REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL
DEVELOPMENT AGREEMENTS

BACKGROUND

At the July 21, 1987 City Council hearing on the Interim Development Ordinance ("IDO"), and at the August 7, 1987 hearing on amendments to the IDO, you asked for my analysis and opinion with respect to the law on "development agreements" into which the City has entered pursuant to Government Code Sections 65864, et seq., and the application of the IDO to those agreements. This report describes the legal and legislative history surrounding development agreements, and their relationship to the IDO.

INTRODUCTION

A development agreement is a contract between the developer and The City of San Diego ("City") which allows a builder to acquire a vested right to proceed with development pursuant to all applicable laws at the time of the contract. Any later enacted laws which conflict with those which were effective at the time of the contract may not apply to the developer. This report supplements and expands on information related to you in our report on "Development Agreements," dated May 21, 1987 (attached as Exhibit A).

LEGAL HISTORY

The case history preceding development agreement legislation is the Avco Community Developers, Inc. v. South Coast Regional Coastal Commission, 17 Cal.3d 785 (1976), app. dism. 429 U.S. 1083 (1977), line of cases. (See my report on "Legal History of Vesting Map Legislation," dated August 6, 1987 (attached as Exhibit B).) Proposed development agreement legislation began to circulate in 1978, two years after Avco, with legislation being passed in September 1979, and amended in 1984 and 1986. (Vesting tentative map legislation was adopted in 1984 and amended in 1986, Exhibit B, pp. 4-6.)

LEGISLATIVE HISTORY

The intent of the Legislature, as expressed in Government Code Section 65864, is to alleviate the costs of housing by reducing the uncertainty surrounding development approvals prior to the issuance of a building permit and the incurring of substantial expense. The 1984 amendment added a section which acknowledges the need for public facilities in new development areas and seems to encourage local government to reimburse

developers for the cost of improvement, although there is no reason, absent market factors, why it could not be included in the cost to the home buyer.

Prior to adoption of the present development agreement statutes, several attempts were made to pass such statutes. In May of 1978, Assembly Bill 2951 (Papan), circulated with the following basic definition of vested rights:

> The current law of vested rights has evolved through a series of judicial decisions, the latest being the 1976 Avco Decision. In short, a developer gains a "vested right" to finish development only after making substantial expenditures for construction AND incurring substantial liabilities in good faith reliance on a government permit which has the same specificity as a building permit.

The thrust of AB 2951 was to permit a developer to gain a vested right by incurring "substantial liability" by reason of his expenditures for architectural, engineering, feasibility, or design studies without any physical development on the project site. (Bill Analysis, May 4, 1978, Assembly Committee on Resources, Land Use and Energy.)

The history of Assembly Bill 853 (Calvo) which became the present legislation is a continuation of the concept surrounding AB 2951. The idea of "contracting" for a vested right was proposed by the California Building Industries Association ("CBIA"). It is clear that the purpose behind AB 853 was to allow rights to vest earlier in time than under the Avco rule so that the developer could proceed with certainty:

> This concept has been controversial in the past. This year, under the leadership of Mr. Calvo, a bill has emerged which is without opposition. Here are the key provisions which provide protection to the public interest and avoid the "serious impairment of the government's right to control land use policy." Letter from CBIA to Governor Edmund G. Brown, Jr., September 18, 1979.

The letter correctly states that its passage went unopposed. The League of California Cities worked closely with Assemblyman Calvo on the bill and, although it could not support the bill, it did not oppose it. The final version of the bill incorporated amendments responding to all of the League's concerns, such as the effect of subsequent changes in state or federal law on the agreement, California Coastal Commission approval and its duration.

The concerns raised by those supporting the bill

characterized the developer as being in a constant state of uncertainty. "Will the rules of the game change midstream?" was a frequently raised question. References were made to "laundry lists of horror stories" involving local government action. The Legislature saw itself as responding to those concerns. For example, a press release in March of 1979 by Assemblyman Calvo read:

> "We've heard a number of horror stories from developers who've been forced to revise their plans after a substantial amount of work is already under way," Calvo said. "By permitting formal contracts between the parties involved, we can guarantee the protection of agreed-to development rights and speed up completion of the projects."

Assemblyman Calvo stressed that his bill would not reduce local control over development, but would set up for the first time a mechanism for formal agreement. It is clear that the purpose of AB 853 was to protect developers from subsequent changes after entering into the agreement.

APPLICATION OF THE IDO

A development agreement may be terminated: (1) by mutual consent of the parties (Government Code Section 65868); and (2) by the City if the developer does not exhibit good faith compliance with the terms of the agreement (Government Code Section 65865.1). Subsequent changes in state or federal law preempt the provisions of the agreement with which they conflict (Government Code Section 65869.5). A development agreement is inapplicable to a project in which local coastal program certification is necessary unless the project is certified prior to the agreement or the California Coastal Commission approves the agreement (Government Code Section 65869). A development agreement is a legislative act requiring approval by local ordinance subject to referendum (Government Code Section 65867.5). Government Code Section 65866 says that a development agreement does not prevent a city from applying new laws to the development so long as those laws do not conflict with those laws which were in force at the time of execution of the agreement.

Whether the IDO will apply to development agreements, then, cannot be answered as a general proposition. Each development agreement must be reviewed to discover what laws were in effect at the time of execution. If the IDO does not conflict with any of those laws for a particular agreement, then the IDO will apply. If the IDO conflicts with any laws applicable to the agreement in force at the time of execution, then the agreement in whole or in part will be outside the IDO.

CONCLUSION

As is the case for vesting tentative maps, I believe that my office will have to review each development agreement on a case by case basis to determine what effect, if any, the IDO will have on a particular developer's right to proceed. I propose to deal with this issue on a case by case basis, just as I have indicated our intentions with respect to vesting tentative maps, and advise the IDO administration accordingly.

Respectfully submitted,
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City Attorney

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Attachment
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