
INTEROFFICE MEMORANDUM

TO: CITY COUNCIL

FROM: MIKE APPLGARTH

SUBJECT: DEVELOPMENT AGREEMENTS

DATE: MARCH 21, 2019

CC: AGENDA PACKET

On March 26, 2019 you will be considering The Villas at Southtowne project which would rezone 9.32 acres located at 10670 S. 700 E. from the CN Zone (Planned Center-Neighborhood District) to the PUD(12) Zone (Planned Unit Development, 12 units per acre).

In addition to the options identified by the Community Development Department in the staff report (1. Approve the application, 2. Approve with conditions, 3. Deny, or 4. Table the application), I wanted to remind you of another tool the Council possesses as the City's land use authority.

Under the Municipal Land Use, Development, and Management Act § 10-9a-102, "municipalities may enact all ordinances, resolutions, and rules and may enter into other forms of land use controls and **development agreements** that they consider necessary or appropriate for the use and development of land within the municipality, including ordinances, resolutions, rules, restrictive covenants, easements, and **development agreements** governing uses, density, open spaces, structures, buildings, energy efficiency, light and air, air quality, transportation and public or alternative transportation, infrastructure, street and building orientation and width requirements, public facilities, fundamental fairness in land use regulation, considerations of surrounding land uses and the balance of the foregoing purposes with a landowner's private property interests, height and location of vegetation, trees, and landscaping, unless expressly prohibited by law."

The City Council has had numerous discussions about the use of development agreements as a tool to better balance the breadth of uses allowed in certain zones with the concerns of the adjacent community, and as a surety against significant deviation from an acceptable concept plan and/or protracted timelines once a zone is granted. To refresh this discussion, I am including for your review the *Pros and Cons of Development Agreements* document prepared by the City Attorney in September 2016.

Finally, given the level of community interest in The Villas at Southtowne project, I strongly recommend that your contract legal counsel be present for the public hearing.

Pros and Cons of Development Agreements

Sandy City Council Discussion - 9.6.16

"DA's are neither a 'panacea' nor should they be feared"

1. *Adds another tool to the tool kit.*
 - a. Advantage – This tool may work in situations that others do not.
 - b. Disadvantage – It may be used instead of others that are more/equally effective;
Comment: Development staff must "speak up" to offer alternatives if they exist; SD zone suggested by CD Director in Council Meeting as example; City Council should seriously consider not using DA if staff identifies another method; City Council should give staff time to consider alternatives – don't draft DA in Council meeting.
2. *Negotiated/flexible/creative.*
 - a. Advantage – The parties are forced to discuss and understand the project and respective positions.
 - b. Disadvantage – Potential politicizing of the project. More time, funds and effort up front
Comment: Time up front can prevent confusion/conflict over time.
3. *Definitive, certainty, predictability.* (Note: To be legally sufficient, the development agreement must be consistent with the Code existing at the time of executing the agreement)
 - a. Advantage – This should reduce the potential for misunderstandings
 - b. Disadvantage – Potential conflict with the Code, which may already be definitive as to some, many or all of the topics that the parties would like to cover
Comment: Traditional zone may also leave unanswered questions – one size never fits every unique development; Terms of well drafted agreement will can address, mitigate, or avoid conflicts.
4. *Broader vesting possibilities.*
 - a. Advantage – Vesting can be consideration for things City wants and things applicant want.
 - b. Disadvantage – Whether vesting is or is not beneficial to the City is not always apparent up front
Comment: Current Utah Vesting doctrine creates same disadvantage with traditional Euclidean zoning; City is bound by vested right at time of completed application.
5. *Expires.*
 - a. Advantage – The vesting ends with the expiration unless otherwise provided by the agreement.
 - b. Disadvantage – After expiration, the parties will know what the project is not, but will they know what the project is/can be? May be difficult to track.
Comment: Designate "DA" on zoning map; reversion or other clause may clarify what project can be if agreement expires
6. *Recorded and binding upon future owners.*
 - a. Advantage – The City is assured that transfer will not affect the City's bargained-for consideration.
 - b. Disadvantage – The City may not want to be contractually bound to a successor;
Comment: same concern exists with Euclidean zoning – future owners are entitled to vested zone.
7. *Can address phasing, timing of public facilities with build-out of the development.*
 - a. Advantage – The development can balance revenue with costs. Dates certain can be discussed to support predictability.
 - b. Disadvantage – The build-out is sometimes market driven with unpredictable timing.
Comment: Same concern exists with traditional Euclidean zoning approach

8. *Council retains more discretion.*
 - a. Advantage – Legislative decisions receive more deference. Negotiated agreements also receive more deference to the negotiated terms
 - b. Disadvantage – Potential for referendum
*Comment: assuming terms are clear and unambiguous, this is an advantage. If unclear or ambiguous, heightened probability of litigation; split among land use practitioners as to whether DA is legislative or administrative - probably legislative
zone change subject to referendum also, irrespective of DA.*

9. *It's a contract.*
 - a. Advantage – Both the City and Developer are bound to the terms and conditions expressly set forth in the Development Agreement. City may pursue compliance (and enforce non-compliance) through a breach of contract action. Can include terms and conditions (i.e. "no damages") that could not be unilaterally adopted by the City.
 - b. Disadvantage – Contracts have a longer statute of limitations. No matter how well drafted, there is potential for a third party (i.e. judge) to read it differently; "Deference" standard to legislative acts: how will that apply to DA interpretation/enforcement?
Comment: current thinking is that if DA considered a legislative act, subject to referendum, then deference should be given to City: challenge should be 30-days, arbitrary, capricious, illegal should be standard used by court to judge enforceability of provisions; judges also routinely misunderstand Euclidean zoning and misinterpret zoning ordinances;

10. *Terms and conditions can add to or clarify Code requirements.*
 - a. Advantage – Additional clarity and flexibility may be desirable. IF clearly drafted, shields developer from shifting municipal landscape and City from lost memory and "developer recollection" of transaction.
 - b. Disadvantage – May be difficult to track. If laws change, development agreement may not be affected (very narrow exception);
Comment: Current Utah Vesting doctrine creates same disadvantage for City relative to zoning ordinance generally once developer "vests" in given zone; DA may actually give City more flexibility in delineating what rights will or will not change if Code changes

11. *Cannot be changed without mutual consent.*
 - a. Advantage – Certainty, predictability, and beneficial when no change is desired.
 - b. Disadvantage – If City does want the change;
Comment: can't change a vested right of any zone without mutual consent

12. *Treats a large project as a whole.*
 - a. Advantage – Integrated projects and phasing.
 - b. Disadvantage – Potential change of vision as time passes
Comment: occurs with general plan also

This document is for discussion only. It is not intended as a comprehensive summary of the advantages/disadvantages of development agreements; neither does it represent the policy or position of the Sandy City Administration or the Sandy City Council, nor does it constitute legal advice from the Sandy City Attorney