

9 Tips for Better Public-Private Development Agreements

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Development agreements play a critical role in memorializing partnerships between local governments and private partners on public-private projects. Here are some tips for creating better public-private development agreements:

1. Start with a term sheet.

Effective development agreements start with robust business term sheets. Too often, development partners begin drafting legal agreements before business terms are fully vetted. Investing early effort on a well-considered term sheet helps the business team chart the project's course and saves time and legal fees later.

2. Focus on development terms.

A well-crafted development agreement is a storyboard for how a project will unfold and builds accountability and transparency into the public-private development process. In addition to key business terms, it provides a blueprint for conducting and managing the project, clearly addressing issues such as scope, budget, schedule, risk-management, design, construction, oversight and approvals, close-out, regulatory compliance, change-management, and claims management.

3. Separate the property transaction.

The transfer of property rights (purchase or lease terms) should be handled in a separate agreement. A development agreement can outline the timing and conditions for an eventual closing and attach the transaction agreement as an exhibit, but the business and legal terms of the two documents should be segregated. Intermingling development and conveyance terms threatens the efficacy of a development agreement as a project delivery vehicle and risks confusing how legal provisions, such as indemnities and remedies, should be applied for failed performance.

4. Develop processes.

Effective risk mitigation creates processes to limit the impact of forecasted risks if they materialize during development. Successful public-private partnerships also demand a practical and collaborative approach to tracking accountability and continuous monitoring and adaptation. The development

teams who will execute the project should play a key role in preparing a development agreement and should craft practicable processes to address risk and facilitate project implementation.

5. Change management.

Changes in project scope, budget, and schedule are the most common causes of disputes in public-private partnerships. Development agreements should clearly define how changes to a project are processed, accounted for, and tracked.

6. Check the law.

State law may be more or less prescriptive in how public-private development agreements may be structured and what terms they must contain. In the absence of specific statutes, other legal or constitutional limitations may apply. Check local law to understand how public-private development agreements may be used in your state.

7. Keep it simple.

A well-prepared development agreement for a complex project can get lengthy. At the same time, it is the document the development team will refer to during project implementation. Thus, it must be logically structured, clearly written, and pragmatic in its application.

8. Build in flexibility.

No agreement can anticipate every problem that might arise during the development process. Effective development agreements provide for flexibility and collaborative problem-solving as a project unfolds. Creating a development operations committee, for example, allows issues to be identified and resolved in a collaborative way during development and is a useful communications tool for public-private partnerships.

9. Create a project management plan.

Consider creating a separate project management plan that sets out more detailed processes and conditions to guide project implementation. While a management plan can be incorporated by reference into the development agreement, keeping it separate allows it to be a living document that helps build a truly collaborative public-private development partnership.

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