Untended Consequences of Developer Agreements

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Panel Members
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Presentation Overview

- Introductions
- Capital financing in development agreements
- Discuss “real life” municipal experiences—both good and bad
- Impact in studies of credits and reimbursements
- Legal implications – how to do it right!
Development Agreements

- Allow infrastructure capital facilities to be accelerated in community
- Necessary flexibility between municipalities & development
- Specify funding responsibilities
- Create a win/win
- Administration of agreements
- Pros and cons
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Lessons Learned

1. Begin with the End in Mind
2. Get the Right People in the Room
3. Keep it Simple-Devil in the Details
4. Times Change - Review Annually
1. Begin with the End in Mind

- Define Outcomes
  - City and Developer

- Interest Based Negotiations (not Position Based)
  - Focus on Why, not What

- Match Revenues with Expenses

- Define Performance Measures
  - Revenue Yield, Jobs Created vs. Square Feet Constructed
2. Get the Right People in the Room

- Unique Perspectives Add Value
  - Elected Officials
  - Consultants
  - Financial Advisors
  - Staff (Management and Front Line Employees)
  - External/Internal Auditors
  - Legal
  - Economists
3. Keep it Simple-Devil in the Details

- Identify Practical Elements
  - Tracking, accounting, budgeting, etc.

- Will be Administered Over Many Years
  - Staff Turnover
4. Times Change-Review Annually

- Make it a Requirement
- Adjust for Unforeseen Circumstances
  - City’s Credit Rating Downgraded
  - Economy
Case Study: Prasada

- 3,300+ Acres
  - 1,200+ Acre Regional Core
  - 1,600 Acre Lake Village
  - 530 Acre Urban Core

- 7,300 Residential Units

- 295 Acre Auto Mall
Prasada: Financial Impacts

- 18,500 Jobs and Construction Employment
  - ~$1.5 Billion of Infrastructure
  - ~$1.3 Billion Revenue over 50 year agreement life
  - 530 Acre Urban Core

- Annual Revenues at Build out
  - City: ~$40 Million
  - School District: ~$16 Million
Outcomes

City
- Expand Revenue Base
- Share New Revenues (Performance Based)
- Willing to Use Credit Rating for ID

Developer
- Share New Revenues (Performance Based)
- Build Infrastructure then Receive Reimbursement
- No Third Party Borrowing
  - Receive Interest on Installed Infrastructure
Financial Elements

- $200M. Performance Based Reimbursement
  - 2.2% Sales Tax Split 50 / 50
  - All Other Revenues: 100% City

- Interest
  - 5.5% Pre-Tier
  - 8.0% Post-Tier

- City Can Issue Debt Using Both Halves of Revenue Stream
  - Use “Established” Revenue Stream
Case Study: SPA 2

- Wastewater Reclamation Facility
  - 2MGD Plant built by developers
  - Developer donated 27 acres for site

- 8,000 “Certificates” issued for each EDU

- EDU was for both ¾ and 1” meters
SPA 2: Financial Impacts

- Reality – the recession hit
- Impact fee law changes (SB1525)
- SPA 2 Amendment
  - Standard changed from 250 to 210 GPD
  - Credit for recharge facilities in existing fee
  - Ability to “sell credits”
Outcomes

City
- Certificates issued for $\frac{3}{4}$ or 1 inch meter as the same
- Capacity issues for the future

Developer
- Attorney for developer wrote the agreement when he was City Attorney
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Laveen Area Conveyance Channel (LACC)
What is the Laveen Area Conveyance Channel? (1)

- **Regional flood control facility (channel)**
- **Conveys 100-year storm event**
- **Constructed through public-private partnership**
What is the Laveen Area Conveyance Channel? (2)
What is the Laveen Area Conveyance Channel? (3)
LACC Funding and Construction

- **Initial Proposal from FCD: Standard**
  - FCD manages entire project.
  - City contributes 50%.
  - City reimburses FCD in one or more installments.

- **Agreed/Implemented Process**
  - FCD: managed design/construction.
  - City: managed land acquisition.
  - Land for LACC was acquired by offering future impact fee credits to private landowners in exchange for dedication.
  - Required negotiation of 10-12 development agreements.
Laveen Area (2000)

(Courtesy of MCFCD)
Laveen Area (2010)

(Courtesy of MCFCD)
Unintended Consequence #1: Doubled Land Acquisition Costs

Anticipated costs: $5.0 million to be paid by
- Future impact fees: $2.5 million
- Anticipated FCD reimbursement: $2.5 million

Actual costs: $5.0 million paid by
- Impact fees: $2.5 million
- City of Phoenix (other revenues): $2.5 million
- Actual FCD reimbursement: $0

FCD held that, since the land was not actually purchased by the City, the 50% cost sharing could not be implemented, leaving the City on the hook for the full $5 million in land costs.
Unintended Consequence #2:
Negotiation Nightmares and Additional Concessions

- 10+ different development agreements
- 10+ separate City Council approvals
- Delayed LACC construction due to contentious nature of final agreements
- Concessions beyond impact fee credits:
  - Other needed infrastructure
  - Additional entitlements
  - Cash reimbursement
Unintended Consequence #3: Extensive Administration of Agreements

- Each development agreement allocated a certain total impact fee credit value to each property.
- Impact Fee credits are applied to reduce an impact fee due at the time a building permit is issued.
- Many of these properties are still not fully built out, requiring spreadsheet and database tracking of permits to make sure that 1) credits are still applied, and 2) total credits awarded are not exceeded.
Lesson Learned:
Saving Money Upfront Isn’t Necessarily Cheaper or Easier

What would have happened with the standard FCD process?

• City would have paid more upfront, sooner.
• Private landowners would have been compensated upon dedication/sale.
• No negotiation nightmares.
• No demands for additional concessions.
• Dramatically reduced City’s administrative burden.
• City would have had saved millions of $$$. 
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Issues Influencing Unintended Consequences

- Equity
- Funding
- Risk
- Time
- Additional Considerations
Infrastructure Incorporated in Development Agreements

Local facilities serving development capacity requirements

Facilities and infrastructure included in impact fee assessments

- Oversized facilities
- System-wide facilities typically funded by local government
Development Agreements and Impact Fee Funded Facilities

1. Exclude development from impact fees entirely
2. Credit based on a fixed fee
3. Credit impact fee with cap
4. Credit portion of impact with cap
Best Practices

1. Match facilities, demand and funding
2. Alignment with impact fee program
3. Allow for changes
4. Recognize additional considerations
Andrew J. McGuire
Gust Rosenfeld PLC
Legal Issues

- Waivers
- Credits
- Reimbursements
Waived Fees

• Due Process challenges from “full fare” developers
• Partial “exemption” also a problem
• State statutes may prohibit
  • New Arizona Law requires City “repayment”
  • Check your state enabling act
Credits

- Full Cost “cap” required in states like AZ
  - Limited to DIFs due
    - Based on cost in infrastructure plan
    - Most statutes allow for “substitute”
      - Administrative for cost-neutral in AZ
      - Flexibility desired by developers
  - Could be limited by statutory collection period
Credits

- Partial Cost “cap” potentially invalid
  - States like AZ require “to the extent”
  - Court might allow
    - Articulated “consideration” for lesser credit
    - Clearly bargained-for
      - Strong recitals – tell the story
      - Clear operative language in agreement
Credits

- Potential Trap under AZ-like Statutes
  - Unfulfilled “credits” at end of DA term
    - May lack clear “survival clause”
    - Likely to lead to litigation, even if clear
  - DA extending beyond allowed collection period - Problem for prior agreements
  - Anticipating credits beyond statutory period
    - Tie beyond-term amounts to “phases”
    - Split credits into more discrete units
Reimbursements

- Typically – Remote infrastructure
  - Infrastructure serves area larger than development
    - City interest - consolidation
      - More efficient
      - Lower operating costs
    - Developer interest - full repayment
      - Added to IIP
      - Repaid by DIFs from others
Reimbursements

- Incomplete Reimbursement
  - Not fully repaid at end of DA term
  - Stalled development
  - Market condition changes
  - Developer desires extension
    - Statute may prohibit
      - Collections period expired
- Law Changes prohibit full reimbursement
  - DIFs reduced
    - Categories
    - Amounts
    - Collection Period
Questions?

Wukoki Ruin, Wupatki National Monument
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