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

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Introduction

- Sally Tasker, Butler Snow
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- 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

- 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**

  - **DEVELOPER**
    - Land
    - Assets
    - Equity / Financing
  
  - **CITY**
    - Tax Increment (TIF)
    - Urban Renewal
  
  - **PUBLIC**
    - Public Improvement Fee (PIF)
  
  - **TENANTS**
    - Metro District
We all see things differently . . .
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?”

- Statutory Authority
- Political Will
- IRS Regulations
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

KEEP CALM
ITS
THE CONCLUSION