
DEVELOPMENT AGREEMENTS:

STATUTORY REQUIREMENTS, LEGAL ISSUES AND PRACTICE TIPS

RICH HILL, COURTNEY KAYLOR & IAN MORRISON SEPTEMBER 2015

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DEVELOPMENT AGREEMENTS



BENEFITS

Local Governments

- Promote land use goals
 - Extract concessions not otherwise obtainable
 - Achieve public benefits
- Growth planning certainty

Property Owners

- Predictability
- Vesting
- Encourage phased/complex development
- Flexibility

PART V - DEVELOPMENT AGREEMENTS

NEW SECTION. **Sec. 501.** The legislature finds that the lack of certainty in the approval of development projects can result in a waste of public and private resources, escalate housing costs for consumers and discourage the commitment to comprehensive planning which would make maximum efficient use of resources at the least economic cost to the public. Assurance to a development project applicant that upon government approval the project may proceed in accordance with existing policies and regulations, and subject to conditions of approval, all as set forth in a development agreement, will strengthen the public planning process, encourage private participation and comprehensive planning, and reduce the economic costs of development. Further, the lack of public facilities and services is a serious impediment to development of new housing and commercial uses. Project applicants and local governments may include provisions and agreements whereby applicants are reimbursed over time for financing public facilities. It is the intent of the legislature by sections 502 through 506 of this act to allow local governments and owners and developers of real property to enter into development agreements.

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AUTHORITY

Local Project Review Act

- RCW 36.70B.170 - .210

Dept. of Commerce regulations

- WAC 365-196-845(17)

- Allow local governments to utilize their police powers and contractual authority to specify:
 - Standards and conditions that will govern development of property
 - Provide assurances regarding mitigation and/or infrastructure
 - Provide flexibility and certainty
 - Pre-annexation agreements

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REQUIREMENTS

- Development agreements must set forth development standards that apply to, govern and vest the development of property, including but not limited to:
 - Project elements such as permitted uses and densities;
 - State Environmental Policy Act (SEPA) mitigation;
 - Impact fees or dedications;
 - Design standards;
 - Affordable housing;
 - Parks and open space;
 - Phasing;
 - Review procedures and standards;
 - Build-out or vesting period; and
 - “Any other appropriate development requirement or procedure.”



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REQUIREMENTS

- Development agreements must:
 - Establish duration of agreement.
 - Reserve authority to impose “new or different regulations to the extent required by a serious threat to public health or safety.”

RCW 36.70B.170(4)

When Recorded, Return to:
 City of Bellingham
 Amy Kraham
 Office of the City Attorney
 210 Lottie Street
 Bellingham, WA 98225

**DEVELOPMENT AGREEMENT BETWEEN
 PORT OF BELLINGHAM AND CITY OF BELLINGHAM**

Grantor:	Port of Bellingham
Grantee:	City of Bellingham
Legal Description (Abbreviated):	See Exhibit 2
Assessor's Tax Parcel ID#	Additional Tax Parcel ID# in Exhibit 2 attached hereto.

THIS DEVELOPMENT AGREEMENT, as amended or extended, (the "Agreement") between the Port of Bellingham ("Port"), a municipal corporation, and the City of Bellingham ("City"), a municipal corporation, is entered and effective as of the last date of signature below.

I. RECITALS

WHEREAS, the Port and the City have been working cooperatively since 2005 to plan for the redevelopment of the Waterfront District ("the Waterfront District") into a mixed-use urban waterfront with commercial, industrial, residential, public and recreational use; and

WHEREAS, the Port and the City recognize that the redevelopment is a long-term effort, requiring a phased implementation; and

WHEREAS, the Waterfront District generally encompasses the waterfront properties from the southern end of the former Cornwell Avenue landfill to the I & J Waterway, including the former Georgia Pacific Corporation industrial properties, illustrated on Exhibit 1 attached; and

WHEREAS, the Port currently owns or manages certain real properties within the Waterfront District, including fee simple properties, vacated rights-of-way strips about Port property, and State-Owned Aquatic Land managed by the Port under harbor area leases and/or a Port Management Agreement with the Washington State Department of Natural Resources; and

WHEREAS, these properties, individually referred to herein as a "Port Property" or collectively referred to herein as "Port Properties" are more particularly described and depicted in Exhibit 2 attached and incorporated herein by reference. The term Port Property or Port Properties also includes all property assigned by the Port to any successor in interest; and

*2.3.13 Waterfront District Development Agreement. Page 1

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DURATION

- No statutory duration.
- Development agreements frequently used for phased/complex development.
- Often, 5-10 years.
- 20 years is a common duration.
- Costco Issaquah, 30 years.
- Mercer Island, life of building permit



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PLANNED ACTION

- Development Agreement often adopted together with SEPA Planned Action Ordinance.
 RCW 43.21C.031, WAC 197-11-164 and 168
- Shifts environmental review to earlier stage, e.g. subarea plan.
- No additional SEPA review requirement for qualifying projects.

ADOPTION

- Must be adopted by ordinance or resolution after public hearing.
RCW 36.70B.200
- Must be recorded.
RCW 36.70B.190



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BINDING EFFECT

- Binding on parties and successors, including subsequent purchasers.
 - Including cities who incorporate area subject to development agreement.
RCW 36.70B.190
- Subsequent permits must be consistent with development agreement.
RCW 36.70B.180

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APPEALS

- Development agreements that relate to "a project permit application" are subject to judicial review under the Land Use Petition Act (LUPA).
 - RCW 36.70B.200; *Cedar River Water & Sewer Dist. v. King County*, 178 Wn.2d 763 (2013).
- What about appearance of fairness?
- What standards apply?



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APPEALS

- Growth Management Hearings Board has found jurisdiction for *de facto* amendments to the Comprehensive Plan or development regulations.
 - *Your Snoqualmie Valley v. City of Snoqualmie*, CPSGMHB Case No. 11-3-0015, Final Decision and Order (May 8, 2012) at 27-28.



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BEST PRACTICES

- Vesting
- Impact Fees
- Development Agreement Modification
- Development Regulation Modification
- Dispute Resolution
- Cherry Picking

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VESTING

RCW 36.70B.170 requires that development agreements shall “vest the development, use and mitigation” for the duration of the agreement.

- **Practice tip:** Define which regulations are vested under the development agreement.
 - Commonly, Zoning regulations, but not updated building or fire codes.
- **Practice tip:** Attach all key regulations, exhibits, design guidelines to the executed development agreement.
- Washington impact fees are not “land use control ordinances.”
 - *Pavlina v. City of Vancouver*, 122 Wn. App. 520, 529-30 (2004)
- **Practice tip:** Specify whether further mitigation, including impact fees, can be imposed.

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IMPACT FEES

- Development agreements may specify amount and payment of impact fees imposed or agreed to in accordance with state law. RCW 36.70B.170(3)(b).
- RCW 36.70B.210 further states that nothing in the Local Project Review Act authorizes jurisdictions to impose impact fees or dedications “except as expressly authorized by other applicable provisions of state law.”
 - Authorized impact fees under RCW 82.02.050 - .090. Commonly, jurisdictions will seek public benefits that it could not exact through current regulations.

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AMENDMENT/MODIFICATION

- **Practice tip:** Include defined modification procedures, including objective standards for definition of “major” and “minor” amendments



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DEVELOPMENT STANDARDS MODIFICATION

- RCW 36.70B.170(1) provides development agreements “shall be consistent with the applicable development regulations” under the GMA.
- May jurisdictions modify otherwise applicable development regulations?
 - Commerce regulations discourage such procedures: “Development agreements do not provide means of waiving or amending development regulations that would otherwise apply to a project.” WAC 365-196-845(17)(a).
- Some jurisdictions authorize modification of certain development regulations. See City of Gig Harbor Municipal Code 19.08.020.B.
- Any?
- Some?
- Authorized by, or not by, local ordinances

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QUESTIONS?

THANK YOU

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