Where the Rubber Meets the Road: Negotiating the Public Finance Agreement

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Butler Snow

Brownstein Hyatt Farber Schreck

Introduction

- Sally Tasker, Butler Snow
- Carolynne White, Brownstein Hyatt Farber Schreck
- Projects we've worked on together:
  - Village at the Peaks
    - Longmont (former Twin Peaks Mall)
  - Foothills Mall – Fort Collins
  - Wazee Partners – Wheat Ridge
  - Promenade Castle Rock

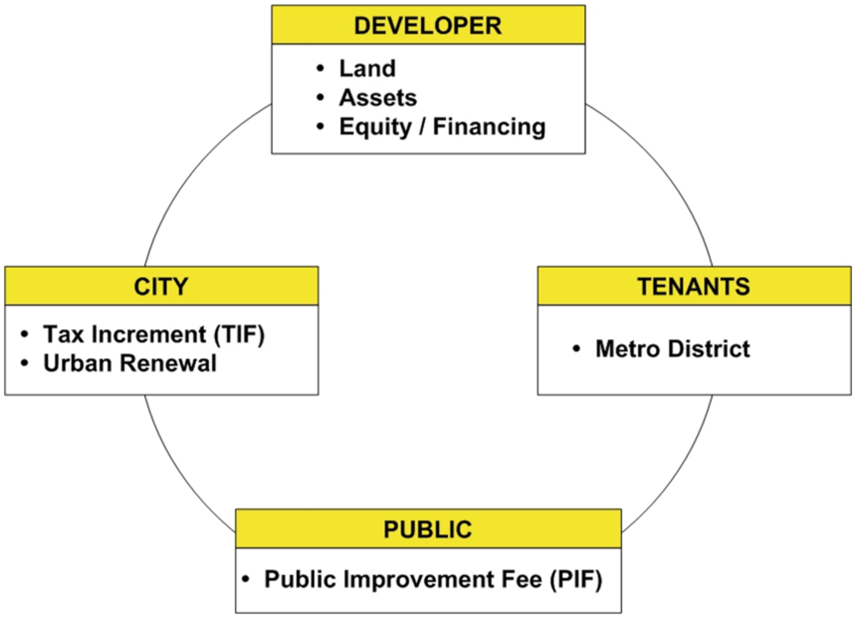
Perspectives: Public v. Private


"Someday, all this will be infrastructure."

- Increased/more sophisticated public demand for infrastructure and services
- Changes in tax policy → more public improvements financed by private developers
- Cities (and citizens) want development to pay its own way
- Result → More public/private partnerships, lines blurred
- Note to developers: public $$ has strings attached

In today's environment, large, complex or phased projects rarely get developed without some form of public participation

- P-3 "Share the Pain" Model



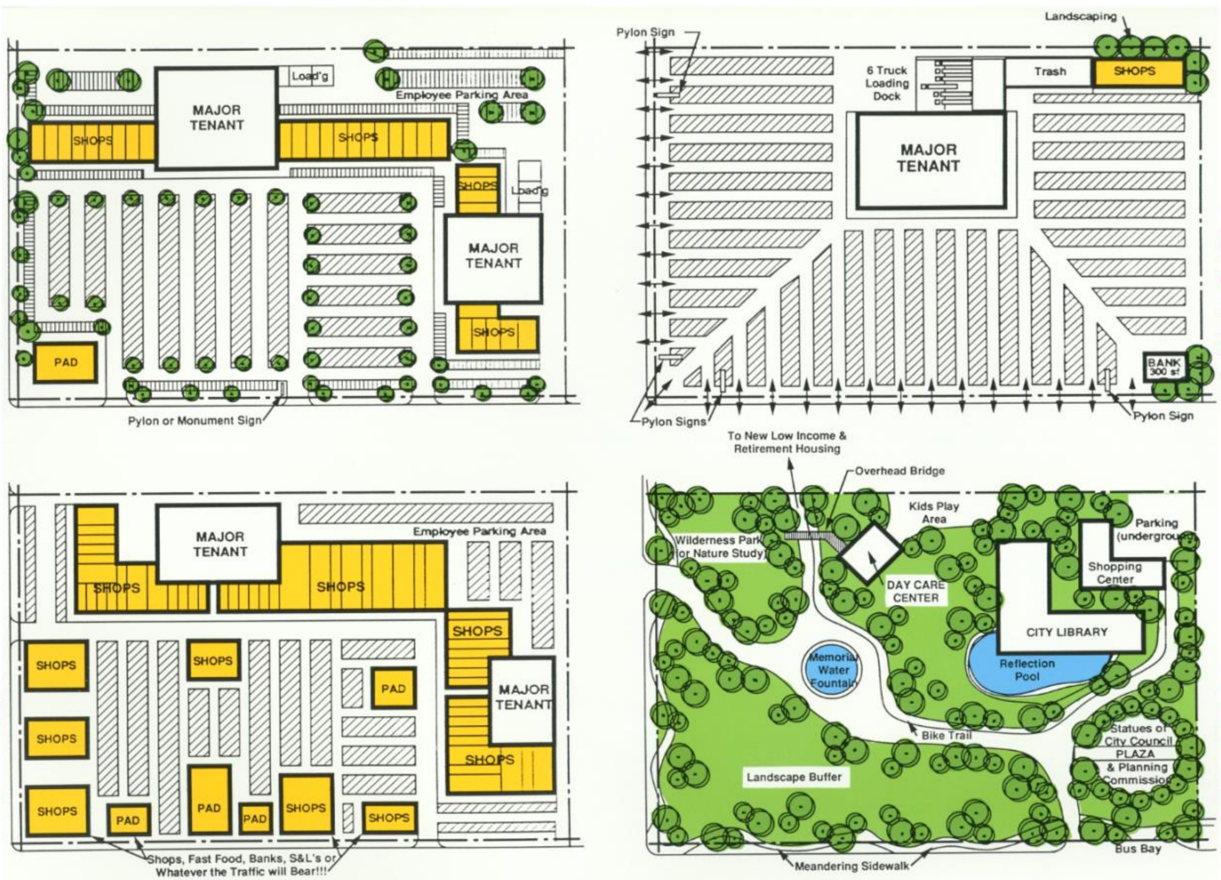
We all see things differently . . .

A TYPICAL SHOPPING CENTER

A SHOPPING CENTER AS SEEN BY MAJOR TENANT

A SHOPPING CENTER AS SEEN BY DEVELOPER

A SHOPPING CENTER AS SEEN BY THE CITY



Overall Municipal Concerns/Perspectives

- Benefit of the Bargain
- Accountability
  - Limit financial support to “Eligible Improvements”
  - Maximize proceeds to minimize total dollar commitment
  - Schedule
  - Finding that project provides public benefits
- Confirmation of Developer Financial/Experience Capabilities

Overall Developer Concerns/Perspectives

- Confirm public finance component
- Maximize flexibility
    - Assignability of agreement
    - Phasing
    - Development Program
- Preserve confidentiality/proprietary information
- Retain control of project

The "But For" Analysis

- How do you know a project is appropriate for support?
  - Consistent with City's goals/plans
  - Project would not occur absent tax public support ("but for")
    - "Gap analysis" – e.g. private market return requirements not met
    - Extraordinary costs – infrastructure or vertical construction
    - City desires public benefit that does not generate sufficient revenue

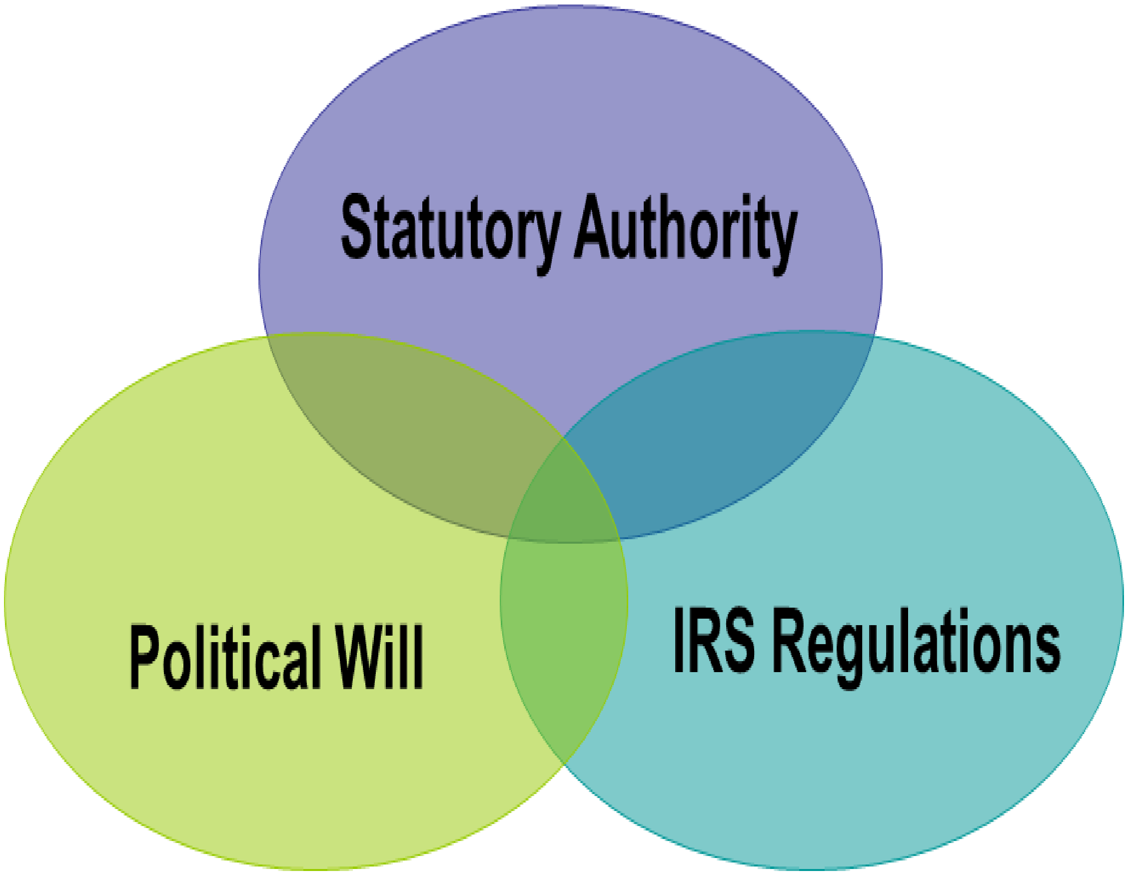
Gap Analysis Exercise

- What are the total project costs?
- What are developer's anticipated returns?
  - If anticipated returns are significantly lower than market expectations, project will likely not occur.
  - What amount of participation is required to meet market expectations?
- Does the project include extraordinary costs that serve as a barrier to market participation?
  - demolition of existing structures; infill (CU Health Center, 9th & Colorado)
  - landfill/contamination (e.g. Castle Rock, Gates)
  - oversized or regional infrastructure

Reducing the Gap

- Reductions in Project Cost
  - Fee waivers
  - Use tax rebates
  - Forgive water dedication requirements
  - Value engineering - redesign components of the project

What is "public?"



Eligible Costs

- What project costs will be eligible for reimbursement?
  - Legal restrictions on different revenue streams
  - Public policy restrictions of elected officials
  - Tangible v. intangible costs
  - “Public” v. “private” costs
  - “Soft costs”
  - Land Acquisition?

Potential Revenue Sources

- Tax Increment (URA or DDA)
    - Property Tax Increment
    - Sales Tax Increment
- Incremental Sales Taxes not pursuant to a URA or DDA
    - Enhanced Sales Tax Incentive Program (ESTIP); (subject to annual appropriation)
    - Credit Public Improvement Fee (PIF)
- Mill Levy revenues
    - Title 32 metro district
    - Business Improvement District (BID)
- Add-On Public Improvement Fee (PIF)

Potential Financing Mechanisms

City as Issuer

- Traditional bonded indebtedness
- Certificates of Participation (COPs)
- Bond on behalf of DDA

URA as Issuer

Developer entity as Issuer

- Metro District
- BID
- Public Improvement Corporation (PIC)

Private Lender Financing

Cap

- Maximum amount of “public” funds available to the project
  - Fixed or adjustable?
- What is included?
  - Accrued interest?
  - Financing Costs?
    - Additional limit on financing costs?

Accrued Interest – Developer Reimbursements

- Will interest accrue on unreimbursed advances?
- Is there sufficient capacity to allow it?
- When will accrual begin?
- When will it stop?
- Are there performance requirements?
- Maximum rate?
- Simple or Compound?

When does Developer Receive Funds?

- Conditions of Reimbursement?
- Phasing
- Milestones
- Verification process for Eligible Costs?
  - Certification
  - Inspection
- “Waterfall”
  - What gets paid first?
  - What revenues get used first?

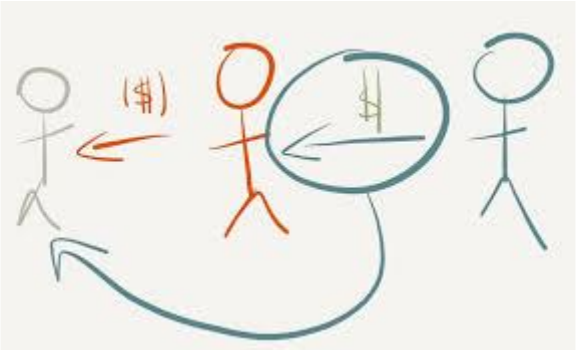
Dispute Resolution and Remedies

- Generally, courts not useful in this context because of timing issues
- Stopping flow of funds not an appropriate remedy if bonds are issued
- Arbitration?
- Mediation?
- Other processes?

"I'm glad we settled our conflict this way. War is expensive."

Assignability of Agreement

- General rule in Colorado – contracts are freely assignable unless otherwise specified
- Balancing of Developer desire for flexibility with City's desire to ensure qualifications of Developer
- Carve outs
    - Collateral assignment to lender
    - Assignment to SPE/joint venture created for project, so long as original developer retains 51% control
- Consent required for assignment?
    - Which parties?
- Objective criteria



Conclusion