How Development Agreements Can Protect Landowners

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Zoning began in the early 20th Century when cities started regulating their land use development by designating zones for certain uses such as residential, retail, industrial, etc. The zones had the value of keeping certain types of uses together and separate from other uses that might not be acceptable such as industrial uses in residential neighborhoods. Over time, zoning ordinances became rigid and once passed offered very little flexibility for changing conditions or evolution of communities. Later community activists used zoning as a method to oppose development on the grounds that the developer was changing the community and was violating the zoning ordinance. Some courts even ruled that a landowner's right to develop their land pursuant to existing zoning did not "vest" until the landowner had obtained a building permit and expended substantial money in reliance on that validly issued building permit. Grading, zoning, subdivision approvals and other land use entitlements short of a building permit could not vest your rights and activists sometimes successfully lobbied for a "downzoning" of the land which would prohibit the proposed development. This recently happened on Johns Island.

In response to a desire for certainty and flexibility, in 1994 the S.C. Legislature passed the Development Agreement Act. This Act has given a huge tool to both developers and communities to deal with what has been a growing problem throughout our State, and that is the fact that it is very difficult to rely on the current state of the law in any given jurisdiction as being the final rules by which a given property may be developed over the course of time.

This Act is one of the most important pieces of legislation enacted by our Legislature in many years with respect to the development of real property in the State of South Carolina. A negotiated development agreement is worth its weight in gold, and more. It allows an owner/developer of real property to vest the development rights to that property for up to 30 years, or even longer, depending upon the size of the tract which is subject to the terms of the agreement. This vests not only such matters as density and use, but development standards such as set-backs, amount of required open space, road alignments, provision of government infrastructure, such as roads, water and sewer, and many other important elements to any development.

The best way to do these projects is to put together a team consisting of a land planner, engineers, surveyor, wetlands and environmental, archeological, and of course, legal – and keep in mind that we are often brought in by other attorneys for the sole purpose of putting in place a planned development with zoning and a development agreement for their clients because of our experience and the ability to get them done fairly quickly.

It has been our experience that it is best to have the zoning document prepared and submitted – whether it is a PUD, a PDD, a PD-MU, an OP-IP or whatever, and follow that process with the negotiated development agreement, so that the two proceed in a parallel fashion, with the zoning document getting final reading just prior to final reading of the development agreement. In fact, this is often done on the same evening, although with complex projects we sometimes like to allow a week or two for final adjustments to the development agreement so that it is entirely consistent with the zoning document that has already been approved. If we expect no changes in the zoning document then we like to get them both done at the same time. Keep in mind, approval of a Development Agreement requires <u>two</u> public hearings, and the 2nd must be noticed at the 1st. The zoning document then becomes a key exhibit to the development agreement. It is preferable to have all information regarding the specific uses, density, the plan itself, the property descriptions, all of that as exhibits to the development agreement and have the agreement track the Act – Title 6, Chapter 31 of the South Carolina Code.

One recent development agreement was only 20 pages, but this 20 page agreement vests the property owner's/developer's right to develop the master planned community in accordance with the approved zoning and other exhibits until 2038 Without the development agreement, and with the identical zoning, subsequent action by County Council could dramatically impact (in a negative way) the developer's ability to realize the economic benefits that he is relying upon in the acquisition of the property and the development of the project plans. For example – and this has happened in a number of places over the past 2 years – County Council determines that because of traffic problems they will double the minimum lot size thereby effectively decreasing the density of residential housing within the County. Of course, this type of solution actually exacerbates the problem. Sure, density is lowered, but prices increase and development moves further out thus creating sprawl.

A development agreement can also contain some unique provisions that may not be available at all under the traditional zoning regulations. For example, you can retain property in an agricultural tax classification pending subsequent development, and we have had success in many jurisdictions in building in significant flexibility provisions that allow for precise location of boundary lines between uses and development tracts to be changed as phases are submitted for final plan review over the life of the project.

During the first 10 years since passage of the Act, only a handful of development agreements were adopted throughout the State. First and foremost there were not many large projects being planned during the late 1990's, it was also because of the lack of understanding by the counties and cities of what a positive impact such agreements can have on a community. It is not just a developer's Act. It is a great planning tool for a community to know what is going to be done in a given area over a long period of time so that the proper infrastructure plans may be laid well in advance of the actual impact occurring. This is particularly true in the case of roads, water and sewer. If development is proceeding in a random manner with various residential and commercial projects coming in 50 to 100 acres at a time, it is virtually impossible to know what a large area will look like at the end of 20 or 30 years.

On the other hand, by having an area of several thousand acres planned, and the planning rights vested under a Development Agreement, which also provides for when infrastructure is going to be built and how it will be funded, the governmental body can proceed with certainty. To that end, the use of the development agreements is much more beneficial to government than it is to private property owners, but it is a huge win for property owners as well. In other words, it is a win-win situation. It is our job to convince the elected officials that this is true.

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