ENVIRONS
ENVIRONMENTAL LAW AND POLICY JOURNAL
UNIVERSITY OF CALIFORNIA, DAVIS
SCHOOL OF LAW

UC DAVIS SCHOOL of LAW

VOLUME 30 FALL 2006 NUMBER 1

Forming a Tie That Binds: Development Agreements in Georgia and the Need for Legislative Clarity

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INTRODUCTION

Georgia is growing. More specifically, Georgia's population is growing. According to the United States Census Bureau, from 1990 to 2000, Georgia was the fourth fastest-growing state in terms of change in population percentage[1] and the sixth fastest-growing state by actual change in numeric population.[2] An additional 3.8 million residents are projected to reside in the state by 2030.[3] Based on these statistics, Georgia has been described as "the fastest growing state east of the Rockies."[4]

This growth has been felt dramatically at the local level. Of the state's 159 counties, 110 experienced a population increase of at least ten percent.[5] The 20 counties comprising the Atlanta Metropolitan Statistical Area grew by 38.9%, accounting for approximately 65% of the state's new residents and making the region one of the country's largest urban centers.[6] Nearly one-fifth of the nation's fastest-growing counties are located in Georgia.[7]

Naturally, with population increases of this kind, local governments are being inundated with new development. While much of this development is advantageous from an economic standpoint,[8] it has brought to the fore a host of

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[1] *See* United States Census Bureau, *Census 2000 PHC-T-2. Ranking Tables for States: 1990 and 2000. Table 3: States Ranked by Percent Population Change: 1990 to 2000* (Apr. 2, 2001), *available at* http://www.census.gov/population/cen2000/phc-t2/tab03.pdf.

[2] *See* United States Census Bureau, *Census 2000 PHC-T-2. Ranking Tables for States: 1990 and 2000. Table 2: States Ranked by Numeric Population Change: 1990 to 2000* (Apr. 2, 2001), *available at* http://www.census.gov/population/cen2000/phc-t2/tab02.pdf.

[3] *See* United States Census Bureau, *Interim State Population Projections, 2005. Table A1: Interim Projections of the Total Population for the United States and States: April 1, 2000 to July 1, 2030* (Apr. 21, 2005), *available at* http://www.census.gov/population/projections/SummaryTabA1.pdf.

[4] *See* Georgia Governor's Office of Planning & Budget, *Georgia Population Trends 1990 to 2000* (visited June 7, 2006), http://www.gadata.org/information_services/Census_Info/GeorgiaPopulationTrends%201990%20to%202000.htm.

[5] *See id.*

[6] *See* United States Census Bureau, *Census 2000 PHC-T-3. Ranking Tables for Metropolitan Areas: 1990 and 2000. Table 4: Metropolitan Areas Ranked by Numeric Population Change: 1990 to 2000* (Apr. 2, 2001) http://www.census.gov/population/cen2000/phc-t3/tab04.pdf.

[7] *See* United States Census Bureau, *Table 9: Population Estimates for the 100 Fastest Growing U.S. Counties with 10,000 or more Population in 2005: April 1, 2000 to July 1, 2005 (CO-EST2005-09)* (Mar. 16, 2006) http://www.census.gov/Press-Release/www/2006/countypop05-table4.pdf (including 18 Georgia counties on list of 100 counties nationwide). The Georgia counties included on the list are: (1) Forsyth; (2) Henry; (3) Newton; (4) Paulding; (5) Barrow; (6) Cherokee; (7) Jackson; (8) Lee; (9) Effingham; (10) Walton; (11) Pickens; (12) Gwinnett; (13) Dawson; (14) Coweta; (15) Douglas; (16) Bryan; (17) Carroll; and (18) White. *See id.*

[8] In addition to residential growth, Georgia has experienced a good deal of job-producing industrial and commercial development as well. In 2004, for example, the Honda Motor Company announced that it would construct a 400-employee transmission plant in Tallapoosa, Georgia. *See* Danny Hakim, *Honda To Build Transmission Plant In Georgia*, N.Y. TIMES, Nov. 10, 2004, at C4.

issues underlying the state's land use system. In large part, Georgia land use regulation follows traditional Euclidean zoning, which derives its name from the 1924 United States Supreme Court decision upholding local zoning regulations as a valid exercise of the police power.[9] One of the hallmarks of Euclidean zoning is the division of property into separate zones, each of which is assigned a specific, permissible land use.[10] Thus, one zone is designated for agricultural use, another is designated for residential use, still another is designated for commercial use, and so on. As one commentator has explained, this system of land use control is based "on the assumption that development would proceed in appropriate zones, and minor adjustments would be made only as necessary in unanticipated cases of hardship...."[11]

Georgia's experience demonstrates the fallacy of this assumption. Rapid growth and market forces have led developers, investors, businesses and residents to demand frequent changes in zoning regulations. Moreover, these changes often have been made without regard to whether the necessary infrastructure exists to support the new development.[12] Concerns about adequate traffic and water infrastructure, in particular, have received much attention.[13] Frequent responses to these concerns include demands for zoning

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About a year and a half later, this news was followed by an announcement that Kia plans to build its first American automobile assembly plant in West Point, Georgia. *See* Walter Woods, *Georgia Scores Kia Plant: Auto Factory to Help End State's Run of Bad Luck*, ATLANTA J.-CONST., Mar. 13, 2006, at A1. Additionally, with its central location to Atlanta's airport and Savannah's ports, the Macon-Bibb County area rapidly is becoming a hub for logistical and distribution operations. *See* Matt Barnwell, *Mail-sorting facility to open in Macon*, MACON TELEGRAPH, June 2, 2006, *available at* 2006 WLNR 9468492 (noting that four companies recently have constructed or planned distribution centers in the Macon area).

[9] *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390-95 (1924).

[10] *See* Shelby D. Green, *Development Agreements: Bargained-For Zoning That is Neither Illegal Contract Nor Conditional Zoning*, 33 CAP. UNIV. L. REV. 383, 386 (2004); *see also* GA. CODE ANN. § 36-66-3(3) (2000) (defining "zoning" as "the power of local governments to provide within their respective territorial boundaries for the zoning or districting of property for various uses and the prohibition of other or different uses within such zones or districts and for the regulation of development and the improvement of real estate within such zones or districts in accordance with the uses of property for which such zones or districts were established"); Fairmax MK, Inc. v. City of City of Clarkston, 555 S.E.2d 722, 724 (Ga. 2001) (describing zoning ordinance as "a comprehensive or master plan for dividing the community into zones where specified uses are permitted") (quoting Mayor & City Council of Baltimore v. Dembo, 719 A.2d 1007, 1011 (Md. Ct. Spec. App. 1998)).

[11] *See* Green, *supra* note 10, at 387.

[12] *See* Janice C. Griffith, *The Preservation of Community Green Space: Is Georgia Ready To Combat Sprawl With Smart Growth?* 35 WAKE FOREST L. REV. 563, 566 (2000) (noting that land use regulations have contributed to sprawl by, *inter alia*, "permitting growth free of the associated infrastructure costs that accompany it").

[13] *See, e.g.*, Ryan Mahoney, *ARC Taking Larger Role in Metro Area's Development*, ATLANTA BUS. CHRON., June 9, 2006, at 2A (reporting on plan by Atlanta Regional Commission to reduce traffic congestion by tying transportation dollars to densification efforts); Christopher Quinn, *Georgia's Growth Will Sag When Taps Dry Up*, ATLANTA J.-CONST., May 30, 2006, at A1 (reporting concerns that North Georgia's water supply cannot adequately accommodate

moratoria and more rigid land use controls.

However, such demands miss the point. Georgia does not need greater rigidity in its approach to land use, but greater flexibility[14]—that is, mechanisms for allowing a variety of uses within a single development project, which (in one measure or another) helps subsidize its own public improvements without overburdening either existing infrastructure or the existing tax base. The recent success of Atlantic Station, a 138-acre, mixed-use development on formerly contaminated property in midtown Atlanta, shows the benefits of a flexible approach to land use.[15] Combining office, retail and residential uses at one location,[16] and utilizing a public-private partnership for the provision of needed infrastructure,[17] the project has been touted as "a national model for smart growth and sustainable development."[18] Plans for other mixed-use developments currently are in the works throughout the state.[19]

Two primary obstacles exist in undertaking such developments, however. First, given the long-term commitment it takes to build these projects,[20] many developers are wary of obligating themselves (at least in detail) to these types of design plans. Because the composition of local governing authorities likely will change at least once (if not several times) before the development is completed, there is a significant risk that the land use regulations governing the development also may change before the developer obtains vested rights in the project, but after it has expended large sums of cash in the initial work. Given the lack of certainty under Georgia law as to when a developer's rights will vest,[21] some developers may be loath to take on "out-of-the-box" projects,

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development); *see also* James L. Bross, *Smart Growth in Georgia: Micro-Smart and Macro-Stupid*, 35 WAKE FOREST L. REV. 609, 614 n.28 (2000) (describing polls indicating that traffic congestion and water quality ranked among highest priority issues for residents in Atlanta metropolitan area).

[14] *See* PETER W. SALSICH, JR. & TIMOTHY J. TRYNIECKI, LAND USE REGULATION 177 (2d ed. 2003) (noting "the rigidity of the Euclidean zoning response to explosive development growth" has resulted in a "search for regulatory alternatives that would preserve the basic concept of zoning but add flexibility to the process").

[15] *See* Lisa Chamberlain, *Building a City Within the City of Atlanta*, N.Y. TIMES, May 24, 2006, at C8.

[16] *See id.*

[17] *See* David Pendered, *Atlanta Station Opens: A City Within the City*, ATLANTA J.-CONST., Oct. 16, 2005, at E1.

[18] *See* Jerry Grillo, *The Power Players: Jim Jacoby*, GA. TREND, Jan. 1, 2006, at 38.

[19] *See, e.g.*, Randy Southerland, *A Tale of Two Developers*, GA. TREND, Mar. 1, 2006, at 108 (noting plans for "Macon's first mixed use live/work/play development"); Christopher Quinn, et al., *Horizon*, ATLANTA J.-CONST., Apr. 24, 2006, at D5 (reporting on plans for mixed-use developments in Bartow County, Carroll County, Henry County, and Cobb County).

[20] *See, e.g.*, Chamberlain, *supra* note 15 (indicating that Atlantic Station is only "about half finished" ten years after plans were first disclosed); Christopher Quinn, *Massive Development Plan Confronts Rural Way of Life*, ATLANTA J.-CONST., May 24, 2006, at B1 (reporting that 11,810-acre mixed-use development planned for Carroll County will take 25 or more years to build-out).

[21] *See infra* Part II.A.

preferring instead to continue along the more traditional model that leads to sprawl and inadequate infrastructure.[22] Second, local governments in Georgia have very little leeway to provide the certainty that developers desire and very little leverage to require developers to assist with the provision of public infrastructure.[23] Thus, many development projects are subject to a lengthy evaluation process in which traditional land use mechanisms (such as variances, special exceptions, and conditional zoning) are pushed beyond their intended boundaries.[24]

To combat these obstacles, several other states have utilized development agreements.[25] In simplest terms, a development agreement is a contract between a developer and a local government that vests certain development rights in the developer in consideration for some public benefit (such as the construction and dedication of infrastructure improvements).[26] Through a development

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[22] *See* Griffith, *supra* note 12, at 567 (linking sprawl with continued need "for capital facilities for water, sewer, drainage, and transportation systems").

[23] As explained in more detail *infra* Part II.B, local governments are constitutionally limited from imposing many development conditions by the United States Supreme Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825, 837 (1987) and *Dolan v. Tigard*, 512 U.S. 374, 391 (1994). Additionally, local governments in Georgia are statutorily prohibited from imposing certain categories of exactions, unless they do so through the burdensome process of enacting an impact fee ordinance. *See* GA. CODE ANN. § 36-71-3(a) (2000).

[24] *See, e.g.*, Jill Lerner, *Blocked on the Beltline: Developer Says City Must Decide About His Project by October*, ATLANTA BUS. CHRON., June 9, 2006, at A1 (reporting on threats by developer to withdraw rezoning application pending for more than a year); Benita Dodd, *Presentation on Land Use Prepared for the GRTA Land Development Committee*, http://www.gppf.org/article.asp?RT=10&p=pub/LandUse/GRTA_2_11_04.htm (last visited Feb. 11, 2004) (commenting on mixed-use development in Cobb County for which more than 200 variances were required).

[25] *See* ARIZ. REV. STAT. ANN. § 9-500.05 (West 1996 & Supp. 2004); CAL. GOV'T CODE § 65864 (West 1997); COLO. REV. STAT. § 24-68-102 (2003); FLA. STAT. § 163.3220 (1995); HAW. REV. STAT. § 46-121 (1993); IDAHO CODE § 67-6511A (Michie 1995 & Supp. 2004); LA. REV. STAT. ANN. § 33:4780.21 (2002); MD. ANN. CODE, art. 66B, § 13.01 (2003); NEV. REV. STAT. § 278.0201 (1997); N.J. STAT. ANN. § 40:55D-45.2 (West 1991); OR. REV. STAT. § 94.504 (2003); S.C. CODE ANN. § 6-31-10 (2004); VA. CODE ANN. § 15.2-2303.1 (Michie 2003); WASH. REV. CODE ANN. § 36.70B.170 (West 2003). In addition to the aforementioned states, which explicitly allow development agreements through enabling legislation, development agreements appear to be used to some extent in other states without statutory authorization. *See, e.g.*, Guarisco v. City of Daphne, 825 So.2d 750 (Ala. 2002) (involving validity of revenue warrant used to finance construction of parking lot required by development agreement); Giger v. City of Omaha, 442 N.W.2d 182 (Neb. 1989) (upholding development agreement despite lack of express statutory authorization); Hotels of Distinction West, Inc. v. City of Albuquerque, 755 P.2d 595 (N.M. 1988) (same); Larkin v. City of Burlington, 772 A.2d 553 (Vt. 2001) (discussing, but not deciding, potential validity of development agreement even without statutory authorization); R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 TEX. TECH. L. REV. 955, 957-58 (2001) (arguing that development agreements are allowed in Texas despite absence of explicit enabling legislation).

[26] *See* David L. Callies & Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After* Nollan *and* Dolan, 51 CASE W. RES. L. REV. 663, 664-65 (2001); Green, *supra* note 10, at 393; David Hartman, Comment, *Risky Business: Vested Real Property Development Rights—The Texas Experience and*

agreement, the developer obtains the certainty necessary to invest in innovative and long-term projects, while the local government receives a project consistent with its land use goals without overburdening the infrastructure, public services, or taxpayers.

Given these advantages, the use of development agreements in Georgia could prove practically beneficial to both sides in the development process. From a broader viewpoint, however, Georgia can be viewed as a case study of sorts for the utilization and validity of development agreements in high-growth areas where traditional land use regulations remain the norm. In many ways, the land use issues currently facing Georgia are illustrative of those facing other rapidly developing areas throughout the country, especially in other parts of the Southeast. And given the reputation of metropolitan Atlanta among many as "the sprawl capital of the world,"[27] how Georgia addresses these issues may serve as a model (good or bad) for other jurisdictions.

Unfortunately, development agreements do not fare well under the current legal framework. Two deeply-rooted principles of Georgia local government law make it doubtful that the courts would enforce such agreements. First, the courts have refused to enforce contracts that were not within the express authority of the local government.[28] Because there is no express authority that plainly permits local governments in Georgia to enter into development agreements, it is not clear that such agreements would be enforceable. This lack of clarity, in turn, defeats the very purpose of entering into a development agreement in the first place, which is to create certainty in the development process. Second, even assuming that development agreements are validly authorized contracts, they still might run afoul of Georgia's binding contracts prohibition. In essence, this prohibition prevents local governments from entering into long-term contracts that bind subsequent governing authorities in matters of municipal government.[29] The prohibition has been subject to a number of exceptions and inconsistent applications over time, however, and its exact parameters are not always easy to discern.[30] The most recent application of the prohibition suggests a willingness to apply it very stringently against the

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Proposals for the Texas Legislature to Improve Certainty in the Law, 30 TEX. TECH. L. REV. 297, 306 (1999); Brad K. Schwartz, Note, *Development Agreements: Contracting for Vested Rights*, 28 B.C. ENVTL. AFF. L. REV. 719, 720 (2001).

[27] *See* Richard Halicks, *Q&A / ROBERT BRUEGMANN, architecture historian: IN DEFENSE OF SPRAWL*, ATLANTA J.-CONST., Nov. 27, 2005, at B1.

[28] *See, e.g.*, H.G. Brown Family Ltd. P'ship v. City of Villa Rica, 607 S.E.2d 883, 885 (Ga. 2005) ("[I]f a local government enters a contract in abrogation of its delegated power or in excess of its authority to enter contracts, then the contract is deemed *ultra vires* and void.").

[29] *See, e.g.*, City of Powder Springs v. WMM Prop., Inc., 325 S.E.2d 155, 157 (Ga. 1985).

[30] *See id.* at 157-58; *see also* R. Perry Sentell, Jr., *The Georgia Supreme Court and Local Government Law: Two Sheets to the Wind*, 16 GA. ST. U. L. REV. 361, 372-384 (1999) (detailing history of judicial treatment of binding contracts prohibition).

enforceability of contracts to which a government is a party.[31] Because a development agreement almost certainly would have a duration lasting several years, it is doubtful that such an agreement would survive the binding contracts prohibition, again defeating the clarity the agreement would be designed to achieve.

This Article proposes that enabling legislation is necessary to ensure that the benefits of development agreements can be enjoyed in Georgia. To facilitate better understanding of these benefits, Part II of this Article describes the advantages offered by development agreements to both sides of the development process—specifically, providing certainty to the developer with regard to vested rights and providing more flexibility to the government in imposing exactions for adequate infrastructure. Part III analyzes the use of development agreements in light of the two Georgia doctrines mentioned above, concluding that development agreements likely would be found unenforceable by Georgia courts. Part IV proposes a legislative solution that would allow development agreements despite these doctrines and would govern the way in which development agreements are used by local zoning authorities.[32] Part V offers closing remarks.

I. THE BENEFITS OF DEVELOPMENT AGREEMENTS

The process of developing real property poses challenges both to developers and local governments. For a project to come to fruition, developers frequently must spend significant resources on land acquisition, engineering and consulting services, legal fees, and public relations and community outreach efforts. Despite these expenses, which often occur early in the development process, developers cannot be assured that their rights in a particular project will vest until much later—sometimes as late as the issuance of a building permit. Thus, developers bear a substantial risk that their investment will be subject to subsequent changes in the local land use regulations. Similarly, local governments need to ensure that adequate infrastructure is provided to accommodate new growth without placing an inordinate burden on existing resources, facilities, and taxpayers. But local governments are constrained in the exactions they may impose on developers, meaning they have little leverage to ensure that new projects truly will pay their own way. A solution to these obstacles is found in the utilization of development agreements, whereby the developer gains certainty that his development rights will vest and the government obtains commitments as to development standards and the provision

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[31] *See* Greene County Sch. Dist. v. Greene County, 607 S.E.2d 881, 882 (Ga. 2005) (stating that prohibition generally precludes a government from entering into a contract that "lasts longer than that government's term of office" and ignoring prior precedent to the contrary).

[32] Additionally, a model statute is appended to this Article.

of public improvements.[33]

A. The Developer's Lack of Certainty with Regard to Vested Rights

Inherent in the land use process is a tension between the developer's desire to maximize the use of his property and the government's desire to respond to changing circumstances through its police power. This tension is magnified in the modern land use arena, where simply obtaining rezoning or some other development approval can be a costly endeavor with regard to both time and money. Thus, developers want some sort of assurance that once the rezoning process is completed, they will be able to proceed with development regardless of subsequent changes in the government's land use policy. Traditionally, to the extent it has been achieved, this assurance comes from the common law doctrine of vested rights.

As a general rule, a vested right may be defined as one which is "complete and consummated, and of such character that it cannot be divested without the consent of the person to whom it belongs, and fixed or established, and no longer open to controversy."[34] In the context of real estate development, the doctrine of vested rights concerns that point in time when the property owner's proposed land use or development plan becomes "complete and consummated" such that it may not be revoked or diminished by subsequent changes in land use regulations.[35] Because substantial investment of time, money and other resources depends upon being able to complete a proposed development plan, the precise instance at which vesting occurs is of crucial significance to developers.[36]

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[33] The benefits of development agreements in resolving these obstacles have been noted by courts and commentators alike. *See, e.g.*, City of W. Hollywood v. Beverly Towers, Inc., 805 P.2d 329, 334-35 (Cal. 1991) ("The purpose of . . . the development agreement is to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations."); Queen Anne's Conservation, Inc. v. County Comm'rs of Queen Anne's County, 855 A.2d 325, 327 (Md. 2004) ("[A] central purpose of the development agreement is to vest development rights in the landowner or developer in exchange for the dedication and funding of public facilities.") (quotations omitted; alteration in original); *see also* Callies & Tappendorf, *supra* note 26, at 664; Daniel J. Curtin, Jr. & Jonathan D. Witten, *Windfalls, Wipeouts, Givings, and Takings in Dramatic Redevelopment Projects: Bargaining for Better Zoning on Density, Views, and Public Access*, 32 B.C. ENVT'L AFF. L. REV. 325, 340-41 (2005); Green, *supra* note 10, at 394.

[34] *See* BLACK'S LAW DICTIONARY 1564 (6th ed. 1990); *accord* Merch. Bank v. Garrard, 124 S.E. 715, 717 (Ga. 1924) ("To be vested, in its accurate legal sense, a right must be complete and consummated, and one of which the person to whom it belongs cannot be divested without his consent.").

[35] *See, e.g.*, Schwartz, *supra* note 26, at 721 ("A vested right allows development of a proposed use of land to proceed even when subsequent changes in zoning regulations render the proposed use impermissible.").

[36] *See* SALSICH & TRYNIECKI, *supra* note 14, at 152 ("The point at which a zoning designation or other development permit becomes vested has substantial implications in the development of real

Unfortunately, determining when vesting occurs in Georgia often is a Herculean task. To begin with, the Georgia Supreme Court has articulated no less than four rules to determine when vesting occurs: (1) a property owner has a right to develop pursuant to a validly issued building permit, notwithstanding subsequent changes in the land use regulations, regardless of whether he has detrimentally relied on the permit; (2) a property owner has a right to be issued a building permit in accordance with the land use regulations existing at the time a proper application is submitted to the proper authorities; (3) a property owner has a right to develop pursuant to a development plan approved, either formally or informally, by the zoning authorities, if he relies to his detriment on such approval; and (4) a property owner has a right to be issued a building permit if he detrimentally relies on existing zoning and the assurances of zoning officials that a permit probably will issue.[37] By discussing vesting in such a variety of ways, the court has made it extremely challenging to determine in advance when vesting actually will occur. The specific test to be applied will depend to some degree upon the facts and circumstances of each particular case, not all of which will be known to the property owner until after a problem arises. As such, it is difficult for a property owner to know at the outset of a project which rule ultimately will be applied to his claim. Additionally, such variety leaves open the possibility that the courts will apply one rule even though another rule may be equally applicable or even superior.

A second problem with Georgia's vested rights law is that the courts do not always apply the rules consistently. For example, some decisions suggest that purchasing property or incurring preliminary expenses in reliance on an existing zoning designation can vest rights to use the property in accordance with that designation.[38] Other decisions, however, state that such activities do not

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estate."); *see also* John J. Delaney & Emily J. Vaias, *Recognizing Vested Development Rights as Protected Property in Fifth Amendment Due Process and Takings Claims*, 49 WASH. U. J. URB. & CONTEMP. L. 27, 31 (1996) ("Only after landowners acquire vested rights under state law are they free to continue a project in the face of subsequent changes to land use regulations that would otherwise preclude continuing the project."); Hartman, *supra* note 26, at 301 (commenting that "the exact juncture at which a landowner has progressed sufficiently with his project so that his right to proceed is vested yields a land management problem of monumental proportions").

[37] *See* WMM Props., Inc. v. Cobb County, 339 S.E.2d 252, 254-55 (Ga. 1986).

[38] *See, e.g., id.* at 255 (stating that developer acquired vested rights by purchasing property in reliance on, *inter alia,* zoning certification from county planning commission); Barker v. County of Forsyth, 281 S.E.2d 549, 550-51 (Ga. 1981) (holding that expenses incurred in reliance upon assurances from zoning administrator as to use of property under existing zoning created factual issue as to vested rights); Norton Realty & Loan Co. v. City of Gainesville, 160 S.E.2d 819, 823 (Ga. 1968) (holding that factual issues existed as to whether developer obtained vested rights where evidence showed that it spent $75,000 "plus considerable time, efforts, worry and activities" to purchase and develop property in reliance on existing zoning designation); Clairmont Dev. Co. v. Morgan, 149 S.E.2d 489, 491 (Ga. 1966) (holding that developer obtained vested rights where it became obligated under contingency contract to purchase property for $50,000 and expended unspecified amounts of "time, effort and money" to plan for development in reliance on existing

constitute a sufficient change in position such that development rights will vest.[39] Similarly, cases contain potentially conflicting statements concerning whether expenditures and other acts of reliance will vest rights in the entirety of a comprehensive development scheme or only in those phases to which the acts of reliance directly relate.[40] In light of these conflicting decisions, determining exactly which acts of reliance will vest rights in what portions of a project is a daunting task for developers.

Finally, the courts have posited differing theories to support the vested rights doctrine. Early cases based the doctrine squarely upon constitutional principles, such as notions of due process,[41] protection of private property,[42] limitations on retroactive laws,[43] and prohibitions on the impairment of contractual obligations.[44] Later cases, however, have in large part eschewed such constitutional language, relying instead on principles of equitable estoppel.[45] Some commentators, noting the similarities between constitutional and estoppel theories in other states, have concluded "that attempts to differentiate between the doctrine of constitutional vested rights and zoning estoppel are mainly academic exercises, for lack of differences between the two."[46] Regardless of whether this analysis correctly portrays the law in other jurisdictions, the choice of describing vested rights as deriving from constitutional principles or from

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zoning).

[39] *See, e.g.*, Meeks v. City of Buford, 571 S.E.2d 369, 371 (Ga. 2002) (holding that property owner did not acquire vested rights in variance despite having spent $500,000 to purchase property in reliance on variance); Cohn Communities, Inc. v. Clayton County, 359 S.E.2d 887, 889 (Ga. 1987) (holding that zoning certification from county planner prior to purchase of property was not sufficient type of "assurance" to vest rights in existing zoning); N. Ga. Mountain Crisis Network, Inc. v. City of Blue Ridge, 546 S.E.2d 850, 853 (Ga. Ct. App. 2001) (stating that "the purchase of land by itself does not confer a vested right to a particular use upon the purchaser").

[40] *Compare Cohn*, 359 S.E.2d at 889 (refusing to count $900,000 expenditure on single-family parcel toward vested rights analysis concerning multi-family parcel of same project) *with* City of Duluth v. Riverbrooke Props., Inc., 502 S.E.2d 806, 810-11 (Ga. Ct. App. 1998) (stating that actions taken in reliance on comprehensive subdivision plan vested rights as a matter of law in entire subdivision rather than just completed phases).

[41] *See Clairmont*, 149 S.E.2d at 491 (citing Fourteenth Amendment to United States Constitution).

[42] *See id.* (citing provision of Georgia Constitution stating that protection of property is "paramount duty of government").

[43] *See* Craig v. Lilburn, 177 S.E.2d 75, 76 (Ga. 1970) (citing Retroactivity Clause of Georgia Constitution); *accord Barker*, 281 S.E.2d at 552 ("The existence of vested rights under zoning ordinances rests upon the same constitutional footing which precludes retroactive application of zoning ordinances.").

[44] *See Craig*, 177 S.E.2d at 76 (stating that ordinance purporting to divest previously-accrued development right would unconstitutionally impair "obligations of contracts").

[45] *See, e.g.*, Union County v. CGP, Inc., 589 S.E.2d 240, 242 (Ga. 2003) (stating that "all the bases enumerated in *WMM Properties* for the accrual of vested rights involve some species of estoppel"); *Cohn*, 359 S.E.2d at 889 (describing vesting rules as "derived from the principle of equitable estoppel").

[46] *See*, Hartman, *supra* note 26, at 304.

estoppel has real-world implications under Georgia law, which will constrain local governments to act in accordance with their constitutional obligations but generally will not limit their actions based on principles of estoppel.[47] Not surprisingly, when the courts rely upon the former theory, the developer tends to triumph, whereas under the latter theory the developer loses. The quandary for the developer, however, is to predict in advance of beginning a project which theory the court might utilize.

B. The Government's Limitations in Imposing Exactions for Public Improvements

In addition to the lack of certainty regarding vested rights, a second obstacle to quality development is presented by the laws limiting the local government's ability to exact public infrastructure improvements from developers. These limitations come in two primary forms: (1) constitutional limitations established by the United States Supreme Court's decisions in *Nollan v. California Coastal Commission* [48] and *Dolan v. City of Tigard* [49]; and (2) statutory limitations established by the Georgia Development Impact Fee Act.[50]

1. Constitutional Limitations

The constitutional limitations on a local government's ability to impose development exactions are rooted in the Takings Clause of the Fifth Amendment to the United States Constitution,[51] which is made applicable to state and local governments through the Fourteenth Amendment.[52] As with other land use regulations, the question is to determine when such exactions cease to be a valid exercise of the police power and, instead, become an uncompensated taking of private property. Unlike most other land use regulations, however, exactions are subjected to heightened scrutiny under the two-pronged *Nollan/Dolan* test.

The first prong of the test was established by the Supreme Court's decision in *Nollan*. In that case, the property owners applied to the California Coastal Commission for a permit allowing them to tear down a dilapidated bungalow on

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[47] *See, e.g., CGP, Inc.*, 589 S.E.2d at 242 (declaring that "estoppel will not lie against a county government"); Corey Outdoor Adver., Inc. v. Bd. of Zoning Adjustments, 327 S.E.2d 178, 182 (Ga. 1985) (explaining that estoppel will not apply "so as to frustrate or contravene a governmental function" or where it "will embarrass a municipality in its capacity as a governing body or operate to prevent it from exercising its police power").

[48] *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[49] *See* Dolan v. Tigard, 512 U.S. 374, 391 (1994).

[50] *See* GA. CODE ANN. § 36-71-1 *et seq.*

[51] *See* U.S. CONST. amend. V (". . . [N]or shall private property be taken for public use, without just compensation").

[52] *See Dolan*, 512 U.S. at 383.

their beachfront property and, in its place, construct a three-bedroom house.[53] The Commission agreed to grant the permit subject to the condition that the property owners grant a public easement across their property, so as to connect two public beaches that lay on either side.[54] The property owners brought suit, claiming that the condition worked an unconstitutional taking of their property.[55] The Commission defended the imposition of the condition on the grounds that the new house would obstruct the view of the beach from the road—impairing the public's "visual access"—and, as a result, would create a "psychological barrier" to physical access, since the obstructed view would make it more difficult for people to realize that the adjoining beaches were open to the public.[56] Accordingly, the Commission maintained that the condition promoted access to the beaches and was a valid exercise of the police power. The Supreme Court disagreed, holding that there was no "essential nexus" between the mandated lateral easement and the governmental interest at issue—i.e., promoting an unobstructed view of the beach from the roadway.[57] Because this nexus did not exist, the condition could not be deemed "a valid regulation of land use but 'an out-and-out plan of extortion,'" whereby the government simply obtained a public easement without having to pay for it.[58]

Although *Nollan* established the necessity of an "essential nexus" between the exaction imposed and the state interest being advanced, it did not address the degree of connection that was required between the exaction and the development's projected impact. The Court subsequently attended to this issue in its decision in *Dolan*, which established the second prong of the constitutional test. The property owner in *Dolan* sought a permit from the city allowing her to redevelop her commercial property so as to increase and intensify the uses thereon.[59] The city granted the permit subject to the condition that the property owner dedicate portions of her property lying within and adjacent to the 100-year floodplain for improvement of a storm drainage system and a pedestrian/bicycle pathway.[60] The property owner challenged the condition on the ground that it constituted an uncompensated taking,[61] and the case eventually made its way to the Supreme Court. The Court first concluded that, unlike in *Nollan*, there was an "essential nexus" between the city's legitimate interests—

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[53] *See Nollan*, 483 U.S. at 828.

[54] *See id.*

[55] *See id.* at 829.

[56] *See id.* at 838.

[57] *See id.* at 838-39 ("It is quite impossible to understand how a requirement that people already on public beaches be able to walk across the Nollan's property reduces any obstacles to viewing the beach created by the new house.").

[58] *See id.* at 837.

[59] *See* Dolan v. Tigard, 512 U.S. 374, 379 (1994).

[60] *See id.* at 380.

[61] *See id.* at 382.

i.e., the prevention of flooding and the reduction of traffic congestion—and the condition imposed upon the property owner—i.e., floodplain and pathway easements.[62] However, the conditions still failed because they did not bear a "rough proportionality" to the projected impact of the property owner's redevelopment project.[63] While the Court eschewed any "precise mathematical calculation," it nonetheless required that the city make some individualized determinations that the condition imposed on the property owner "is related both in nature and extent to the impact of the proposed development."[64]

Under the *Nollan/Dolan* test, then, a local government bears the burden of showing that an "essential nexus" exists between the legitimate state interest being advanced and the exaction imposed, as well as demonstrating that there is "rough proportionality" between that exaction and the likely impact of the development project under consideration.[65] This burden can prove to be a heavy one for local governments seeking to exact infrastructure improvements from developers. Although no Georgia appellate court has fully applied the *Nollan/Dolan* rubric,[66] courts in other jurisdictions have done so to strike down infrastructure exactions.[67]

2. Statutory Limitations

In addition to the aforementioned constitutional limitations, local governments in Georgia are restrained in their ability to impose infrastructure exactions by virtue of the Georgia Development Impact Fee Act (or "DIFA"). The DIFA prohibits local governments from imposing certain categories of exactions—known as "system improvements"—unless they do so through a properly enacted impact fee ordinance.[68] "System improvements" are defined as

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[62] *See id.* at 387-88.

[63] *See id.* at 391.

[64] *See id.*

[65] *See id.*; Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

[66] There are only two Georgia decisions that address the *Nollan/Dolan* test, and in both, the court rejected its application on the basis that the test applies only to adjudicative determinations, whereas the regulations at issue were legislative in nature. *See* Greater Atlanta Homebuilders Ass'n v. DeKalb County, 588 S.E.2d 694, 697, n.16 (Ga. 2003); Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994). As pointed out by the dissent in one of those cases, however, this distinction between adjudicative and legislative determinations is not accepted by all jurists, including some on the United States Supreme Court. *See* Greater Atlanta Homebuilders, 588 S.E.2d at 701-02 (Carley, J., dissenting).

[67] *See, e.g.*, Christopher Lake Dev. Co. v. St. Louis County, 35 F.3d 1269, 1274-75 (8th Cir. 1994) (applying *Nollan/Dolan* to strike down requirement that residential development provide drainage system for entire watershed and concluding that developer was entitled to recoup payments in excess of its *pro rata* share of impact); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 643-45 (Tex. 2004) (rejecting condition that developer improve public road as violation of *Dolan*'s "rough proportionality" requirement).

[68] *See* GA. CODE ANN. § 36-71-3(a) (2000).

"capital improvements that are public facilities and are designed to provide service to the community at large...."[69] The statute defines a "capital improvement" as an improvement with a useful life of at least ten years.[70] The definition of "public facilities" includes: (1) water facilities; (2) wastewater facilities; (3) roads, streets, and related transportation facilities (such as traffic signals); (4) storm water and drainage facilities; (5) parks, open space, and recreational facilities; (6) public safety facilities; and (7) library and related facilities.[71] As these definitions encompass many of the categories of public infrastructure affected by new development, the adoption of an impact fee ordinance often is crucial to ensuring that development pays its own way. But adopting a valid impact fee ordinance is no small task.

Five primary steps are required to adopt an impact fee ordinance in accordance with the DIFA, each of which contains its own subordinate procedural regulations: (1) the adoption of a comprehensive plan containing a capital improvements element;[72] (2) public hearings and review of that comprehensive plan by the appropriate Regional Development Center and the state Department of Community Affairs;[73] (3) the formation of a Development Impact Fee Advisory Committee;[74] (4) additional public hearings on the adoption of the impact fee ordinance itself;[75] and (5) the incorporation of no less than eighteen substantive provisions governing the calculation, assessment, and expenditure of the impact fees.[76] Accurately complying with all of these requirements generally necessitates a great deal of time and administrative expense. Moreover, although they usually can be recouped through the collection of the impact fees themselves,[77] large monetary outlays are often required in advance of the impact fee regime being formally put in place. As a result of the procedural, administrative, and financial burdens required by the DIFA, some local governments have been dissuaded from utilizing impact fees as a means of financing infrastructure improvements.[78]

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[69] *See* GA. CODE ANN. § 36-71-2(19) (2000).

[70] *See* GA. CODE ANN. § 36-71-2(1) (2000).

[71] *See* GA. CODE ANN. § 36-71-2(16) (2000).

[72] *See* GA. CODE ANN. § 36-71-3(a) (2000).

[73] *See* GA. COMP. R. & REGS. 110-12-1.08 (2005).

[74] *See* GA. CODE ANN. § 36-71-5 (2000).

[75] *See* GA. CODE ANN. § 36-71-6 (2000).

[76] *See* GA. CODE ANN. § 36-71-4 (2000).

[77] *See* GA. CODE ANN. § 36-71-2(18) (2000) (defining compensable "system improvement costs" to include fees for expert consultants in preparing the mandatory capital improvement element, as well as administrative costs up to 3% of total amount of costs for system improvements).

[78] *See* Griffith, *supra* note 12, at 591 (noting that there has been "[n]o widespread adoption of comprehensive impact fee ordinances" in Georgia and observing that DIFA's "complexity requires sophisticated financial planning and fee calculation that undoubtedly deter its application to some extent").

C. Development Agreements as Solution to Vested Rights and Exactions Problems

Development agreements offer a solution to both of the aforementioned problems.[79] For the developer, they can ensure that rights in the project will vest by "freezing" most of the land use regulations (including any negotiated development standards) in effect at the time the agreement is executed.[80] Thus, the agreement provides the developer with the requisite certainty to undertake and complete more complex and creative projects, such as mixed-use developments, brown-field reclamation, and other "smart growth" measures. For the local government, the development agreement provides a more flexible mechanism for ensuring that new development finances its own infrastructure, since the agreement can commit the developer to construct, pay for, or otherwise provide necessary improvements.[81]

Additionally, through a development agreement, governments generally should be able to obtain dedications and improvements that go beyond the specific *pro rata* impact of the development. Several courts and commentators have concluded that development agreements should not be subject to the *Nollan/Dolan* standard since such agreements are negotiated contracts based on mutual, voluntary assent.[82] While this argument has merit so long as the agreement truly is voluntary, it tends to underestimate the asymmetry of

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[79] *See, e.g.*, CAL. GOV'T CODE § 65864 (West 1997) (declaring that lack of certainty with regard to vested rights and inadequacy of public facilities are impediments that may be overcome through use of development agreement).

[80] *See, e.g.*, NEV. REV. STAT. ANN. § 278.0201 (Michie 2002) (providing that, unless otherwise specified in development agreement, land use regulations applicable to property "are those in effect at the time the agreement is made").

[81] *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-500.05(H)(1)(g) (West Supp. 2005) (providing that development agreement may address "[c]onditions, terms, restrictions and requirements for public infrastructure and the financing of public infrastructure and subsequent reimbursements over time").

[82] *See, e.g.*, Leroy Land Dev. v. Tahoe Reg. Planning Agency, 939 F.2d 696, 697-98 (9th Cir. 1991) (finding *Nollan* inapplicable to conditions voluntarily agreed to by developer and supported by valid consideration); Xenia Rural Water Ass'n v. Dallas County, 445 N.W.2d 785, 788-89 (Iowa 1989) (rejecting *Nollan* challenge to setback requirement that was part of negotiated agreement between parties); Meredith v. Talbot County, 560 A.2d 599, 604-05 (Md. Ct. Spec. App. 1989) (holding that development agreement was result of "reasonable and informed" business decision on part of developer and, as such, conditions imposed by agreement were enforceable); *see also* Callies & Tappendorf, *supra* note 26, at 695 (arguing that a local government should "be free to negotiate its best terms in exchange for the benefit conferred, regardless of nexus"); Curtin & Witten, *supra* note 33, at 343 ("[S]ince development agreements are adopted as a result of negotiations between the local agency and a developer, they are not subject to the *Nollan/Dolan* heightened scrutiny standard."); Catherine Lockhard, Note, *Gaining Access to Private Property: The Zoning Process and Development Agreements*, 79 NOTRE DAME L. REV. 765, 786 (2004) ("The developers . . . bargain out of their own choice, and municipalities should be able to exact as much as they can . . . ."); Schwartz, *supra* note 26, at 741 ("The voluntary nature of the development agreement, however, suggests that developers ought to be bound by the agreed upon conditions, even if the conditions violate *Nollan* and *Dolan*.").

bargaining power (and the concomitant potential for coercion) in the land use approval process, where the local government generally enjoys a superior position. As one commentator has explained: "[D]evelopers who depend on the affected projects for financial sustenance will often accede to, or even suggest, the unlawful exaction rather than face years of litigation and delay."[83] And it certainly does not account for those situations where the development agreement itself is forced upon the developer as an express requirement of development approval, as is done by some local governments in Georgia.[84] Nonetheless, the leading view is that a truly voluntary commitment to construct or fund public improvements typically should be enforceable, notwithstanding the strictures of *Nollan/Dolan*.[85]

Regardless of whether and to what extent *Nollan/Dolan* applies, however, development agreements still can prove beneficial to local governments in Georgia as an alternative to a development impact fee ordinance. By allowing governments to negotiate with developers on a project-by-project basis, development agreements offer more flexibility and less procedural and administrative hurdles than impact fees.

II. THE (UN)ENFORCEABILITY OF DEVELOPMENT AGREEMENTS IN GEORGIA

For the reasons just articulated, development agreements are valuable land use tools that could encourage and facilitate quality development in Georgia. Indeed, some local governments, recognizing the mutual benefits offered by development agreements, already have begun utilizing them.[86] As mentioned previously, however, two major hurdles exist to the validity and enforceability of such agreements in Georgia: (1) the lack of express statutory authority; and (2) the binding contracts prohibition.

A. The Lack of Express Statutory Authority

The first hurdle to successful utilization of development agreements in Georgia is the lack of any legislative action expressly authorizing local

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[83] *See* Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, 22 URB. LAW. 23, 38-39 (1990).

[84] *See, e.g.*, Carroll County, Ga., Resolution Establishing Benchmarks for the Rezoning Application Submitted by Temple-Inland Land and Timber for a Planned Unit Development District, etc. (Feb. 1, 2005) (making presentation of development agreement to County Board of Commissioners prerequisite to obtaining hearing on rezoning application).

[85] Precisely how to determine if a development agreement truly is voluntary on the part of the developer, or a product of duress, presents an interesting question, but one that is beyond the scope of this Article.

[86] *See, e.g.*, Carroll County, Ga., Planned Unit Development District Ordinance § 8.8 (Aug. 3, 2004) (stating that county may enter into development agreement with regard to proposed planned unit development); Henry County, Ga. Resolution RZ-04-02 (Feb. 1, 2005) (rezoning mixed-use project subject to development agreement).

governments to execute and perform such agreements. It is well-settled Georgia law that the powers of counties and municipalities are limited to those areas in which either the constitution or the General Assembly has bestowed authority for them to act.[87] The Georgia courts have applied this principle specifically to a local government's ability to contract: "[I]f a local government enters a contract in abrogation of its delegated power or in excess of its authority to enter contracts, then the contract is deemed *ultra vires* and void."[88]

In light of this principle, it is more than a little problematic to the validity of development agreements that no legislative authority currently exists for their use.[89] Indeed, even outside of Georgia, commentators have noted the importance of enabling legislation to a development agreement's legitimacy.[90] In short, without some statute explicitly allowing development agreements to be utilized, it is highly likely that the courts would find them to be illegal, void, and unenforceable by either party.

A potential solution to this problem might be found in language contained in the DIFA. In two separate code sections, the DIFA speaks about agreements between developers and local governments regarding the construction or funding of approved public facilities. Section 36-71-7, which generally requires that a developer be given a credit for any contributions of land or money applicable to the system improvements for which an impact fee is assessed, addresses how this credit should be applied when the developer's contribution

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[87] *See, e.g.*, Albany Bottling Co. v. Watson, 30 S.E. 270, 271 (Ga. 1898) (stating that counties "can exercise such powers as the general assembly may grant; and they possess no powers not so conferred upon them, either expressly or by fair implication from the statutes applicable to them"); City of Atlanta v. Gate City Gas Light Co., 71 Ga. 106, 124 (1883) (declaring that municipal corporations "can exercise no other powers than those bestowed by the acts creating them").

[88] *See* H.G. Brown Family Ltd. P'ship v. City of Villa Rica, 607 S.E.2d 883, 885 (Ga. 2005). Although most of the decisions addressing this issue appear to arise in the context of contracts made by cities, the principle applies to county contracts as well. *See, e.g.*, Mobley v. Polk County, 251 S.E.2d 538, 541 (Ga. 1979) ("Neither the counties of this state nor their officers can do any act, *make any contract*, nor incur any liability not authorized by some legislative act applicable thereto.") (emphasis added).

[89] This absence of legislative authorization has been noted by the Georgia Department of Community Affairs. *See* http://www.dca.state.ga.us/toolkit/ToolDetail.asp?GetTool=122 (visited July 12, 2006) (promoting development agreements as beneficial land use tool but acknowledging that there is "no State-enabling legislation in Georgia authorizing local governments to enter into development agreements"). Georgia law does permit contracts similar to development agreements in connection with particular redevelopment projects. *See* GA. CODE ANN. § 36-44-19 (2000). These contracts are permitted, however, only pursuant to a specific plan to redevelop urban or previously developed areas that have become socially or economically depressed. *See* GA. CODE ANN. § 36-44-3(7) (2000 & Supp. 2005) (defining "redevelopment area").

[90] *See* Callies & Tappendorf, *supra* note 26, at 678-82 (arguing that enabling legislation is "important, if not critical" to legality of development agreements); Schwartz, *supra* at note 26, at 729 ("It is of critical legal importance . . . that development agreements are entered into pursuant to express enabling legislation.").

exceeds the fee the developer otherwise would have had to pay.[91] In doing so, the code section seemingly acknowledges that these types of contributions will be made pursuant to agreements between the developer and the government that delineate the public improvements to be contributed and how those improvements are to be financed.[92] Similarly, Section 36-71-13 provides that nothing in the DIFA

> shall be construed to prevent or prohibit private agreements between property owners or developers and municipalities, counties, or other governmental entities in regard to the construction or installation of system improvements and providing for credits or reimbursements for system improvement costs incurred by a developer including interproject transfers of credits or providing for reimbursement for project improvement costs which are used or shared by more than one development project.[93]

Although the aforementioned statutes clearly raise the issue of local governments entering into agreements with developers, reliance on these provisions as statutory authority for development agreements of the kind described in this Article is risky. To begin with, by discussing the developer's ability to receive credits against impact fees that otherwise would be assessed, the language of both code sections indicates that the agreements alluded to must arise in the context of a duly-enacted impact fee regime. If the local government has not adopted an impact fee ordinance in compliance with the DIFA, then the developer's credit would be worthless, since there would be nothing against which the credit could apply.

The only judicial treatment of these statutes confirms this interpretation. In *Fulton Greens Limited Partnership v. City of Alpharetta*,[94] the Georgia Court of Appeals construed an agreement whereby the developer agreed to construct a road extension in exchange for a credit against the county's road impact fees.[95] In the event that the credits were in excess of the impact fees due on the project, the agreement provided that such excess could be applied against other development fees (such as building permits) assessed against the developer or against impact fees assessed against other projects.[96] After constructing the road

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[91] *See* GA. CODE ANN. § 36-71-7(b) (2000) ("In the event that a developer enters into an agreement with a county or municipality to construct, fund, or contribute system improvements such that the amount of the credit created by such construction, funding, or contribution is in excess of the development impact fees which would otherwise have been paid for the development project, the developer shall be reimbursed for such excess construction, funding, or contribution from development impact fees paid by other development located in the service area which is benefited by such improvements.").

[92] *See id.*

[93] *See* GA. CODE ANN. § 36-71-13(b) (2000).

[94] *See* 612 S.E.2d 491 (Ga. Ct. App. 2005).

[95] *See id.* at 492.

[96] *See id.*

extension, the developer had excess credits, and sued for cash reimbursement of the excess credits pursuant to Section 36-71-7(b). Conceding that Section 36-71-7(b) normally would require monetary reimbursement, the court nonetheless sided with the county on the ground that Section 36-71-13(b) permitted the parties to agree to alternative mechanisms for credits and reimbursements, which they had done in the instant case.[97] Thus, although DIFA "permits developers and municipalities to enter into *private* agreements governing reimbursement for system improvement construction,"[98] the court's focus on credits and reimbursements suggests that these agreements properly occur only in connection with the imposition of impact fees.

Further bolstering this interpretation is the fact that the DIFA elsewhere explicitly prohibits the imposition of exactions for system improvements except "by way of development impact fees imposed pursuant to and in accordance with the provisions of this chapter."[99] Because Georgia courts must give "due weight and meaning" to all words in a statute,[100] the better interpretation of the DIFA as a whole is that private agreements are allowed only to govern credits and reimbursements within the parameters of a duly-adopted impact fee system. Otherwise, the prohibition on "extra-DIFA" exactions would be meaningless.

Finally, even assuming that the DIFA did permit private agreements for public infrastructure in the absence of impact fees, nothing indicates that such agreements would resolve the developer's lack of certainty over vested rights. Neither the aforementioned code sections nor any other provision of the DIFA remotely hints that the referenced agreements permissibly may "freeze" the land use regulations applicable to a development project or otherwise vest rights in the developer apart from the traditional common law tests. Accordingly, the developer still would have no certainty that its rights would vest notwithstanding subsequent regulatory changes and, accordingly, likely would be reluctant to enter into the agreement in any event.

B. The Binding Contracts Prohibition

Apart from the lack of express statutory authorization, a separate hurdle to the validity of development agreements is presented by Georgia's "binding contracts" prohibition. This prohibition is Georgia's version of the "reserved powers" doctrine, which precludes governments from bargaining away their police powers or unduly obligating successive legislative bodies in the exercise of such powers.[101] Codified at section 36-30-3 of the Official Code of Georgia

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[97] *See id.* at 493-94.

[98] *See id.* at 493 (emphasis in original).

[99] *See* GA. CODE ANN. § 36-71-3(a) (2000).

[100] *See* Boyles v. Steine, 162 S.E.2d 324, 326 (Ga. 1968).

[101] *See, e.g.*, Stone v. Mississippi, 101 U.S. 814, 817-18 (1879); *see also* Janice C. Griffith,

Annotated,[102] the prohibition literally provides that "[o]ne council may not, by an ordinance, bind itself or its successors so as to prevent free legislation in matters of municipal government."[103] Although the statute specifically speaks only of municipal governments, the courts have held that the doctrine embodied by the statute applies equally to counties.[104] Similarly, even though the statute expressly concerns itself only with local government ordinances, the courts have applied the doctrine to local government contracts as well.[105] The prohibition is not absolute, however, and not all contracts will be struck down under the doctrine. Rather, the courts have construed the prohibition to preclude only those contracts that relate to governmental functions (as opposed to proprietary functions) and only where the term of the contract is unreasonably long.[106] Likewise, contracts that are expressly authorized by a statute or by the local government's charter are not prohibited, even if they otherwise would violate the doctrine.[107] Finally, in certain instances, the courts have indicated that even long-term, governmental contracts might be valid if subsequent governments ratify or reaffirm the contract.[108]

Determining whether a particular contract falls within the "binding contracts" prohibition, then, involves the following four-part analysis:

> (1) Is the contract governmental in nature and hence subject to the prohibition, or proprietary and hence not subject to the prohibition? (2) If governmental in nature, is the contract subject to an exception? (3) If not, is the contract subject to ratification and has it been ratified? (4) If not, is the municipality estopped from relying on the prohibition?[109]

Local Government Contracts: Escaping from the Governmental/Proprietary Maze, 75 IOWA L. REV. 277, 282 (1990) (noting that prohibition against bargaining away police power and prohibition against binding successors are used interchangeably). For the history and development of the reserved powers doctrine, see *id.* at 286-304.

[102] Although codified, the prohibition is of judicial origin. *See* Williams v. City Council of West Point, 68 Ga. 816, 816 (1882). For an excellent discussion of the history and development of the prohibition in Georgia, including the significance of its judicial origins and subsequent codification, see Sentell, *supra* note 30, at 372-84, R. Perry Sentell, Jr., *Binding Contracts in Georgia Local Government Law: Configurations of Codification*, 24 GA. L. REV. 95, 95-111 (1989), and R. Perry Sentell, Jr., *Statutes of Nonstatutory Origin*, 14 GA. L. REV. 239, 258-62 (1980).

[103] *See* GA. CODE ANN. § 36-30-3(a) (2000).

[104] *See* Madden v. Bellew, 397 S.E.2d 687, 688 (Ga. 1990).

[105] *See* Screws v. City of Atlanta, 8 S.E.2d 16, 20 (Ga. 1940) ("What can not be done by an ordinance can not be done by a contract.").

[106] *See* Jonesboro Area Athletic Ass'n, Inc. v. Dickson, 181 S.E.2d 852, 856 (Ga. 1971); *see also* Unified Gov't of Athens-Clarke County v. North, 551 S.E.2d 798, 802-03 (Ga. Ct. App. 2001).

[107] *See* Summerville v. Ga. Power Co., 55 S.E.2d 540, 542 (Ga. 1949).

[108] *See* DeKalb County v. Ga. Paperstock Co., 174 S.E.2d 884, 887 (Ga. 1970).

[109] *See* City of Powder Springs v. WMM Props., Inc., 325 S.E.2d 155, 158 (Ga. 1985) (footnote omitted).

1. Governmental or Proprietary Function

Applying this analysis to development agreements yields less than favorable results. To begin with, the topics addressed in such agreements almost certainly would relate to the local government's governmental, rather than proprietary, functions. As discussed, a primary purpose of the development agreement will be to establish the development standards applicable to the project and "freeze" those standards against subsequent regulatory changes. Moreover, the local government is likely to condition any rezoning or other approval on the developer's fulfillment of its obligations under the development agreement. Thus, the development agreement will be tied directly to the zoning or land use decision made by the governing authority, and it is clear that such decisions are governmental functions subject to the "binding contracts" prohibition.[110] In fact, the Georgia Court of Appeals has utilized the prohibition to strike down a litigation settlement agreement that purported to limit a county's future ability to regulate the use of a particular piece of property—a scenario very similar to the "freezing" of land use regulations under a development agreement.[111] Thus, to the extent that a development agreement contains long-term restrictions on the government's ability to impose additional or conflicting land use regulations, it probably would be void under the "binding contracts" prohibition.

Even if the development agreement could be structured in such a way that it was deemed not to bind the local government's zoning authority, the agreement nonetheless likely would address other topics relating to governmental functions. For example, the courts have held that the decision to construct public facilities—such as roads—and the terms of supplying public services—such as water and sewer—are governmental functions.[112] Since another primary purpose of the development agreement is to ensure the provision of adequate public infrastructure, these or similar matters almost certainly would be addressed or alluded to in a development agreement. Similarly, the development agreement likely would discuss methods of financing the improvements and reimbursing the developer for a portion of its out-of-pocket expenses through special tax districts, user fees, and other similar devices. However, the courts have held or intimated that these types of functions—i.e., the collection of user fees and the use of the government's taxing power—are governmental in nature and, therefore, subject to the "binding contracts" prohibition.[113] Finally, it is possible that the proposed development agreement

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[110] *See* Barton v. Atkinson, 187 S.E.2d 835, 843 (Ga. 1972); Buckhorn Ventures, LLC v. Forsyth County, 585 S.E.2d 229, 233 (Ga. Ct. App. 2003).

[111] *See Buckhorn Ventures*, 585 S.E.2d at 233.

[112] *See* Screws v. City of Atlanta, 8 S.E.2d 16, 20 (Ga. 1940) (water supply); Unified Gov't of Athens-Clarke County v. North, 551 S.E.2d 798, 802 (Ga. Ct. App. 2001) (road construction).

[113] *See* Simmons v. City of Clarkesville, 216 S.E.2d 826, 827 (Ga. 1975) (voiding agreement whereby city would aid developer in collecting tap fees); *see also* Greene County Sch. Dist. v.

would involve some sort of financial obligation on the part of the local government, a factor that has been held to suggest that the local government is operating in its governmental rather than proprietary capacity.[114]

It is true that the courts do not always apply the governmental/proprietary distinction with logical consistency. For example, while it has been held that a contract locking in the *terms of service* for water and sewer affects a governmental function subject to the "binding contracts" prohibition,[115] it also has been held that a contract guaranteeing future *access* to a public sewer system is a proprietary function not subject to the prohibition.[116] Similarly, the Georgia Court of Appeals has held that, while the decision to build a road is governmental, the steps taken in carrying out that decision are proprietary.[117] Thus, the court upheld a contract requiring a subsequent council to complete construction of a road under the theory that the subsequent council was not bound in matters of governmental decision-making, but only in the proprietary function of carrying out the governmental decision that already had been made.[118] Under this rationale, an argument could be fashioned that any binding obligations of the local government pursuant to a development agreement are merely the proprietary fulfillment of governmental decisions previously made.

It should be noted, however, that the cases supporting this argument seem to be results-driven and their conclusions are reached through splitting some pretty fine hairs. In its most recent encounter with the prohibition, though, the Georgia Supreme Court showed no inclination to engage in these types of mental gymnastics. In *Greene County School District v. Greene County*,[119] the court struck down a contract whereby the county agreed to waive commissions to which it was entitled for collecting local school taxes in exchange for receiving a piece of real estate owned by the board of education.[120] The court held that the contract violated the "binding contracts" prohibition, showing no regard for fine distinctions (such as why earning commissions for the collection of taxes on behalf of another entity was governmental rather than proprietary in nature). In fact, the court did not even mention the governmental/proprietary distinction in its opinion. Similarly, the court seemed completely unconcerned with the consequences of its ruling; the county already had conveyed the property to a third-party and it therefore could not be returned. Indeed, instead of declaring

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Greene County, 607 S.E.2d 881, 882-83 (Ga. 2005) (voiding contract whereby county agreed to waive its commission for the collection of school board taxes).

[114] *See* Bd. of Comm'rs of Chatham County v. Chatham Advertisers, 371 S.E.2d 850, 851 (Ga. 1988); Brown v. City of East Point, 268 S.E.2d 912, 914 (1980).

[115] *See, e.g.*, *Screws*, 8 S.E.2d at 20.

[116] *See* City of Powder Springs v. WMM Properties, Inc., 325 S.E.2d 155, 158-59 (Ga. 1985).

[117] *See* North, 551 S.E.2d at 802-03.

[118] *See id.*

[119] 607 S.E.2d 881 (Ga. 2005).

[120] *See id.* at 882-83.

the agreement void *ab initio* (and therefore never enforceable), as usually is the case with *ultra vires* contracts,[121] the court simply held that "the *current* County Commissioners are not bound by the contract."[122] This language suggests that the contract was enforceable against the original commissioners and the school district, which simply was now out of luck. In this judicial climate, it is highly unlikely that the Georgia courts would be willing to deem development agreements proprietary in nature and thus exempt from the "binding contracts" prohibition.

2. Exceptions to Prohibition

Because development agreements likely would be deemed to concern governmental functions, the next analytical question is whether any exceptions to the "binding contracts" prohibition would apply. Answering this question is difficult because the courts have not delineated exactly what exceptions exist or described the precise parameters of those exceptions that have been applied. The only two exceptions that clearly can be gleaned from the case law involve: (1) an express grant of authority to enter into the particular contract at issue;[123] and (2) a contract that extends only for a reasonable length of time after the term of office of the council that executed it.[124] Whether either of these exceptions applies is doubtful.

First, as previously explained, there is no express grant of authority for local governments to enter into development agreements with developers.[125] To circumvent the "binding contracts" prohibition, the exception generally requires that the grant of authority be spelled out plainly.[126] Because the authority to enter into a development agreement is not explicitly stated by any legislative action, the chances of successfully applying this exception are minimal.

Second, because many of the projects for which development agreements are most beneficial would be built-out over the course of several years (if not decades), the development agreement in many cases would need to be in force for the entire duration of construction. However, the amount of time that would be deemed reasonable for this type of agreement remains uncertain. It seems

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[121] *See, e.g.*, Screws v. City of Atlanta, 8 S.E.2d 16, 20 (Ga. 1940).

[122] *See* Greene County Sch. Dist., 607 S.E.2d at 883 (emphasis added).

[123] *See, e.g.*, City of Athens v. McGahee, 341 S.E.2d 855, 858 (Ga. Ct. App. 1986).

[124] *See, e.g.*, Unified Gov't of Athens-Clarke County v. North, 551 S.E.2d 798, 803 (Ga. Ct. App. 2001).

[125] *See supra* Part III.A.

[126] *Compare* Brown v. City of East Point, 268 S.E.2d 912, 914-15 (Ga. 1980) (holding that incremental pay raises for municipal employees, enacted as part of local ordinance, did not bind future councils where charter did not provide for such) *with McGahee*, 341 S.E.2d at 858 (holding that subsequent council was bound by contract concerning severance pay where contract was authorized by specific provision of city charter).

clear that contracts containing no time limitation at all are unreasonable as a matter of course. [127] On the other hand, the courts have upheld leases and similar agreements for periods of ten years.[128] Where in this continuum a development agreement for a multi-phase, mixed-use development project would fall is impossible to predict. The most similar contract that has been upheld by the courts—one for the construction of a road—lasted for only eighteen months.[129] But eighteen months (and, in some cases, perhaps even ten years) probably would not be sufficient time to construct the entire infrastructure necessary for a large mixed-use development. Also, it should be noted that, in its decision in *Greene County School District*, the Georgia Supreme Court paid no attention whatsoever to the durational reasonableness of the contract, instead declaring that the "binding contracts" prohibition precludes a government from entering into a contract that "lasts longer than that government's term of office."[130] Accordingly, it is doubtful under existing precedent that a development agreement of significant duration would be deemed to fall within the "reasonable time" exception to the prohibition.

3. Ratification

The third step in the analytical framework asks whether the offending contract is subject to ratification and whether it has, in fact, been ratified. Over the past several decades, the judicial decisions indicated that the courts would take a fairly expansive view of ratification in the context of the "binding contracts" prohibition. Beginning in 1970, for example, the Georgia Supreme Court held that a contract could be enforced against a subsequent council on two grounds—first, if the subsequent council formally approved the contract and, second, if the subsequent council accepted the benefits of the contract.[131] As recently as 2001, the Georgia Court of Appeals seized upon the latter ground—accepting the benefits of the contract—to enforce an agreement obligating a local government to construct a road.[132] As discussed, among the benefits flowing to a local

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[127] *See* Greene County Sch. Dist. at 882 (invalidating agreement containing no time limit); Horkan v. City of Moultrie, 71 S.E. 785, 785 (Ga. 1911) (same); *see also* Buckhorn Ventures, LLC v. Forsyth County, 585 S.E.2d 229, 233 (Ga. Ct. App. 2003) (invalidating agreement expressly obligating county "in perpetuity").

[128] *See* Bd. of Comm'rs of Chatham County v. Chatham Advertisers, 371 S.E.2d 850, 851 (Ga. 1988) (upholding agreement between county and private company obligating company to place benches at public bus stops in exchange for use of benches as advertising space); Jonesboro Area Athletic Ass'n, Inc. v. Dickson, 181 S.E.2d 852, 856 (Ga. 1971) (upholding lease of municipal property for period of five years with option to renew for additional five years).

[129] *See* Unified Gov't of Athens-Clarke County v. North, 551 S.E.2d 798, 803 (Ga. Ct. App. 2001).

[130] *See* Greene County Sch. Dist., 607 S.E.2d at 882.

[131] *See* DeKalb County v. Ga. Paperstock Co., 174 S.E.2d 884, 887 (Ga. 1970).

[132] *See North*, 551 S.E.2d at 803.

government under a development agreement would be public infrastructure such as roads, sewers, and similar improvements. Under the rationale of the foregoing cases, there is an argument that, once these improvements are put in place, their benefits continually will be received by all subsequent governing authorities that allow their residents to utilize them. Accordingly, the argument goes, the development agreement would be ratified by each subsequent governing authority and would be enforceable against it.

Again, however, the *Greene County School District* decision renders the success of that argument doubtful. In that case, the Georgia Supreme Court failed to apply this "receiving the benefit" ground of ratification, even though it clearly would have applied to the facts of the case. As mentioned earlier, the suspect agreement obligated the county to waive the commissions it earned on collecting school district taxes. In exchange for this waiver, the board of education conveyed a piece of real property to the county. After receiving the property from the school board, the county subsequently conveyed the property to the local Masonic lodge. And in exchange for this conveyance, the Masons deeded to the county the third floor of the county courthouse (which, somehow, they had owned and occupied since before the Civil War).[133] Thus, the county unquestionably received the benefit of its contract with the school district, and this benefit (i.e., the third floor of the courthouse) was enjoyed by subsequent county commissions as well.

Nonetheless, the court held that the contract was not enforceable against a subsequent commission because it violated the "binding contracts" prohibition.[134] In doing so, the court failed to explain why the subsequent council's acceptance of the ultimate benefits of the contract did not amount to ratification, per the court's own prior decisions. In fact, the court completely ignored the issue of ratification, failing even to mention it anywhere in its analysis. Given this recent treatment of the issue by the state's highest judicial authority, it seems doubtful that a development agreement would be subject to ratification or that the courts would apply the "receiving the benefit" rationale even if it was.[135]

4. Estoppel

The final analytical question under the "binding contracts" prohibition is whether the local government would be estopped from relying on the

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[133] *See* Greene County Sch. Dist., 607 S.E.2d at 882.

[134] *See id.* at 883.

[135] It also should be noted that ratification would not be an issue until *after* a developer expended its resources in complying with the agreement. For this reason, even if the courts were to apply the ratification doctrine, it is doubtful that a developer would consider the prospect of ratification (based on the *potential* of future governmental actions) to be sufficient protection against the other risks inherent in contracting with the government.

prohibition. The short answer to this question seems fairly strongly to be "no." As explained previously, the doctrine of estoppel generally does not to apply against local governments and certainly not as to their governmental functions.[136]

III. A LEGISLATIVE SOLUTION

Development agreements are likely unenforceable under Georgia law because there is no express legislative action authorizing their use and because they run afoul of the "binding contracts" prohibition. To overcome these hurdles, enabling legislation is necessary. This Part briefly discusses the primary elements that should be included in such legislation. A model enabling statute, which draws elements from the development agreement statutes of several other states, follows as an Appendix.

A. Express Authority to Contract

To remedy the problem raised by the lack of express authority, any enabling legislation should clearly authorize local governments to enter into development agreements upon application by those persons having legal or equitable interests in the real property subject to the agreement. Additionally, enabling legislation should require that local governments, in advance of entering into development agreements, adopt an "enabling ordinance." This local legislation will activate the local government's authority to enter into development agreements and establish the procedures and requirements the government will follow in considering development agreement requests.[137] This will minimize the danger of *ad hoc* transactions and help ensure that all applications for a development agreement, as well as the finalized agreements themselves, will be treated by the local government in a consistent manner.[138]

B. Duration of Agreement

Similarly, to overcome the hurdle presented by the "binding contracts" doctrine, enabling legislation specifically should authorize local governments to

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[136] *See* Union County v. CGP, Inc., 589 S.E.2d 240, 242 (Ga. 2003) (declaring that "estoppel will not lie against a county government"); Corey Outdoor Adver., Inc. v. Bd. of Zoning Adjustments, 327 S.E.2d 178, 182 (Ga. 1985) (explaining that estoppel will not apply "so as to frustrate or contravene a governmental function" or where it "will embarrass a municipality in its capacity as a governing body or operate to prevent it from exercising its police power").

[137] The local rules should be required to satisfy certain minimum procedural requirements, which are addressed *infra* Part IV.D.

[138] *See, e.g.*, CAL. GOV'T CODE § 65865(c) (West 1997); FLA. STAT. § 163.3223 (1995); HAW. REV. STAT. § 46-123(1) (1993); LA. REV. STAT. ANN. § 33:4780.22 (2002); MD. ANN. CODE art. 66B, § 13.01(b)(1) (2003); S.C. CODE ANN. § 6-31-30 (2004).

enter into development agreements lasting up to 15 years.[139] This duration provides a fair balance between the developer's need to have sufficient time in which to complete the development and the government's need to address changing circumstances. Additionally, while the development agreement is in force, the progress of the development should be subject to periodic review to ensure that the developer is complying in good faith with the terms of the agreement.[140] If the local government finds that the developer is not in compliance, then the developer should be given a reasonable opportunity to cure the deficiencies, rebut the findings of noncompliance, or consent to an amendment to the agreement that addresses the government's concerns. If the developer fails to perform any of these tasks, the government should then have the power unilaterally to terminate or modify the agreement.[141] To prevent abuses, however, such action should be subject to judicial review upon petition by the developer.

C. Substantive Provisions of Agreement

In addition to the foregoing provisions, enabling legislation should specify the minimum substantive provisions that must be contained in all development agreements, regardless of local requirements. By addressing the issues most relevant to the development project, these mandatory provisions will facilitate the negotiation of development agreements and help to ensure some standardization in how development agreements are treated from jurisdiction to jurisdiction.

Enabling statutes in other states typically require a development agreement to include the following: (1) a legal description of the property subject to the agreement; (2) the names of the legal and equitable owners of such property; (3) the duration of the agreement; (4) the development uses permitted on the property; (5) the development standards for the project (such as densities, maximum height limitations, etc.); (6) a description of the public facilities that will service the development, including who will provide, construct, and finance such facilities; (7) a description of all local development permits approved or needed to be approved for the development of the property; (8) a schedule of all local government fees and charges applicable to the development of the property; (9) a description of the conditions, terms, restrictions, or other requirements determined by the local government to be necessary to ensure the

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[139] *See, e.g.*, OR. REV. STAT. § 94.504(8)(a) (2003) (allowing cities to enter into development for maximum duration of 15 years); VA. CODE ANN. § 15.2-2303.1(B) (2003) (setting maximum duration of development agreement at 15 years).

[140] *See, e.g.*, CAL. GOV'T CODE § 65865.1 (West 1997); FLA. STAT. § 163.3235 (1995); HAW. REV. STAT. § 46-125 (1993); LA. REV. STAT. ANN. § 33:4780.23 (2002); S.C. CODE ANN. § 6-31-90 (2004).

[141] *See, e.g.*, HAW. REV. STAT. § 46-125(b) (1993); S.C. CODE ANN. § 6-31-90 (West 2004).

public health, safety, and welfare of its citizens; (10) provisions for the dedication or reservation of land for public purposes, protection of environmentally sensitive areas, and preservation or restoration of historic structures; and (11) a statement concerning the consistency of the proposed development with the local government's comprehensive plan.[142] Additionally, while not mandatory, many states permit a development agreement to specify the phasing of the project or the time in which construction must be commenced or completed.[143]

D. Procedural Requirements

Regardless of the variety in the procedural requirements adopted by local governments (which variety may be necessary to address the unique needs of each jurisdiction), all development agreements throughout the state should be subject to the same minimum procedural requirements. Again, these requirements will help to bring some standardization, as well as facilitate fairness and transparency, in the development agreement process.

Common procedural requirements in the enabling statutes of other states include: (1) the need for a formal ordinance or resolution of the governing authority of the local government giving approval to the development agreement;[144] (2) the requirement that a public hearing be held prior to approval;[145] (3) the obligation to record the executed development agreement in the public land records;[146] (4) provisions governing amendment or cancellation

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[142] *See, e.g.*, ARIZ. REV. STAT. § 9-500.05(H)(1) (West 1996 & Supp. 2004); CAL. GOV'T CODE § 65865.2 (West 1997); FLA. STAT. § 163.3227 (1995); HAW. REV. STAT. § 46-126 (1993); LA. REV. STAT. ANN. § 33:4780.24 (2002); MD. ANN. CODE, art. 66B, § 13.01(f)(1) (2003); NEV. REV. STAT. § 278.0201(1) (1997); OR. REV. STAT. § 94.504(2) & (3) (2003); S.C. CODE ANN. § 6-31-60 (2004); WASH. REV. CODE ANN. § 36.70B.170(3) (West 2003).

[143] *See, e.g.*, ARIZ. REV. STAT. § 9-500.05(H)(1)(f) (West 1996 & Supp. 2004); CAL. GOV'T CODE § 65865.2 (West 1997); FLA. STAT. § 163.3227(2) (1995); LA. REV. STAT. ANN. § 33:4780.24 (2002); MD. ANN. CODE, art. 66B, § 13.01(f)(2) (2003); NEV. REV. STAT. § 278.0201(1) (1997); S.C. CODE ANN. § 6-31-60(B) (2004); *see also* OR. REV. STAT. § 94.504(4) (2003) (making such provision mandatory rather than permissive).

[144] *See, e.g.*, ARIZ. REV. STAT. § 9-500.05(A) (West 1996 & Supp. 2004); CAL. GOV'T CODE § 65867.5(a) (West 1997); HAW. REV. STAT. § 46-124 (1993); LA. REV. STAT. ANN. § 33:4780.29 (2002); NEV. REV. STAT. § 278.0203(1) (1997); OR. REV. STAT. § 94.508(2) (2003); S.C. CODE ANN. § 6-31-30 (2004); VA. CODE. ANN. § 15.2-2303.1(B) (2003); WASH. REV. CODE ANN. § 36.70B.200 (West 2003).

[145] *See, e.g.*, CAL. GOV'T CODE § 65867 (West 1997); FLA. STAT. § 163.3225 (1995); LA. REV. STAT. ANN. § 33:4780.28 (2002); MD. ANN. CODE, art. 66B, § 13.01(d) (2003); OR. REV. STAT. § 94.513(2) (2003); S.C. CODE ANN. § 6-31-50 (2004); WASH. REV. CODE ANN. § 36.70B.200 (West 2003).

[146] *See, e.g.*, ARIZ. REV. STAT. § 9-500.05(D) (West 1996 & Supp. 2004); CAL. GOV'T CODE § 65868.5 (West 1997); FLA. STAT. § 163.3239 (1995); HAW. REV. STAT. § 46-132 (1993); LA. REV. STAT. ANN. § 33:4780.31 (2002); MD. ANN. CODE, art. 66B, § 13.01(k)(1) (2003); NEV. REV. STAT. § 278.0203(2) (1997); OR. REV. STAT. § 94.528 (2003); S.C. CODE ANN. § 6-31-120 (2004); WASH. REV. CODE ANN. § 36.70B.190 (West 2003).

of the agreement;[147] (5) provisions governing the enforcement of the development agreement;[148] and (6) in the event the agreement calls for the local government to incur debt, a requirement that the local government comply with all applicable obligations concerning the incursion and approval of such debt.[149]

E. Effect of Development Agreement

Enabling legislation should also address the effect of the development with regard to subsequent changes in local land use regulations. The statute should clearly provide that the land use regulations governing the development subject to the agreement are those in effect at the time the agreement is executed, including any standards or requirements specified in the agreement itself.

There will, of course, be some circumstances under which the application of subsequent regulations is appropriate or required to protect the public. Accordingly, to account for these circumstances (and to protect the local government's ability to exercise its police powers when necessary) the enabling statute should delineate specific instances where subsequent regulations may be applied. These instances should include: (1) where the subsequent regulations do not conflict with the laws governing the development agreement and do not prevent or materially burden the development project contemplated by the development agreement; (2) where the subsequent regulations are essential to the public health, safety, or welfare and expressly state that they apply to a development that is subject to a previously executed development agreement; (3) where the subsequent regulations are specifically anticipated and provided for in the development agreement; (4) where substantial changes have occurred in pertinent conditions existing at the time the development agreement was approved, which, unless addressed by the local government, would pose a serious threat to the public health, safety, and welfare; and (5) where the development agreement is based on substantially and materially inaccurate information supplied by the developer.[150] To prevent abuse, the local government should be required to hold a public hearing to consider and determine whether any of these instances apply.[151] Additionally, as with the government's ability unilaterally to terminate or modify the agreement in the

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[147] *See, e.g.*, ARIZ. REV. STAT. § 9-500.05(C) (West 1996 & Supp. 2004); CAL. GOV'T CODE § 65868 (West 1997); FLA. STAT. § 163.3237 (1995); HAW. REV. STAT. § 46-130 (1993); LA. REV. STAT. ANN. § 33:4780.30 (2002); MD. ANN. CODE, art. 66B, § 13.01(h) (2003); NEV. REV. STAT. § 278.0205 (1997); OR. REV. STAT. § 94.522 (2003); S.C. CODE ANN. § 6-31-100 (2004).

[148] *See, e.g.*, CAL. GOV'T CODE § 65865.4 (West 1997); FLA. STAT. § 163.3243 (1995); HAW. REV. STAT. § 46-127(a) (1993); LA. REV. STAT. ANN. § 33:4780.26 (2002); MD. ANN. CODE, art. 66B, § 13.01(*l*) (2003).

[149] *See, e.g.*, S.C. CODE ANN. § 6-31-145 (2004).

[150] *See, e.g.*, FLA. STAT. § 163.3233 (1995); S.C. CODE ANN. § 6-31-80 (2004).

[151] *See, e.g.*, FLA. STAT. § 163.3233 (1995); S.C. CODE ANN. § 6-31-80 (2004).

case of a material breach, any action taken by the local government to apply subsequent land use regulations should be subject to judicial review upon petition by the developer.

Finally, enabling legislation should speak specifically to the parties' ability to enforce the terms of the agreement through an action for injunctive relief, as well as to challenge compliance with the requirements established by the enabling legislation by declaratory judgment or a writ of mandamus.

CONCLUSION

Georgia has experienced rapid growth, and the development accompanying this growth has strained both the state's resources and its land use regulations. To encourage and accommodate quality development without overburdening existing infrastructure or taxpayers, developers need some certainty that their rights will vest in a particular project and local governments need more flexibility in addressing the provision and financing of public improvements. Development agreements provide an attractive mechanism for addressing both of these issues by protecting a developer's rights to proceed with development for a specified period of time in exchange for commitments that adequate infrastructure and public services will be in place to serve that development.

Despite the benefits offered by development agreements, however, they likely are unenforceable under existing law. Because there is no express legislative authorization for local governments to enter into such agreements, the courts probably would conclude that the agreements are *ultra vires* and void. Even if statutory authorization could be found (for example, in the provisions of the DIFA), however, development agreements still would likely run afoul of the "binding contracts" prohibition by binding local governments for multiple years in matters relating to their governmental functions.

To resolve these problems, enabling legislation is needed that explicitly authorizes local governments to enter into development agreements, as well as allows such agreements to have long-term duration. Additionally, enabling legislation should address certain substantive provisions that must be included in all development agreements, establish minimum procedural requirements for the consideration and adoption of development agreements, and spell out the legal effects of such agreements with regard to subsequent land use regulations. By adopting such legislation, the Georgia General Assembly would serve as a model for similar jurisdictions and take an important step in equipping Georgia's local governments to address the complex issues presented by land development in the twenty-first century.

APPENDIX: MODEL DEVELOPMENT AGREEMENT LEGISLATION

Section 1. Short Title.

This chapter may be cited as the "Georgia Local Government Development Agreement Act."

Section 2. Legislative findings and declarations.

The General Assembly finds and declares that:

(a) The lack of certainty in the approval of development can result in a waste of economic and land resources, discourage sound capital improvement planning and financing, lead to sprawl, escalate the cost of housing and development, and discourage investment and commitment to comprehensive planning.

(b) Assurance to a developer that, upon receipt of its development permits, it may proceed in accordance with existing laws and policies, subject to the conditions of a development agreement, strengthens the public planning process, encourages sound capital improvement planning and financing, assists in ensuring that there are adequate capital facilities for the development, encourages private participation in comprehensive planning, reduces the economic costs of development, allows for the orderly planning of public facilities and services, and allows for the equitable allocation of the cost of public services.

(c) Because the development approval process involves the expenditure of considerable sums of money, predictability encourages the maximum efficient utilization of resources at the least economic cost to the public.

(d) Public benefits derived from development agreements may include, but are not limited to, affordable housing, improved design standards, protection of greenspace and environmentally sensitive areas, preservation of historic structures, and on-site and off-site infrastructure and other improvements. These public benefits may be negotiated in return for the vesting of development rights for a specified period of time.

(e) Land use planning and development involve review and action by multiple government agencies. The use of development agreements may facilitate the cooperation and coordination of the requirements and needs of the various governmental agencies having jurisdiction over a land development project.

(f) Development agreements will encourage the vesting of property rights by generally protecting such rights from the effect of subsequently enacted local legislation or from the effects of changing policies and procedures of local government agencies that may conflict with any term or provision of the development agreement or in any way hinder, restrict, or prevent the development of the project. Development agreements will provide a reasonable certainty as to the lawful requirements that must be met in protecting vested

property rights, while maintaining the authority and duty of the government to enforce laws and regulations that promote the public safety, health, and general welfare of the citizens of Georgia.

(g) It is the intent of the General Assembly to encourage a stronger commitment to comprehensive and capital facilities planning, ensure the provision of adequate public facilities for development, encourage the efficient use of resources, and reduce the economic cost of development. This intent is effected by authorizing local governments to enter into development agreements in accordance with the procedures and requirements of this chapter.

(h) The execution of development agreements as authorized by this chapter is a proper exercise of the police power of local governments.

(i) This chapter is to be regarded as supplemental and additional to the powers conferred upon local governments by other laws and shall not be regarded as in derogation of any powers existing on the effective date of this chapter.

Section 3. Authorization; procedures.

(a) A local government may, upon application by a developer, enter into a binding development agreement with a developer. For purposes of this chapter, "local government" means any county, municipality, special district, water authority, water and sewer authority, solid waste management authority or other local governmental entity established pursuant to law that exercises regulatory authority over, and grants permits for, land development (including the provision of necessary public facilities and services thereto). For purposes of this chapter, "developer" means any person having a legal or equitable interest in real property that is subject to the regulatory authority of the local government.

(b) A local government desiring to enter into a development agreement as authorized by this chapter shall first establish procedures and requirements for the consideration of and entering into development agreements; provided, however, that such procedures and requirements must at least meet the minimum procedures and requirements established by this chapter.

(c) A development agreement must be approved by the governing authority of the local government by means of a duly-adopted ordinance or resolution.

(d) A development agreement entered into in compliance with this chapter shall be valid and enforceable notwithstanding any other provisions of general or local law concerning a local government's authority to contract.

Section 4. Public hearings; notice and publication.

(a) Before entering into a development agreement, a local government shall conduct at least one public hearing to consider the proposed agreement.

(b) Notice of intent to consider a development agreement must be advertised in a newspaper of general circulation in the county where the local government is located at least 15 but not more than 45 days prior to the date of the hearing.

(c) The notice shall specify the name of the developer, the location of the land subject to the proposed development agreement, the development uses proposed on the property, and the place where a copy of the proposed development agreement can be obtained.

(d) The public hearing required by this code section may be held in conjunction with any other required public hearing related to the development project.

Section 5. Duration of development agreement.

Notwithstanding the provisions of Code Section 36-30-3 or any other law to the contrary, a local government may enter into a development agreement for a term of up to 15 years. The initial duration of a development agreement shall not exceed 15 years, although this duration may be extended for an additional 15 years by mutual consent of the parties thereto; provided, however, that any such extension is subject to a public hearing held in accordance with Section 5.

Section 6. Relationship of development agreement to comprehensive plan.

A development agreement must either be consistent with the local government's comprehensive plan or contain specific findings as to why any deviations from the comprehensive plan are in the best interests of the public.

Section 7. Contents of development agreement.

(a) A development agreement shall include the following:

(1) A legal description of the property subject to the agreement;

(2) The names of the legal and equitable owners of such property;

(3) The duration of the agreement;

(4) The development uses permitted on the property;

(5) The permitted densities and intensities of the uses permitted on the property, the maximum heights and sizes of proposed buildings within such property, minimum setbacks and yard requirements for the property, and similar development standards;

(6)(A) A description of the public facilities that will service the development, including: (i) identification of the entity that will provide such facilities; (ii) the date any new facilities, if needed, will be constructed; (iii) how any new facilities, if needed, will be financed; and (iv) a schedule to ensure public facilities are available concurrent with the impacts of the development.

(B) For purposes of this subparagraph, "public facilities" shall mean:

(i)Water supply production, treatment, and distribution facilities;

(ii)Waster-water collection, treatment, and disposal facilities;

(iii)Roads, streets, and bridges, including rights of way, traffic signals, landscaping, and any local components of state or federal highways;

(iv)Storm-water collection, retention, detention, treatment, and disposal facilities, and bank and shore protection and enhancement improvements;

(v)Solid waste collection, treatment, disposal, and management

facilities;

(vi)Public transportation facilities, including but not limited to buses, trains, trolleys, streetcars, and other means of public transportation;

(vii)School, educational. and related facilities;

(viii)Parks, open space, and recreational areas and related facilities;

(ix)Public safety facilities, including police, fire, emergency medical, and rescue facilities; and

(x)Library and related facilities.

(7) A description of all local development permits approved or needed to be approved for the development of the property;

(8) A schedule of all local government fees and charges applicable to the development of the property;

(9) A description of the conditions, terms, restrictions, or other requirements determined by the local government to be necessary to ensure the public health, safety, and welfare of its citizens;

(10)To the extent applicable, provisions for the –

(A)dedication or reservation of land for public purposes;

(B)protection of environmentally sensitive areas; and

(C)preservation or restoration of historic structures;

(11)Either a statement that the proposed development project is consistent with the local government's comprehensive plan or specific findings as to why any deviations from the comprehensive plan are in the best interests of the public; and

(12)The timing of periodic reviews as required by Section 9.

(b) A development agreement may include the following:

(1) A provision that the entire development or any phase thereof be commenced or completed within a specified period of time or in relation to some other benchmark; and

(2) Provisions addressing any other matter consistent with this chapter.

(c) If more than one local government is made party to a development agreement, the agreement must specify which local government is responsible for the overall administration of the agreement.

Section 8. Periodic review; material breach by developer.

(a) The local government shall establish procedures by which it shall engage in a periodic review at least once every 24 months, during which the developer must be required to demonstrate good faith compliance with the terms of the development agreement.

(b) If, as a result of a periodic review, the local government finds and determines, on the basis of substantial evidence, that the developer has committed a material breach of the terms and conditions of the development agreement, the local government shall serve notice in writing, within 30 days after the periodic review, upon the developer setting forth with reasonable

particularity the nature of the breach and the evidence supporting the finding and determination, and providing the developer a reasonable time in which to –

(1)cure the breach;

(2)rebut the finding and determination that a material breach has occurred; or

(3)consent to amend the development agreement so as to meet the concerns of the local government with respect to the finding and determination of material breach.

(c) If the developer fails to take any of the actions listed in paragraph (b) of this code section within the time provided, then the local government unilaterally may terminate or modify the development agreement.

(d) Any final action taken by a local government under this code section shall, upon petition by the developer within 30 days following such final action, be subject to judicial review by the superior court of the county in which the local government is located.

Section 9. Local laws, etc. governing development; exceptions.

(a) Except as otherwise provided in this code section and Section 15, and unless otherwise provided by the development agreement, the local laws, regulations, and policies applicable to the development of the property subject to a development agreement are those in effect (including any specifications contained in the agreement itself) at the time of execution of the agreement.

(b) A local government may apply subsequently adopted local laws, regulations, and policies to a development that is subject to a development agreement only if the local government, after notice to the developer and public hearing, determines that:

(1)The laws, regulations, and policies are not in conflict with the laws governing the development agreement and do not prevent or materially burden the development set forth in the development agreement;

(2)The laws, regulations, and policies are essential to the public health, safety, or welfare and expressly state that they apply to a development that is subject to a previously executed development agreement;

(3)The laws, regulations, and policies are specifically anticipated and provided for in the development agreement;

(4)Substantial changes have occurred in pertinent conditions existing at the time of approval of the development agreement and that such changes, if not addressed by the local government, would pose a serious threat to the public health, safety, and welfare. The annexation or incorporation of territory subject to a previously executed development agreement between the developer and the county shall not constitute a substantial change for purposes of this subparagraph; or

(5)The development agreement is based on substantially and materially inaccurate information supplied by the developer.

(c) Any final action taken by a local government under paragraph (b) of this code section shall, upon petition by the developer within 30 days following such final action, be subject to judicial review by the superior court of the county in which the local government is located.

(d) This code section is cumulative of, and not intended to replace or abrogate, any rights that may vest pursuant to common law.

Section 10. Enforcement of development agreement.

A development agreement entered into in accordance with this chapter is enforceable by any party thereto and their successors in interest by way of an action for injunctive relief to enforce the terms of the development agreement or by way of an action for declaratory judgment or mandamus to challenge compliance of the agreement with the provisions of this chapter.

Section 11. Validity of development agreement entered into prior to incorporation or annexation; modification or suspension by municipality.

(a) Except as otherwise provided in this code section or in Section 14 or in Section 15, if a newly incorporated municipality or newly annexed area comprises territory that formerly was unincorporated, any development agreement applicable to the territory entered into by the county prior to the effective date of annexation shall remain valid for the duration of the agreement. The developer and the municipality have the same rights and obligations with respect to each other regarding matters addressed in the development agreement as if the property had remained in the unincorporated territory of the county, with the municipality being the successor in interest to the county.

(b) After incorporation or annexation, the municipality may apply subsequently adopted local laws, regulations, and policies to the newly annexed or newly incorporated territory subject to such a development agreement only in accordance with the provisions of paragraph (b) of Section 10.

Section 12. Recording of development agreement; effect.

Within 14 days after a local government enters into a development agreement, the developer shall record a copy of the agreement with the clerk of the superior court in the county where the property subject to the agreement is located. A development agreement shall not be effective until it is properly recorded in the public records of the relevant county. The burdens of the agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

Section 13. Amendment or cancellation.

A development agreement may be amended or canceled by mutual written consent of the parties to the agreement or by their successors in interest. The developer shall record any instrument amending or canceling a development agreement within 14 days after the date on which the instrument is executed by all of the parties thereto. No amendment or cancellation of a development agreement shall be effective until the written instrument effecting the

amendment or cancellation is properly recorded in the public records of the relevant county.

Section 14. Modification or suspension to comply with state or federal laws.

In the event state or federal laws or regulations, enacted after a development agreement has been entered into, prevent or preclude compliance with one or more provisions of the development agreement, the provisions of the agreement must be modified or suspended as may be necessary to comply with the state or federal laws or regulations.

Section 15. Applicability of procedures for incurring and approving debt.

In the event that any obligations of the local government contained in a development agreement constitute debt, the local government, at the time the obligation to incur such debt becomes enforceable against the local government, shall comply with any applicable constitutional and statutory procedures for the incursion and approval of such debt.

Section 16. Development agreements not mandatory.

Nothing in this chapter is to be construed as requiring a local government to establish procedures and requirements for the consideration of and entering into development agreements; nor is this chapter to be construed to permit a local government to require a developer to enter into a development agreement.