referendum of the voters who reside in the particular ward in which the facility is proposed to be located.

4. Value the municipality's in-house expertise:

The municipal employees who are responsible for the local water, sewer, and roadway network have an important contribution to make in terms of practical knowledge and, very often, decades of local infrastructure history and real world experience. If they say, "we tried that before and it did not work," take that into account and seek to solve the problem differently. On the other hand, municipal staff will need to recognize that advances in technology can successfully address formerly insurmountable challenges.

5. Don't get greedy:

Negotiation classes and books teach participants to come to the table with outrageous demands to drag the discussion toward what they want and away from what the other side desires. If everyone is aware of this technique, is it really necessary to use it? It is important to remember that if the project goes forward, the developer and municipality will be in a relationship for decades to come. In theory, at least, it should be possible to start off with honest communication that helps each understand the other's perspective. Of course, that honesty must be reflected on both sides of the table for the success of the business relationship and for the agreement that is drafted to be sustainable over the long term. Municipal officials should be wary if they are the only ones readily offering information and engaging in problem solving.

6. Try to identify public benefits that address neighborhood and municipality-wide goals:

Unlike mitigation, public benefits do not need to be directly tied to the project. A list of improvements that benefit a broader section of the community can be considered. Additionally, not all public benefits need to be made at the time of initial investment. Some could come in future years from a capital fund or from future municipal operating revenues, including voluntary property tax surcharges. Development financing is not the only funding mechanism. It is not inconceivable that a development agreement establish a regular payment schedule that extends over a period time to be used for initially undefined community benefits. A municipality might then bond against this long term revenue stream to make larger capital investments in the near term – or they could directly use the funds for a series of more modest projects.

7. Establish a contingency fund and/or process:

The best of all studies may not identify all of the potential impacts of a development project. Some may only be discovered after opening. The agreement might establish a mitigation fund and/or process to evaluate and address unforeseen impacts to avoid future disagreement.

8. Develop an outreach and communications plan:

Making technical information available and transparent and engaging with the public at an early stage can help gather all perspectives and begin to generate community buy-in. Many municipal officials have learned the hard way how vitally important it is to allow all parties to share their points of view. If

people feel they are being heard and their comments taken into account, they are more likely to support the outcome even if it is not 100% of what they wanted. Ways to garner community support include:

- Holding a meeting(s) on-site or allowing for site visits so attendees can get an understanding of the scale of the project and how it relates to nearby properties, where possible;
- Gaining an understanding of existing challenges in the vicinity and showing how the project will either not exacerbate the problem or, preferably, will address the problem;
- Creating high quality visuals so that residents can understand what the project will look like in three dimensions instead of just through a horizontal plan; or,
- Offering community members a tour of other nearby sites built or operated by the development team.

Planning for the Worst Case Scenario

While no one wishes for a project to fail, it is recommended that municipal officials be prepared for the worst since developments that remain incomplete can have serious negative impacts. They reduce public revenues as anticipated property taxes are not realized, drain public resources as code enforcement, police, and fire officials respond to site conditions, and impact the quality of life as residents have to bear with construction fencing and debris that never goes away.

In recognition of this, some development agreements include provisions that allow the municipality to ensure that a property does not lie fallow for years should the developer be unable to complete the construction. Possible mechanisms and examples include:

Fines / Penalties

An agreement could include the payment of financial penalties to help ensure that construction progresses. In the event the penalty alone is not sufficient to ensure that work proceeds, the municipality can use the funds received to make sure the site remains safe and secure and to help address any budget shortfall resulting from the delayed opening of the project.

Quincy, Massachusetts: "Cessation of Construction of Private Improvements. If, except for a Force Majeure Event, the Redeveloper stops work on any Private Improvement (including, for this purpose, any Parking Public Improvement which is part of a Private Improvement) for more than ninety (90) consecutive days, (a) the City may give notice to the Redeveloper to recommence such work within the next sixty (60) days, and (b) starting with the ninety-first (91st) day, the Redeveloper shall pay the City a penalty in the same manner as aforesaid in the amount of One Hundred Thousand Dollars (\$100,000) per month for the first three (3) months and Two Hundred Thousand Dollars (\$200,000) per month thereafter until such work is recommenced."

For gaming establishments, the Massachusetts Gaming Commission will have established a date by which a licensed establishment is expected to be open and operating, and will have statutory authority to take action if the deadline is not met. Specifically, Section 10(b) of the Gaming Act states, "A licensee who fails to begin gaming operations within 1 year after the date specified in its construction timeline, as approved by the commission, shall be subject to suspension or revocation of the gaming license by

the commission and may, after being found by the commission after a hearing to have acted in bad faith in its application, be assessed a fine of up to \$50,000,000.”¹¹

Reverter / Acquisition

In the most draconian agreements (particularly appropriate where a redevelopment authority acquires property by eminent domain for a development), there might be a right of reverter allowing the authority to take back possession of the property. Another option would be a provision that allows the municipality to acquire the property and transfer to a third party after a specified period of time after construction has ceased. This Purchase Option would give it the municipality the right to acquire the property for a predetermined price or assume the developer’s mortgage.

Somerville, Massachusetts: “Applicant shall have entered into an agreement ("Option Agreement") with the Somerville Redevelopment Authority ("SRA"), giving the SRA and/or its nominee, for a period of five (5) years from the date of said Option Agreement, the right to purchase (Option to Purchase) the Property, at a date and time to be determined by the SRA, provided however, that the SRA shall not exercise such Option to Purchase if the Applicant is proceeding expeditiously to develop a project at the Property conforming to the Development Agreement, as demonstrated by the filing of an application for a building permit, the commencement of construction, and the receipt of a temporary occupancy permit. The Option Price shall be the fair market value determined by “mutually agreed upon,” commercially reasonable, method based on independent third party appraisals by qualified appraiser.”

“Acts of God”

The agreement could also require the developer to rebuild in the event of destruction fire, flood, or other catastrophe, instead of walking away from a damaged or destroyed property.

Detroit, Michigan: “In the event of damage to or destruction of Improvements on the Project Premises or any part thereof by fire, casualty or otherwise, Developer, at its sole expense and whether or not the insurance proceeds, if any, shall be sufficient therefor, shall promptly repair, restore, replace and rebuild (collectively, "Restore") the Improvements, as nearly as possible to the same condition that existed prior to such damage or destruction (subject to Developer's right to make Alterations in accordance with the terms of this Agreement), using materials of an equal or superior quality to those existing in the Improvements prior to such casualty.”

Future Obsolescence

The agreement can also presuppose how the property will be used upon its obsolesce or needed change of use. At times, some buildings are so purpose-built and ill-suited to future reuse that they increase the cost of redevelopment and can thereby reduce buyer interest in a site. In this case, a commitment to demolition could be required as part of the development agreement or a bond to offset the demolition cost could be required.

Hammond, Indiana: The developer is required to post a bond in an amount sufficient, to pay for the demolition of a parking deck and other improvements should the project fail.

¹¹ M.G.L. c. 23K, § 10(b).

CONCLUSION

Developing real estate is a risky proposition for both the developer and municipality. However, with a thoroughly-vetted, well-considered development agreement, both parties can achieve their goals, protect themselves from common mistakes, and create a project that will benefit the community for years to come.

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APPENDICES: SAMPLE DEVELOPMENT AGREEMENTS

While development agreements will be unique to the individual project and municipality, a review of multiple agreements shows that they typically include common elements and a common structure.

Attached are copies of five different development agreements and a brief analysis of each, showing how the respective communities addressed complex development processes.

The attached agreements and the accompanying analysis are for illustrative purposes only and are in no way intended to provide legal advice. Questions about Massachusetts municipal and real estate law should be addressed to a qualified attorney.

Sample development agreements include:

- MGM Grand Casino – Detroit, Michigan
- M Resort and Casino – Henderson, Nevada
- New Quincy Center – Quincy, Massachusetts
- Assembly Square – Somerville, Massachusetts
- City Square – Worcester, Massachusetts

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Development Agreement Synopsis: MGM Grand Detroit, Michigan

Signatories

- Mayor
- Developer

Legislative Approvals

- City Council

Year Executed

- 1998

The agreement between the MGM Grand Detroit, LLC and the City of Detroit is one of three nearly identical agreements that were initially executed for the redevelopment of the

“Casino District”, formerly industrial land just north of downtown Detroit. In total, the Casino District anticipated the construction of three casinos. After attempting to move forward with the district approach and being unsuccessful, the City ultimately entered into different agreements with the casino developers on different sites. Nevertheless, the original development agreement is illustrative of a project that required considerable land acquisition and coordination among multiple developers.

The district plan called for the City of Detroit, through its Economic Development Corporation, to acquire 60 acres of private land through eminent domain and combine this with 20 acres of land the City already owned, for a total of 80 acres. The three developers pledged to reimburse the City for their pro rata share of the acquisition and infrastructure costs provided the total not exceed \$250 million. The City pledged to contribute \$50 million to acquire additional public land and make relocation payments, payable in either cash or land. If the City was not able to acquire the site, it pledged to work with the developers to find new sites. The agreement included significant commitments to community benefits and provisions for local hiring and sourcing.

In the following agreement, MGM Grand Detroit proposed to invest \$700 million to build a 100,000 square foot gaming floor, with 800 hotel rooms, 12 restaurants, a 69,000 square foot meeting and convention facility, a performing arts theatre, and 30,000 square feet of retail space.

Michigan law requires a Municipal Services Fee of \$4 million or 1.25% of adjusted gross receipts, whichever is larger, annually, to assist the City in defraying the cost of hosting casino operations. At the time, the State planned to levy a tax of 18% of adjusted gross receipts, of which 55% would go to the City to pay for eight specific programs identified in the legislation. The City would also receive a 9.9% share of adjusted gross receipts, which use would be unrestricted. (It should be noted that the actual percentage today is greater than was anticipated when this development agreement was executed.)

When it was clear that the district approach would not move forward, the Michigan Gaming Control Board adopted a resolution allowing the development of Temporary Casinos which are allowed to operate while a permanent location was being constructed. Ultimately different agreements with the



Proposed Casino District, Detroit, MI



To download
development
agreement for
MGM Grand,
Detroit, MI
(1998)

individual casino developers eventually took the place of this agreement, but it still remains of interest due to its collaborative approach.

Interesting and Unique Provisions:

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>1.1 Definitions. (114) "Performance Threshold" means EBITDA [Earnings Before Interest, Taxes, Depreciation, and Amortization (debt payments)] ... of at least Twenty-Two Million Five Hundred Thousand Dollars (\$22,500,000) for the most recent trailing twelve month period...</p>	<p><i>The City expects a certain amount of tax revenue based on total revenue and requires that the casino meet a minimum performance level.</i></p>
<p>2.4 Commencement of Rights and Obligations. (a) This Agreement shall confer no rights and impose no obligations until the Effective Date. Notwithstanding...until each of the following conditions has been fully met:</p>	<p><i>The City and the Developer are signing an agreement that, while not immediately in effect, establishes requirements and duties for each party and starts the clock with regard to key milestone dates.</i></p>
<p>(d) Notwithstanding anything to the contrary contained in this Agreement, this Agreement shall automatically terminate if all of the conditions set forth in Sections 2.4(a)(1) through 2.4(a)(14) above are not satisfied or waived on or before December 31, 1999.</p>	<p><i>The referenced conditions are not considered Events of Default, and therefore are not subject to remedies other than the termination of the agreement without penalty or appeal. (See Article X of the agreement for Events of Default, Remedies, and Termination.)</i></p>
<p>2.5 Conveyance of Project Premises to Developer. (b) Within five (5) Business Days following the approval of City Council referred to in Section 2.5(a), Developer shall furnish EDC with a letter of credit in an amount equal to its Pro Rata Share of Feehold Compensation and in such form and upon such terms and conditions as are reasonably necessary to allow City to acquire the Casino Area and the Public Land.</p>	<p><i>The letter of credit will provide the City with reassurance that the Developer will acquire the land from the City once the City secures it from the current property owner.</i></p>
<p>2.6 Compliance with Other Commitments. (a) Developer agrees that the Total Cost, exclusive of the Feehold Compensation, shall not be less than Six Hundred Million Dollars (\$600,000,000).</p>	<p><i>This provision establishes a minimum level of investment, a figure which was not established in the authorizing legislation.</i></p>
<p>(b) As set forth on Exhibit 8.1(g), Developer agrees to use commercially reasonable efforts to acquire all or some of its financing from a Detroit-Based Business, a Detroit Resident Business and/or a Small Business Concern and/or to utilize Detroit-based and/or Minority-owned financial institutions in serving Developer's financial needs.</p>	<p><i>The Developer commits to trying to secure financing from local financial institutions.</i></p>
<p>2.6 Compliance with Other Commitments. (d) Developer agrees that no fewer than three thousand three hundred (3,300) full-time equivalent employees will be employed at the Casino Complex immediately following Completion, exclusive of construction workers,</p>	<p><i>This establishes a minimum employment threshold.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>and thereafter, subject to Section 7.17, will employ such number of employees as may be appropriate in the exercise of Developer's reasonable judgment to operate the Casino Complex in a manner consistent with First Class Casino Complex Standards and in compliance with this Agreement.</p>	
<p>(e) Developer agrees to use reasonable best efforts to attain the goals of employment of Detroit residents set forth in Exhibit 8.1(q).</p>	<p><i>The Developer commits to trying to hire local residents.</i></p>
<p>(j) Developer shall use reasonable best efforts to ensure that at least thirty percent (30%) of aggregate amounts expended by Developer under contracts entered into by Developer for the construction of, or any material additions, improvements or modification to the Casino Complex shall be paid to Detroit-Based Businesses, Detroit Resident Businesses, Small Business Concerns, minority business concerns or women-owned businesses.</p>	<p><i>The Developer commits to trying to buy from local businesses.</i></p>
<p>2.8 Payment of Development Process Costs. Upon the Effective Date, Developer shall pay to City the sum of One Million Dollars (\$1,000,000) toward its Allocable Share of the Development Process Costs. Thereafter, City and/or EDC shall invoice Developer from time to time...</p>	<p><i>Funding is provided by the Developer for dedicated project management staff and expenses, and third-party technical assistance including, planners, financial advisors, and outside counsel.</i></p>
<p>2.18 Funding of Excess Costs. (b) If Schedule A [estimated total cost; site acquisition, offsite infrastructure improvements, and environmental remediation] reflects an estimate in excess of Two Hundred Fifty Million Dollars (\$250,000,000), the City, through the Mayor, may, subject to approval of the City Council, within ten (10) Business Days thereafter, determine whether the project described in the EDC Plan is suitable for public purposes. In the event the City determines that such project is still suitable for public purposes, the City shall proceed with the project described in the EDC Plan. If the City determines otherwise, the City and the EDC shall use their commercially reasonable efforts to locate a suitable alternate site for Developer to develop, construct and operate the Casino Complex.</p>	<p><i>The development agreement never officially states an actual amount that the developer will pay for the site; instead, the developer commits to pay its pro rata share of the cost. The same is true for the off-site infrastructure. This section seems to imply that the three developers will not agree to pay more than \$250 million. If Schedule A exceeds that amount then the City will determine whether to proceed or will it help the developer find another site.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>3.2 Financial Covenants.</p> <p>Subject to Section 3.7, Developer shall maintain (i) at all times on and after the Completion Date a Leverage Ratio of not greater than 3.35 to 1 or Net Worth of no less than \$165 million; (ii) commencing with the end of the fourth full fiscal quarter subsequent to Completion, a Debt Service Coverage Ratio of at least 1.0 to 1; and (iii) commencing with the end of the eighth full fiscal quarter subsequent to Completion, a Debt Service Coverage Ratio of at least 1.2 to 1. The obligations of Developer under this Section 3.2 shall lapse and be of no further force or effect seven (7) years after the Execution Date.</p>	<p><i>The City wants to make sure that the Developer will remain financially viable, especially during the early years of operation.</i></p>
<p>4.8 Integrated Complex.</p> <p>Developer agrees that it shall design the Casino Complex as an integrated complex. The goal of the Development is that the buildings, landscaping and other pertinent improvements will blend together and join pleasantly with adjacent properties to create an elegant environment, compatible with City's urban context.</p>	<p><i>The Developer agrees to design the facility to contribute to its surroundings.</i></p>
<p>4.11 Infrastructure Improvements.</p> <p>Provided Schedule A reflects an aggregate estimate of not more than Two Hundred Fifty Million Dollars (\$250,000,000) or such higher number as shall have been approved in writing by Developer, Developer shall pay City for Developer's Pro Rata Share of all reasonable and documented hard and soft costs for Infrastructure Improvements prior to the time that City pays any costs related thereto...</p> <p>Neither the City nor the EDC shall be responsible to pay for or otherwise fund the construction of any Infrastructure Improvements, such costs and expenses being the sole responsibility of the utility in the case of any private or quasi-public utilities or the responsibility of Developer in all other circumstances.</p>	<p><i>The Developer agrees to pay for infrastructure improvements in advance rather than as a reimbursement to the City. The City is not funding any infrastructure improvements.</i></p>
<p>6.2 Performance of the Work.</p> <p>(a) Developer shall cause Contractor(s) to:</p> <p>(1) Provide, furnish and maintain at its expense during the construction period of the Casino Complex an appropriate separate facility located at the project area for use by the PM and the PM's staff as a field office.</p>	<p><i>The Developer agrees to provide on-site facilities for the Project Manager.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>6.3 Commencement and Completion of the Work. ... Developer agrees to use commercially reasonable efforts to open to the public for their intended use no less than ninety percent (90%) of the retail and ninety percent (90%) of the restaurant space within nine (9) months following the Completion Date...</p>	<p><i>This establishes retail/restaurant lease targets, because they are integral to the total project.</i></p>
<p>6.6 Construction Matters. (a) For the purpose of verifying compliance with this Agreement, Developer and the Contractor(s) shall keep such full and detailed accounts as shall be sufficient to verify the costs of the Casino Complex. Subject to Article XVII, City and/or EDC shall be afforded access to Developer's Books and Records and Developer shall preserve all such Books and Records pertaining to the Casino Complex for a period of six (6) years from creation of such Books and Records, or for such longer period as may be required by law. Developer shall cause the Contractor Agreement to contain a provision similarly binding Contractor.</p>	<p><i>The Developer commits to open book accounting for all construction-related activities.</i></p>
<p>6.7 Failure to Complete by Agreed Upon Opening Date. ... delay in Completion will result in substantial injury and additional costs to City and/or EDC. If Completion occurs subsequent to the Agreed Upon Opening Date, ... Developer shall pay to City... an amount per calendar day... equal to the lesser of (i) \$118,290, or (ii) ...twenty-five percent (25%) of the City's share of the aggregate Wagering Tax and Municipal Services fee...</p>	<p><i>This sub-article establishes a penalty for not opening on time, thereby providing the City with a revenue source to take place of gaming revenue and taxes potentially lost if the facility opens late.</i></p>
<p>7.3 Radius Restriction. (a) ... neither Developer, Parent Company, any Casino Manager ... shall directly or indirectly (i) manage, operate or become financially interested in any casino within the Radius other than the Casino Complex or the Temporary Casino, ...</p>	<p><i>This prevents the Developer from building a new facility in proximity to Detroit which could siphon off revenues from the City and/or create a potential monopoly.</i></p>
<p>7.6 Marketing Cooperation and Coordination. ... Developer agrees to construct, at its expense, a visitor information center (the "Center") in the Casino Complex.</p>	<p><i>This allows for cross marketing of area amenities to casino guests.</i></p>
<p>7.10 Financial Statements; Annual Business Plan. ... Developer fails to meet or exceed the Performance Threshold, Developer shall, within thirty (30) days thereafter, prepare and make available to City for review an Annual Business Plan for the upcoming twelve (12) month period. The City shall be allowed to review and make notes from the Annual Business Plan provided that City shall use reasonable efforts to keep the information contained in the Annual Business Plan confidential.</p>	<p><i>The City wants to make sure the Developer is doing everything possible to meet its performance threshold and therefore tax revenue.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>7.13 Negative Covenants. Developer covenants that except as indicated or as otherwise required by applicable law, at all times during the term of this Agreement:</p>	<p><i>In addition to what the Developer will do, this is a list of things the Developer will <u>not</u> do. Some of these include restrictions to restructuring the development team, including local partners.</i></p>
<p>16.1 Damage or Destruction. In the event of damage to or destruction of Improvements on the Project Premises or any part thereof by fire, casualty or otherwise, Developer, at its sole expense ... shall promptly repair, restore, replace and rebuild (collectively, "Restore") the Improvements... to the same condition... If neither Developer nor any Mortgagee ... fail to proceed ... Agreement, City may, but shall have no obligation to, complete such Restoration at Developer's expense.</p>	<p><i>The development (and the anticipated cash flow from taxes) is an asset to the City that the City must protect. This provision requires the Developer to rebuild in place after damage or disaster. (The NYC World Trade Center lease similarly required the replacement of lost commercial property.)</i></p>
<p>16.3 No Termination. No destruction of or damage to the Improvements, or any portion thereof or property therein by fire, flood or other casualty, whether such damage or destruction be partial or total, shall permit Developer to terminate this Agreement or relieve Developer from its obligations hereunder.</p>	<p><i>This section indicates that damage or destruction does not terminate the agreement.</i></p>
<p>17.1 Financial and Accounting Records. ... during such periods as Developer fails to meet or exceed the Performance Threshold, Developer shall make available and require each Casino Component Manager/Operator to make available to City's third party consultants ("City's Consultants") for their review, full and accurate Books and Records reflecting the results of the Casino Complex and, if applicable, any Casino Component Manager/Operator's operation of the applicable Component.</p>	<p><i>The Developer commits to open book accounting on non-construction-related activities only when the Developer certifies that the development has not met its performance threshold. Such financial information is typically limited to owners.</i></p>
<p>19.1 Access and Inspection. (a) City and/or its representatives shall have the right at all reasonable times ... to enter the Development for the purposes of (1) inspection, (2) making of such repairs or performing such acts that City and/or EDC shall have the right to make or perform by the Agreement provisions, or (3) determining whether Developer is complying with the terms and conditions of this Agreement...</p>	<p><i>The City is given the authority to make repairs. Municipalities typically only have the right to make inspections.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>20.2 Temporary Casino Site</p> <p>(b) At the time Developer submits the Temporary Casino Design Documents in accordance with Section 20.4, Developer shall submit plans for the reuse of the Temporary Casino Site and the Improvements thereon subsequent to Completion.</p>	<p><i>The temporary casino may not be simply abandoned, but must be reused, creating a valuable (taxable) asset for the city.</i></p>
<p>21.2 Non-Action or Failure to Observe Provisions of this Agreement.</p> <p>The failure of City, EDC or Developer to promptly insist upon strict performance of any term, covenant, condition or provision of this Agreement, or any Exhibit hereto, or any other agreement contemplated hereby, shall not be deemed a waiver of any right or remedy that City, EDC or Developer may have, and shall not be deemed a waiver of a subsequent default or nonperformance of such term, covenant, condition or provision.</p>	<p><i>If City or the Developer forget or otherwise fail to enforce some part of the agreement, they have the right to go back and enforce it.</i></p>

Development Agreement Synopsis: M Resorts Henderson, Nevada

Signatories

- Mayor
- Developer

Legislative Approvals

- City Council

Year Executed

- 2008

In 2008, the Henderson Nevada City Council passed an ordinance that adopted the Development Agreement and associated exhibits negotiated by the Mayor and his staff with the M Resorts, LLC. Included in those exhibits were the conceptual utility designs, infrastructure payment schedule, mitigation details, and the approved Planning Commission Design Review Application, Comprehensive Plan Amendment, Zoning Change, and Conditional Use Permit.

The agreement with M Resorts LLC was for the construction of a multi-phase development on 83 acres in Henderson, Nevada. The site was divided into four planning areas (one Resort Hotel Planning Area and three Mixed Use Planning Areas).



M Resorts, Henderson, NV



To download development agreement for M Resorts, Henderson, NV (2008)

Planning Areas		Total Land Area
Resort Hotel Area #1		46.7 acres
Mixed Use Area		36.3 acres
Mixed Use Planning Area #1	8.3 acres	
Mixed Use Planning Area #2	26.2 acres	
Mixed Use Planning Area #3	1.8 acres	
Total		83.0 acres

The Resort Hotel Planning Area #1 provided for 160,000 square feet of casino, 130,000 square feet of theater, 190,000 square feet of non-casino restaurants, 1 million square feet of non-casino retail, 150,000 square feet of convention, 3,000 hotel rooms, and a heliport. The Mixed Use Planning Areas #1 (not to be confused with Resort Hotel Planning Area #1) and #2 allowed a maximum of 3,000 multifamily mid- and high-rise housing units over retail. Mixed Use Planning Area #3 permitted a retail gasoline sales establishment and three drive-thru windows.

The first phase of development on the Resort Hotel Planning Area #1 consisted of a 92,000 square foot casino, 390 hotel rooms, 15 restaurants and lounges, a 23,000 square foot spa, a 25,000 square foot events center, 60,000 square feet of meeting space, a 100,000 square foot outdoor pool and entertainment plaza, and a heliport. The first phase of development in the Mixed Use Planning Areas was a 1.8 acre gas station and convenience store complex in Mixed Use Planning Area #3.

Future phases, which are on hold at this time, are projected to include an additional 1,000 hotel rooms, a 30,000 square foot expansion of the casino, a movie theater complex, retail mall, and a mixed use development with 1,900 residential units over commercial/retail ground floors.

The City of Henderson committed to build a new 1.6 mile road connecting the resort to the Henderson Sky Harbor municipal airport. The City also agreed to install the necessary sewer and water lines to the project with the developer paying for a portion of the construction cost.

Mitigation for the project includes the design, construction, and equipping of a new fire station, roadway improvements, utility extensions, construction of a new 2.5 acre park, and the undergrounding of high voltage power lines adjacent to the property.

Interesting and Unique Provisions:

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>2.1 Planned Development. One of the primary objectives of the City and Developer in entering into this Agreement is that development of the Property be undertaken in an organized fashion so as to ensure a well-integrated, unique quality resort that is based on design concepts with a mix of resort hotel and entertainment, commercial and residential uses. The Parties have agreed...</p>	<p><i>This section describes the shared vision and purpose for entering into the agreement. The City has chosen specific language (e.g., “well-integrated” and “unique quality”) to express design intent.</i></p>
<p>2.2 Supplemental Development Standards. For each Planning Area, Developer shall submit to City such specific design guidelines and development standards, necessary to properly identify and authorize development of any particular Planning Area ("Supplemental Development Standards"). For purposes of this Section...</p>	<p><i>The City wants to create a standard that exceeds those currently established in the zoning ordinance. The section goes on to identify what is required in the Supplemental Development Standards submittal.</i></p>
<p>2.7 Parking Lot Landscaping. City agrees as a provision of Developer installing landscaping in excess of Code requirements to defer installation of landscaping diamonds as required by Code within the M Resort Phase One parking lots until January 1, 2014. Developer agrees...</p>	<p><i>The project will be developed in phases. Phase II will be constructed on a portion of property that will be used as a surface parking lot during Phase I. Phase II can only begin after a replacement parking structure is constructed. At the time of execution (2008), the developer believes it would start construction on Phase II before January 1, 2014 and does not want to plant trees in the interior of the surface lot and then tear them out shortly thereafter.</i></p>
<p>3.1 Reliance on Development Standards and Applicable Rules. The City and Developer agree that Developer is approved and permitted to carry out and complete the entire Planned Development [Editor’s note: Phase I] in accordance with the standards, uses, densities and other provisions set forth in the Supplemental Development Standards, and in accordance with this Agreement and the accepted Master Studies. Developer acknowledges that the Master Studies are generally conceptual in nature...</p>	<p><i>The City is not waiving its right to require additional studies and planning for future phases. The City is only approving one piece of a much larger whole.</i></p>
<p>4.1 (a) Permitted Uses. The Planned Development will contain a mix of hotel, entertainment and gaming, commercial, parks and residential consistent with the boundaries shown on the Planning Area Map.</p>	<p><i>This open language offers a great deal of flexibility. The City will further define the project in the following paragraphs. The agreement establishes definitions for the Planning Areas in Section</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
	<p><i>1.1 (Resort Hotel Planning Area and Mixed Use Planning Area). However, it does not identify the number, size, or locations of these areas.</i></p>
<p>4.2 Residential. The Planned Development is permitted a maximum of 3,000 Dwelling Units. The Dwelling Units located in the Planned Development shall comply with the Supplemental Development Standards to include the following: ...</p>	<p><i>This paragraph establishes a maximum number of dwelling units.</i></p>
<p>4.3 Resort Hotel and Mixed Use Planning Areas. (a) Location/Uses. Developer may not materially increase the size, square footage, height and location of the Resort Hotel Planning Area without an amendment to the existing Gaming Enterprise Overlay Zone Change ZCO-05-670051 and Conditional Use Permit (CUP-05-540091) attached as Exhibit G to this Agreement. The Resort Hotel Planning Area and Mixed Use Planning Area shall be permitted...</p>	<p><i>The agreement defines project maximums for specific use categories. The total site area is controlled by the Zoning Ordinance and Comprehensive Plan.</i></p>
<p>4.5 Phasing of Major Transportation Improvements. Developer and City shall complete, and open and/or close to traffic (as applicable), the following transportation routes in accordance with the required improvement level (as defined in this Section 4.5) for the M Resort Phase One:</p>	<p><i>This section not only establishes a time table for completing the transportation improvements but also goes on to define what improvements must be made, and whether the City or the Developer is responsible for completing them. It should be noted that the City is agreeing to build certain improvements at its own expense.</i></p>
<p>4.6 Liquor. Developer shall be allowed to have a maximum of Three (3) tavern licenses within the boundaries of Mixed Use Planning Area.</p>	<p><i>By predetermining the number of liquor licenses available to the developer, the City has reduced some of the developer's risk in attracting tenants to the project.</i></p>
<p>4.7 The Processing of Applications (c) The City and Developer agree that the schedule ("City Schedule") set forth below is a reasonable estimate of service targets for the City to process Applications ...</p>	<p><i>The agreement establishes a timeline by which the City must review, comment, and approve applications for building permits and future studies.</i></p>
<p>(h) Parties have entered into a separate dedicated coordinator reimbursement agreement in the form attached hereto as Exhibit J.</p>	<p><i>The size and complexity of the project exceeds the City's staff capacity and expertise. The City and Developer had entered into a separate agreement by which the City is to hire a project coordinator, and the Developer is to reimburse</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
	<i>the City for its costs.</i>
<p>4.9 Short Term Mining and Processing. City hereby grants Developer or designee an umbrella permit for Short Term Mining and Processing together with Batch Plant operations...</p>	<i>The City is allowing the Developer to mine minerals on site to be used in a batch plan that will provide concrete to the project.</i>
<p>4.14 Nevada Power Electrical Transmission Facilities. The intersection of St Rose Parkway and Las Vegas Boulevard constitutes a major entry into the City of Henderson. Currently an overhead electrical transmission facility is located on a portion of the Property adjacent to Las Vegas Boulevard and St. Rose Parkway. The existing overhead transmission line on the subject property was in existence prior... Developer, subject to an administratively approved design review shall be required to construct required facilities needed to transition the overhead transmission line(s) to below ground within the Planned Development. Construction of the underground electrical transmission line as required by this Section shall be as mutually agreed by the Parties.</p>	<i>The Developer, as a condition of the agreement, is required to bury certain overhead power lines at a gateway intersection.</i>
<p>5.1 Construction of the Park and Trails. Developer shall construct and dedicate to City; approximately Two and One half (2.5) acres of public park(s), trails and landscaping ...</p>	<i>The Developer is required to construct community improvements adjacent to and within the project.</i>
<p>5.2 Park. Developer shall design, construct and maintain a total of approximately Two and One Half (2.5) acres of public park ("Park").</p>	<i>In addition to the design and construction of an interior park, the Developer must also maintain the park.</i>
<p>5.3 Trails and landscaping. Developer shall design and construct trails and landscaping adjacent to Volunteer Boulevard, Gillespie Street and Bowes Avenue for the full frontage of the Planned Development as further depicted on Exhibit N. Developer shall be responsible for maintenance of the landscaping and lighting and City shall be responsible for maintenance of the trail.</p>	<i>This section requires the Developer to light and maintain the landscaping.</i>
<p>6.1 Municipal Water and Sewer Service. The City agrees to construct the backbone water and sewer infrastructure that will provide service to the greater West Henderson area including the Planned Development. Water and sewer service will be available to the Planned Development by November 1, 2008. (a) Developer shall reimburse the City all actual costs associated with City of Henderson Contract No. 2007-86-0036, shown in Exhibit Q, which is only a portion of the major water and sewer infrastructure necessary for full</p>	<i>This section is the subject of a 2007 revision to the original Comprehensive Plan Amendment and Zoning Ordinance Amendment, both of 2005. In the original plans, the Developer was to construct the backbone of the water and sewer infrastructure to flow through the site. In the time between 2005 and 2007, the City designed and entered into a construction</i>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
build out of the area...	<i>contract for the backbone water and sewer infrastructure.</i>
<p>6.1 Municipal Water and Sewer Service <i>(continued)</i>.</p> <p>(c) The sewer portion of the contract will be reimbursed by a special refunding agreement, where the Developer will reimburse the City for their proportionate share calculated by the number of equivalent residential units (ERU's) the Planned Development will contribute to the sewer system.</p>	<i>The reimbursement calculation is based on the number of equivalent residential units that contribute to the sewer system. It is not clear what happens if the projected number of units is not built. It may be that the City continues to carry the cost of the required infrastructure until those units are built, if ever.</i>
<p>8.1 Construction of [Fire] Station and Provision of Equipment.</p> <p>The Developer shall cause the design of a Five (5) bay fire station and construction on the fire station site ("Fire Station Site") as identified on Exhibit S a Two (2) bay fire station ("Fire Station").</p>	<i>As mitigation, the Developer is required to design, construct, and equip a new fire station. Furnishing and equipment requirements are defined in further sections and exhibits.</i>
<p>9.1 Frequency of Reviews.</p> <p>The City Council shall review the development of the Planned Development at least once every Twelve (12) months during the Term of this Agreement. Prior to such review, and upon the written request of the City, Developer shall provide a report summarizing the extent of Developer's and the City's material compliance with the terms of this Agreement during the period preceding such report.</p>	<i>The Developer is required to report to the City Council on an annual basis as to its progress implementing the agreement.</i>
<p>9.4 Arbitration.</p> <p>Except as otherwise provided in Sections 9.3 and 9.6, Disputes between the Parties may only be resolved by binding arbitration in accordance with the Uniform Arbitration Act, Chapter 38 of the Nevada Revised Statutes.</p>	<i>This section establishes binding arbitration as the method of settling disputes.</i>
<p>10.2 Local Improvement Districts.</p> <p>The City agrees to assist Developer, in Developer's sole discretion, in the creation of one or more local improvement districts...</p>	<i>This section discusses financing requirements but does not identify how the funds would be used by the Developer.</i>
<p>10.3 Oversizing Reimbursement/Refunds.</p> <p>The Parties acknowledge that it will be necessary for Developer to construct and/or contribute certain public facilities/apparatus in a manner, or at a size or with a capacity to serve the needs of any property, development or dwelling unit located outside the boundaries of the Planned Development.</p>	<i>The City agrees to enter into a reimbursement agreement in which third parties would repay the developer for upsizing infrastructure that serves off site developments. In some communities this is called a "recapture" agreement.</i>

Development Agreement Synopsis: New Quincy Center Project Quincy, MA

Signatories

- Mayor
- Developer

Legislative Approvals

- The disposition of public land requires a vote of the Quincy City Council

Year Executed

- 2009

The New Quincy Center Development Agreement took the form of a Land Disposition Agreement (LDA), because the project required the acquisition of two City-owned parcels. The agreement calls for a private developer (a.k.a.,



Concept Plan, New Quincy Center, Quincy, MA

“Redeveloper”) to acquire two City-owned parking facilities and 21 privately owned parcels in downtown Quincy within the 50 acre redevelopment area. When completed, the project will consist of 2.7 million square feet of space including: 571,000 square feet of retail space, 1 million square feet of office space, two hotels with a combined total of 280 rooms, and 735 residential units. The majority of the project will be new construction, but it also calls for the renovation of approximately 150,000 square feet of existing space. All parking will be structured, with the City acquiring 2,967 spaces, once complete, from the Redeveloper to operate as public parking.



To download
development
agreement for
New Quincy
Center, Quincy,
MA (2009)

In the agreement, the project is divided into three major components: Core Public Improvements, Implementing Public Improvements, and Private Improvements. The Core Public Improvements are to be constructed by the City with a combination of State and Federal funding and are deemed necessary regardless of any private investment in the area. The Implementing Public Improvements (utilities, roadways, public spaces, and eight public parking facilities that are required to support the Private Improvements) and the Private Improvements themselves are to be constructed by the Redeveloper, with the City acquiring the Implementing Public Improvements upon completion and subject to specific financial terms.

To finance the acquisition of the Implementing Public Improvements from the Redeveloper, the City plans to issue General Obligations bonds which will be retired through a unique funding mechanism. The LDA and subsequent contracts with the Redeveloper establish a series of payments from the Redeveloper to retire the bond financing pursuant to provisions of MGL Chapter 121A (Urban Development Corporations). A “121A corporation” is a special purpose entity recognized by the Secretary of the Commonwealth with the authority and power to carry out a redevelopment project approved by a municipality’s planning board, legislative body, and the Department of Housing and Community Development (referred to in the legislation as the “Housing Board”). Property owned by a 121A corporation is exempt from most local and state taxation including ad valorem real estate taxes. In exchange for this tax exemption, the Quincy Redeveloper has agreed to enter into this Land

Disposition Agreement which, among other things, requires a 121A payment to the municipality to pay off the General Obligation bond as well as other expenses. (In this case, the Redeveloper is not retaining the amount that would otherwise be paid in taxes for itself; instead, the Redeveloper has committed to making a 121A payment that will be used to pay off the General Obligation bond and other expenses related to the project.)

The project is located within an Urban Renewal District and a District Improvement Financing (DIF) District which predate the development agreement. A DIF district commits the incremental increase in property taxes in a defined district to improvements to be made within that district, as opposed to expenses elsewhere in the municipality. In the case of Quincy Center, the use of a 121A corporation, since it does not pay real estate taxes, could have had a major negative impact on the viability of the DIF District plan. To address this situation, the executed development agreement creates a DIF maintenance fund to compensate the City for the loss of tax increment caused by the 121A Corporation taking the property off the tax rolls.

Interesting and Unique Provisions:

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>1.01 Purchase Price. The entire purchase price shall be increased (but never decreased) on an annual basis equal to increases in the Consumer Price Index for each year.</p>	<p><i>This agreement was signed and the purchase price was set in 2009; however, the developer is not required to close on the acquisition until 2014. This clause allows the City to benefit from increased valuation as a result of time.</i></p>
<p>1.03 Redeveloper’s Additional Payment. The Redeveloper has agreed to make an additional payment to the City at the time of Closing 1 in the amount of Thirty Million Dollars (\$30,000,000).</p>	<p><i>The additional payment will be used by the City to retire bonds and reimburse itself for costs associated with existing or ongoing infrastructure improvements adjacent to the project but not identified as Core or Implementing Public Improvements as part of the agreement, as well as planning costs.</i></p>
<p>2.02 Modifications to Development Plan. The City recognizes that, as the Redeveloper and the City proceed through the permitting process for the Development Plan, changes may be required in portions of the Development Plan.</p>	<p><i>This section defines Major and Minor Plan Changes and who from the City can approve them.</i></p>
<p>2.04 Additional Development Opportunity. The City recognizes that in exchange for the Redeveloper's agreement to make the Additional Payment...the Redeveloper needs the opportunity to expand the development program.</p>	<p><i>In exchange for the \$30 million additional payment (Section 1.03) to the City, the redeveloper is authorized to construct an additional 750,000 square feet for gross floor area either within the development area on land not already owned by the redeveloper or by adding bulk (Floor Area) to currently planned private improvements. This allows the redeveloper to exceed the 2.7 million square feet of the Development Plan for a total of 3.4 million square feet.</i></p>
<p>3.04 Cooperation; Construction, Coordination; Future Easements and Declarations. The Mayor shall be authorized to execute such documentation, including a granting of easement affecting City property, upon such terms and conditions as he deems in the City’s best interest.</p>	<p><i>This section preauthorizes the Mayor to execute certain easements which usually require City Council votes.</i></p>
<p>4.03 (b) Payments under 121A Agreements; Timing of Payments.</p>	<p><i>The City will not see a reduction in</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>Between a land closing and the commencement of 121A Payments as described above, the Redeveloper shall make payments to the City...in a manner to avoid any gaps in or cessation of the City's normal receipt of the following ...(a) real estate taxes...(b) net revenue from the parking facilities, ..(c) personal property taxes...</p>	<p><i>revenue as the result of the sale and demolition of the City-owned parking facilities. This is to keep the City's revenues intact during the construction period.</i></p>
<p>4.03 (d) Components of the 121A Payments. There are two components of the 121A Payments; (i) the New Growth Tax Component, and (ii) the Special Assessment Component...</p>	<p><i>This section and its subsections describe the financing framework that makes this deal work.</i></p> <p><i>The City is requiring the Developer to create one or more Massachusetts 121A Corporations (See Section 4.03 (i)) to own all the real estate within the project. Since property owned by a 121A corporation is tax exempt, the City is entering into a separate agreement (Exhibit H) that establishes payments to the City in lieu of ad valorem property tax. Those payments consist of a New Growth Tax portion and a Special Assessment Portion. The rates, which are negotiated with each Step, are fixed and include periodic escalators.</i></p>
<p>4.03 (d) Components of the 121A Payments. (i) The minimum charge per square foot of the New Growth Tax Payment Component is presented in Section 12 of the Development Plan by land use. 1. The first dollars of the New Growth Tax Payment shall be used to compensate the City for property tax revenues it currently receives on the Redevelopment Properties.</p>	<p><i>The New Growth Tax component is further divided into three subcomponents. The first subcomponent replaces the existing real estate tax payment that is being made to the City.</i></p>
<p>2. After deduction of the Existing Real Estate Tax Payment, Five Hundred Thousand Dollars (\$500,000) or thirty-five percent (35%) of the residual New Growth Tax Payment (as escalated under clause (i)(1) above), whichever is more, shall be allocated to the City for the City's general fund and general municipal purposes.</p>	<p><i>The second subcomponent (\$500,000 or 35% of the Net New Growth Tax, whichever is greater) goes to the City's General Fund for ordinary operations of the City.</i></p>
<p>4.03 (d) Components of the 121A Payments; the New Growth Tax component (<i>continued</i>). 3. After deduction of the Existing Real Estate Tax Payment and payment of the amount required</p>	<p><i>The third subcomponent (65% of Net New Growth Tax) is used by the City to make bond payments for the acquisition of the Implementing</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>under the immediately preceding paragraph, sixty-five percent (65%) of the residual New Growth Tax Payments (as escalated under clause (i) (1) above) shall be allocated to fund the purchase of Implementing Public Improvements for the Step.</p>	<p><i>Public Improvements.</i></p>
<p>4.03 (d) Components of the 121A Payments. (ii) The anticipated charge per square foot of the Special Assessment Payment Component is presented in Section 12 of the Development Plan by land use. 1. The Special Assessment Payment shall be established in the Financial Submission for the Step and will be fixed it will not escalate over time.</p>	<p><i>The Special Assessment Payment is also negotiated with each Step. Its rates are fixed and do not include an escalator. This portion of the 121A payment will be used exclusively to make bond payments for the Implementing Public Improvements.</i></p>
<p>4.03 (e) The DIF Maintenance Fund Payment. The DIF Maintenance Fund Payment is in addition to the 121A Payments and shall be used by the City to pay for any municipal services, repairs or maintenance of public infrastructure or amenities within the DIF District.</p>	<p><i>The City's decision to use 121A as a means of financing the redevelopment components negatively impacts the DIF because the property will become tax exempt. This would reduce future incremental tax growth available to the DIF. The DIF Maintenance Fund Payment tries to address this problem by creating a revenue stream that would replace the lost incremental revenue.</i></p>
<p>4.03 (g) Shortfalls and Surpluses in Reimbursement Amounts. The City recognizes that each Step will bear the appropriate cost of completing the Implementing Public Improvements for that Step, and that the revenue from that Step may not be sufficient to support the City Bonds for the Implementing Public Improvements for that Step, and that the Redeveloper, if it shall proceed with the Step, shall be obligated to fund that shortfall.</p>	<p><i>The redeveloper will contribute to debt service payments if the revenue available in certain steps does not cover the debt payment. Furthermore, any surpluses are to be used to offset shortfalls in other steps. Finally, if the City receives additional grant funding for the Public Improvements, those grant funds cannot be used to relieve the redeveloper of making up any shortfalls.</i></p>
<p>4.03 (i) Other 121A Matters. One or more 121A corporations must own the fee interest in all property within a Step (both the City Parcels and all privately-acquired properties) until the termination of the 121A Agreements for such Step.</p>	<p><i>MGL Chapter 121A (Urban Redevelopment Corporations) establishes rules and regulations for a special purpose entity with the authority and power to carry out a redevelopment project approved by the municipality.</i></p>
<p>4.04 Funding for the Town Brook Culvert Restoration; ... The Redeveloper and the City have identified, as part of</p>	<p><i>The Core Public Improvements are to be designed by the redeveloper</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>the Public Improvements, three (3) separate improvements that will benefit the New Quincy Center Area generally, and for which the City will seek Federal and State Funding. [Core Public Improvements]</p>	<p><i>and are expected to cost \$50 million. In the event that state and federal funds cannot be secured, the City is not obligated to use local funds to pay for the Core Improvements unless it chooses to do so. However, failure to construct or cause the construction of the Core Improvements is a default of the agreement and grounds for termination. Furthermore, if the state and federal funds are insufficient to complete the Core Improvements, the redeveloper may choose to complete the Core Improvements provided that there is sufficient bond capacity and repayment cash flows.</i></p>
<p>6.01 and 6.02 Conditions to Closing. <i>(This section lists a series of obligations and terms that must be completed before each closing.)</i></p>	<p><i>A substantial amount of work is to be done by both parties, and this will need to be monitored.</i></p>
<p>8.02 (d) Transfer Following Completion of a Building. Prior to the occurrence of the foregoing events, the Redeveloper may not sell the fee interest or its ground lessor's interest in all or any portion of a City Parcel, except to the City.</p>	<p><i>The redeveloper may not sell an incomplete building to anyone but the City. As a result, the City is assured that it will be able to take action if any of the buildings are not completed per the Development Plan and schedule.</i></p>
<p>13.05 City's Option to Pay Mortgage Debt or Purchase Property. ...the City shall (and every mortgage instrument made prior to completion of the Redevelopment Project with respect to the Redevelopment Properties by the Redeveloper or successor in interest shall so provide or acknowledge) have the option of:</p>	<p><i>The City is establishing its rights to assume the redeveloper's construction loan or force the acquisition of the property from someone who bought it out of foreclosure.</i></p>
<p>15.09 Provisions Not Merged With Deed. None of the provisions of this Agreement are intended to or shall be merged by reason of any instrument.</p>	<p><i>This agreement supersedes future deeds and leases if there is a conflict.</i></p>
<p>15.09 Provisions Not Merged With Deed <i>(continued)</i>. transferring or subleasing title to the City Parcels from the City to the Redeveloper or any successor in interest, and any such instrument shall not be deemed to affect or impair the covenants of this Agreement.</p>	<p><i>This agreement supersedes future deeds and leases if there is a conflict.</i></p>
<p>15.14 Entire Agreement. This Agreement integrates all of the terms and conditions mentioned herein or incidental hereto, and supersedes all negotiations or previous agreements between the parties</p>	<p><i>The section states that this document is the only agreement, and that previous offers or representations are void.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
with respect to all or any part of the subject matter hereof, ...	
15.18 Community Benefits. (a) Construction and Employment.	<p><i>Under this section:</i></p> <ol style="list-style-type: none"> 1) <i>The Redeveloper is required to pay prevailing wages for all public and private improvements.</i> 2) <i>The Redeveloper and City acknowledge that union and non-union companies will be submitting bids.</i> 3) <i>The Redeveloper agrees to a goal of 80% union participation, provided that the unions agree to meet community and minority workforce goals, including a goal of 25% Quincy residents.</i> 4) <i>The Redeveloper agrees to a goal of 25% of all goods and services purchased from Quincy businesses</i>
15.18 Community Benefits. (b) Other Employment Opportunities for Quincy Residents.	<p><i>The Redeveloper and tenants over 15,000 square feet will hold job fairs to identify prospective candidates for jobs with development tenants.</i></p>
15.18 Community Benefits. (c) Affordable Housing.	<p><i>The Redeveloper will make a payment to the City's Affordable Housing Trust Fund for the construction of Affordable Housing, including all Inclusionary Units which are to be built outside of the project area.</i></p>
15.18 Community Benefits. (d) Community Benefits Account.	<p><i>The Redeveloper will make a payment of \$10 million to create a Community Benefits Account for the Mayor to use on public infrastructure/space projects outside the redevelopment area.</i></p>

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Development Agreement Synopsis: Assembly Row, Somerville, MA

Signatories

- Mayor
- Developer

Legislative Approvals

- None

Year Executed

- 2006



Assembly Row illustrative graphic, Somerville, MA

In 2006, four parties executed an amended and restated agreement for the development of Assembly Square in Somerville: Federal Realty Investment Trust (FRIT), IKEA Property Inc., the City of Somerville, and the Somerville Redevelopment Authority (SRA). At the time, FRIT, IKEA, and the Redevelopment Authority each owned property in the Assembly Square Urban Renewal District. The agreement was intended to facilitate the relocation of a permitted, but not constructed, IKEA store from the Mystic River waterfront to an inland site via the issuance of new zoning permits and a land swap. This would allow the waterfront and the balance of the site to be used for the FRIT Assembly Square mixed use project. If successful, this agreement would supersede an earlier agreement for the IKEA waterfront site, but if it is not successfully implemented, the parties retain the right to go back to the original arrangement.



**To download
development
agreement for
Assembly Row,
Somerville, MA
(2006)**

At the time of the signing of this agreement, FRIT owned and operated a 370,000 square foot retail center, the Assembly Square Mall, housed within the former Ford Motor Company assembly plant on a 26 acre parcel. The Somerville Planning Board issued a Special Permit with Site Plan Review to allow for the repositioning of the mall in December 2007. FRIT also owned or controlled, through a Land Disposition Agreement with the SRA, 25 acres known as the Inland Site, on which it proposed to build a mixed use project. IKEA owned a 17 acre site adjacent to the Mystic River on which it has received a Special Permit with Site Plan Review to construct at 340,000 square foot retail store with surface parking.

Both the IKEA and FRIT Assembly Square Mall permits had been challenged in court by the Mystic View Task Force, a local community group. The City helped negotiate a settlement between the developers and the Task Force, which contributed to this Development Agreement (as well as a separate settlement agreement between the parties to the litigation). The Development Agreement called for FRIT and IKEA to swap the Inland and Riverfront sites, thereby allowing IKEA to build its 340,000 square foot retail store on the Inland site and FRIT to build its mixed use development on the Riverfront. At the community's request, FRIT increased the density of its mixed use development to include 1.75 million square feet of office/R&D space, 450,000 square feet of retail and restaurant space, a 62,000 square foot cinema, a 200 room hotel, and 2,100 residential units. The Agreement also established improved mitigation and significant community benefits, including a financial contribution to a new MBTA Orange Line station.

In the agreement, the City committed to working cooperatively with the developers to seek federal, state, and local funding (in the form of District Improvement Financing) to pay for mitigation and other infrastructure improvements. (It should be noted that after many of the actions committed to in the agreement had been completed, including the referenced land swap and issuance of permits for an inland IKEA site, IKEA decided not to move forward with construction of its store.)

Interesting and Unique Provisions:

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>Background.</p> <p>As successor in interest to Assembly Square Limited Partnership, FRA owns the approximately 26.18 acre parcel of land, with improvements thereon, located at 133 Middlesex Avenue, Somerville, MA (the "Mall Parcel")...</p>	<p><i>The background section of the Agreement identifies the four parties to the Agreement, which properties they own or control, what permits have already been issued, and the basic "deal" and its end results.</i></p>
<p>Article I – Prior Agreements and Entitlements.</p> <p>Section I. Status of this Agreement and the Old Agreements.</p> <p>This Agreement shall be in full force and effect as of the Effective Date. Unless and until either (a) this Agreement supersedes and renders null and void the Old Agreements, the MOU, and the Roadway Easements (under Article I, Section 2), or (b) this Agreement is terminated (under Article IX, Section 9), or (c) this Agreement is rendered null and void (under Article I, Section 3), the Parties shall forbear from enforcing their rights or the other parties' obligations or exercising their privileges under the Old Agreements...</p>	<p><i>While the parties all agree to pursue the "New and Improved" development, they do not want to abandon their duties and obligations established in previous agreements, or their rights under the permits that have been issued previously by the Somerville Planning Board. However, in order to move forward with the new plan, all agree not to exercise their earlier rights or enforce others to comply with their prior obligations.</i></p>
<p>Section 2. Effect of Swap Closing.</p> <p>If and when the transactions contemplated by the Swap are consummated (as evidenced by the recordation of a deed to FRIT or its designee of the Riverfront Parcel), this Agreement shall supersede and render null and void ...</p>	<p><i>After the land swap takes place, this Agreement will be in full effect and the old Agreements will be rendered null and void.</i></p>
<p>Article II – Permitting Process.</p> <p>Section 2. Permits for the Assembly Square Mall – 2.1 Prior Permitting.</p> <p>The City and FRIT acknowledge that certain pending litigation has called into question the validity of certain entitlements [granted by a Special Permit from the Somerville Planning Board pursuant to an approved Plan Unit Development] for continued use and occupancy of the Mall. FRIT covenants that it will use best efforts to have the litigation dismissed or withdrawn ... if ... a court of competent jurisdiction issues a final order that invalidates any of those entitlements, then the City will actively support a stay of that order until all necessary entitlements, including without limitation, a Special Permit with Site Review, for continued use and occupancy of the Mall have been issued without appeal.</p>	<p><i>The City pledges to actively support a stay of a court order while the Somerville Planning Board hears an application for a new Special Permit that conforms with a new Preliminary Master Plan.</i></p>
<p>Section 3. Permits for the New IKEA – 3.1 Prior Permitting.</p> <p>... The City covenants that, at IKEA's request, the City will support granting of an extension of the Old IKEA Permits,</p>	<p><i>The City pledges to protect IKEA's right to a riverfront development granted under Special Permit until</i></p>
<p>Section 3. Permits for the New IKEA – 3.1 Prior Permitting</p>	<p><i>the Somerville Planning Board hears</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p><i>(continued.)</i></p> <p>or a new Special Permit with Site Plan Review or similar entitlement with terms and conditions substantially the same as those under the Old IKEA Permits for these improvements.</p>	<p><i>an application for a new Special Permit that conforms with the new mixed use development plan.</i></p>
<p>Article III – Financial Payments.</p> <p>Section I. Previously Made Payments.</p> <p>The City and the SRA hereby acknowledge and agree that FRIT (or its predecessors) have made these payments (as well as a deposit and certain extension payments under the Yard 21 LOA) under the Old Agreements before and as of the date hereof...</p> <p>Section 2. After this Agreement and the Master LDA. FRIT covenants that, upon execution and delivery by all Parties of this Agreement and a Master Land Disposition Agreement for Yard 21 and the Disposition Parcels, all of which the Parties presently expect to occur on or about December 14, 2006, then FRIT will reasonably promptly thereafter pay \$1,000,000.00 to the City or its assignee for design or construction of Trum Field reconstruction project, Hodgkins-Curtin Park...</p>	<p><i>This section acknowledges a series of mitigation and/or community benefit payments made by FRIT or its predecessors under the Land Disposition Agreement and old agreements. Sections 2 through 10 identify a series of additional mitigation and/or community payments to be made by FRIT and their corresponding schedule.</i></p>
<p>Article IV – Transportation Improvements and Mitigation.</p> <p>Section 2. Roadway Mitigation Measures.</p> <p>FRIT covenants that, if and as required under the PUD Approval or any Special Permits with Site Plan Approval for development of the Streetworks Master Plan and the New IKEA and continued use and occupancy of the Mall, then FRIT will implement the following traffic mitigation measures: ...</p>	<p><i>FRIT agrees to construct a number of “off-site” infrastructure improvements that will serve the development site.</i></p>
<p>Section 3. Roadways and Infrastructure – 3.1 Construction.</p> <p>FRIT covenants that it will construct all roadways and infrastructure serving the Streetworks Master Plan and the New IKEA (except as located within the Inland Site)....</p> <p>This infrastructure, includes, without limitation, water, sewer, stormwater, gas, electricity, telecommunications, fire detection and suppression, and cable television, serving the Streetworks Master Plan.</p>	<p><i>FRIT agrees to construct all “on-site” infrastructure.</i></p>
<p>Section 4. I³, DIF, or Other Public Financial Support.</p> <p>The Parties covenant and agree that, while recognizing the importance of increasing tax revenues for, and agreeing not to place any new obligations on, the City's general fund, they will cooperate in good faith to seek all necessary approvals, authorizations or appropriations from any federal, state or local governmental or other non-governmental authority for funding under the</p>	<p><i>The City and the Developers agree to work cooperatively to secure federal, state, or local funding to offset the developer’s construction costs. This could include the Commonwealth’s I-cubed program, a local DIF district, or other funding.</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>Infrastructure Investment Incentive (2006 Mass. Acts ch. 293) ("I³"), the District Improvement Financing (G.L. ch. 40Q) ("DIF"), or other governmental program reasonably sufficient to pay for infrastructure ...</p>	
<p>Article V – Open Space and Public Art. Section 2. Riverfront Arts and Music Festival FRIT covenants that FRIT and its successors and assigns will make reasonable accommodations for: (a) an annual fireworks display event... and (b) an annual Riverfront Arts and Music Festival...</p>	<p><i>The City is establishing minimum requirements for the activation of public space.</i></p>
<p>Article VI – Pedestrian Access. FRIT and IKEA agree to include provision for pedestrian walkways throughout the Streetworks Master Plan and on the Inland Site in connection with the New IKEA in all locations and as and when reasonable and convenient for the use and operation of proposed residential and commercial uses and as necessary and convenient to accommodate existing and new traffic and mitigate traffic impacts.</p>	<p><i>The City intends to integrate the IKEA project into the whole redevelopment so that it does not become its own development island.</i></p>
<p>Article VII – Energy Co-Generation. FRIT will investigate and employ, to the extent commercially reasonable, combined heat and power, district heating, and cogeneration, using commercially available technologies that allow buildings to generate their own electricity in clean, cost effective, and efficient ways, including the production of usable heat which can be deployed onsite for both heating and cooling loads; centralized heating systems that can heat (and cool) entire neighborhoods with significant environmental and climatic benefits.</p>	<p><i>The City hopes to encourage environmental sustainability without setting strict requirements.</i></p>

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Development Agreement Synopsis: City Square, Worcester, MA

Signatories

- City Manager
- Developer

Legislative Approvals

- None

Year Executed

- 2006

This agreement calls for a private developer to demolish an existing shopping mall and portions of a parking tower to construct approximately 1.5 million square feet of new office, retail, hotel, and residential space, and



City Square illustrative graphic, Worcester, MA

re-skin and reposition approximately 133,000 square feet of existing retail space, above a new 480,000 square foot underground parking garage. Directly adjacent to the site were two existing office buildings consisting of 290,000 and 197,000 square feet of office and ground floor retail space that were owned by separate but related entities of the developer. The entire site consisted of approximately 20 acres.

The project was divided into three major components, or elements: Private Project Elements; Delegated Public Project Elements; and Direct Public Project Elements. The majority of the development agreement dealt with the construction and payment for the Delegated Public Project Elements, which are publicly-owned, publicly-financed improvements to be constructed by the developer because they will be structurally connected or form the foundation to future Private Project Elements. As part of the agreement, the City committed to requesting state funding and allocating local funding, including revenues from a District Improvement Financing (DIF) District, to fund the construction of the Direct Public Project Elements and Delegated Public Project Elements. The City authorized the use of Tax Increment Financing (TIF) to assist in the construction one office tower in Phase I and one office tower and a hotel in Phase 2 and 3.

At the time of execution, the developer had secured a Notice of Intent from a major credit tenant for a 195,000 square foot office building. This NOI is not referred to in the Development Agreement and, at the time of execution of the Development Agreement, it was uncertain whether the tenant would or would not proceed with the project. At the time of writing of this report, the tenant has committed to moving forward and, as a result, tax increment will become available to help pay principal and interest on the General Obligation bonds issued in the DIF.



**To download
development
agreement for
City Square,
Worcester, MA
(2006)**

Unique and Interesting Provisions:

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
<p>2.2 Private Project Elements (page 5): The developer will construct (or cause to be constructed) phases 1, 2 and 3. However, if the cost to construct Phase 1 equal or exceed a total development cost of \$470 million, then the developer is no longer bound to construct Phases 2 & 3. If at any time during the construction of Phases 2 & 3 the total development cost exceeds \$470 million, the developer is not obligated to complete Phases 2 & 3.</p>	<p><i>This clause limits the Developer's financial exposure, but it puts some risk on the City if the project needs the incremental tax revenue from Phase 2 or 3 to adequately cover debt service. Plus, the site could remain partially undeveloped according to this provision.</i></p>
<p>2.4 Direct Public Project Elements (page 7): The City shall, at its sole cost and expense, provide and/or Construct the Direct Public Project Elements, including the modification and/or narrowing of Worcester Center Boulevard..</p> <p>Notwithstanding the foregoing, if there is an Event of Default by the Developer and such Event of Default is not cured or resolved as provided in Sections 8.1 and 8.3, then the City shall be excused from any further obligation to Construct the Direct Public Project Elements ...</p>	<p><i>No timeline exists relating to the completion the Direct Public Project Elements, and Phases 1 and 2 of the Private Project Elements do not appear to be dependent upon their completion. Therefore, the City could schedule these physical improvements to commence after completion of the Delegated Public Project Elements, including the new underground parking garage, but before the completion of the Phase 1 Private Project Elements so as to not disturb and inconvenience new tenants and owners.</i></p>
<p>2.5 Schedule for Construction of Delegated Public Project Elements & Private Project Elements (page 8): The estimated schedule for the Construction of the Delegated Public Project Elements and the Private Project Elements is set forth in the Development Program. The Construction of the Trigger Buildings shall Commence as soon as practical...</p> <p>...The timing of the development and Construction of buildings or improvements will be based on market forces and the Developer's ability to obtain leasing and financing commitments for various components of the Project which are acceptable to the Developer in its sole discretion...</p>	<p><i>According to this provision, the Developer would not be eligible for payment of tasks associated with the Enabling Work (primarily the demolition of the mall and portions of the existing parking structure) until the Developer has written commitments for the lease and financing of two key Private Project Elements called the Trigger Buildings. This is important to note since either: (a) the Developer will demolish the structure and hold the cost on its books until a lease and financing are secured because that is a condition of the agreement; or (b) the Developer will not commence demolition until a lease and financing are secured, which could delay the delivery of the</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
	<i>completed buildings/components and negatively impact the City's ability to generate tax increment within the DIF District.</i>
<p>2.7. Design Guidelines.</p> <p>The Developer and Worcester Renaissance C&D agree that the design of the Delegated Public Project Elements and those Private Project Elements included in Phase 1, plus Building J, shall be subject to review by the City pursuant to the Design Guidelines to be prepared by Sasaki Associates...</p>	<p><i>This provision requires that:</i></p> <ul style="list-style-type: none"> <i>a. The design guidelines must be mutually approved in writing.</i> <i>b. The guidelines apply only to the first building constructed during Phase 1 and are no longer in effect after a Certificate of Occupancy for the core and shell of the building, which may affect custom facades and signage for ground level retail tenants.</i> <i>c. The guidelines to not apply to Phase 2 or 3 of the Project.</i> <i>d. The guidelines do not run with the land.</i> <i>e. Neither party shall record the Design Guidelines with the Registry. If they are, they terminate immediately.</i>
<p>4.6 Disbursements for Construction of the Delegated Public Project Elements Section (page 50).</p> <p>4.6(a) First Disbursement – to pay for all Documented Costs up to \$10 million incurred in the construction of the Delegated Public Project Elements prior to the first Application for Payment.</p>	<p><i>The Developer could receive reimbursement for predevelopment activities <u>before</u> private project investment construction begins. Given 2.5 above, the City could be at risk for revenue shortfalls in the DIF if the Developer does not commence construction of Private Project Elements shortly after this First Disbursement is made.</i></p>
<p>4.6(c) Second Disbursement – periodic disbursements from the balance, if any, of the \$10 million referred to in section 4.6(a)...</p>	<p><i>This is another financial obligation to be paid by the DIF.</i></p>
<p>4.6(d)(vii) All issues with regard to TIF's for either of the Trigger Buildings being resolved through negotiation between the Developer and the City and such TIF's being approved by the City Council;</p>	<p><i>If the City Council approves a reduction in property taxes via a TIF, the revenues of the DIF District will be adversely impacted. This section indicates the City Council did approve the tax abatement .</i></p>
<p>Joinder. Worcester Renaissance Towers LLC and Worcester Renaissance C&D LLC hereby execute this Agreement for the limited purpose of agreeing to be bound, severally, but not jointly, by the applicable</p>	<p><i>Worcester Renaissance Tower LLC and Worcester Renaissance C&D LLC each own real estate adjacent to the project which is owned by</i></p>

SECTION OF DEVELOPMENT AGREEMENT	COMMENTS
provisions of:	<p><i>Worcester Renaissance LLC. All three LLCs are affiliates of Berkeley Investments, Inc. and Starwood Capital Group LLC, but they are separate legal entities. The Development Agreement is between the City and Worcester Renaissance LLC only. However, both Worcester Renaissance Tower LLC and Worcester Renaissance LLC have obligations under the agreement. The Joinder is the means by which each entity agrees to be bound by specific provisions in the Development Agreement.</i></p>