

Development Agreement



Hazards Addressed



How it Works

A development agreement is a legally binding contract between a property owner or developer and a local government, often including terms not otherwise required through existing regulations. These agreements can specify various elements of the development process ranging from phasing of a larger master-planned community, to tax-sharing for retail development, to critical infrastructure responsibilities. Development agreements are sometimes used in combination with a planned unit development (PUD) in the form of a binding PUD agreement that specifies the negotiated terms of the development, but the two tools may also be used independently.

For hazard mitigation purposes, development agreements can be used to guarantee that a proposed development reduces risk to hazards by requiring it meet certain use requirements, site development standards, conservation practices, or long-term maintenance provisions not already required by land development regulations. Development agreements can also be used as an incentive. For example, if a developer agrees to enter into an agreement to include defensible space elements in a large-scale development in the wildland-urban interface, the local government might offer reduced fees, expedited review, or even density bonuses in exchange.

Implementation

To establish a development agreement, the developer and the local government both work with legal counsel to develop and execute a contract that binds all parties. During the

negotiation of such an agreement, planning staff should work closely with their land use attorney, appointed and elected officials, and the public to answer the following:

- **What is the purpose of the development agreement?** Crafting the purpose and goals will solidify the reasons why a development agreement is necessary and helps facilitate a process where the expectations for both parties are clearly articulated. This step should also act as a screening process for whether the purpose of the development agreement is consistent with a comprehensive plan or other policies generated by the jurisdiction.
- **Are the benefits to the community balanced with those to the developer?** Along with the general purpose of the agreement, a justification of the benefits of the agreement to health, safety, and welfare of the community should be considered.
- **Will these requirements be consistent for similar developments?** In addition to site-specific development agreement requirements, jurisdictions may choose to require the same standards for planned developments with similar conditions. Examples include offering incentives for developers to maintain vegetation in riparian buffers or requiring major subdivision developments in wildland-urban interfaces to counter the costs of firefighting.
- **Who will be involved in the development agreement process?** Opportunities for public input and stakeholder feedback are often important components of an agreement, which can help limit any negative response from the community.
- **How will the agreement be maintained throughout the life of the agreement?** Local governments should describe the long-term costs and maintenance requirements for both the jurisdiction and the developer, as well as monitoring procedures and processes for amending agreement terms in the future.

Where It's Been Done

La Plata County entered into an agreement with the Electra Sporting Club in 2012 for expansion of their existing facilities. The club was seeking to expand its uses to include new driveways and new cabin sites. The county and the club chose to enter into an agreement for the future development of the site. Although there are many provisions of the agreement, one of them is a Wildfire Mitigation and Evacuation Plan (WMEP). The article states that on an annual basis, Electra will notify all of its members of the WMEP and make available to each member appropriate hazard mitigation resources and materials. It also requires new cabins and replacement cabins to use fire-resistant materials, reduce fuel load on the site



Historic Electra Sporting Club building.

Source: La Plata County

surrounding the structure, and to maintain vegetation consistent with the WMEP. The WMEP is included as an appendix to the agreement. It includes extensive rules for private owners within the club grounds dealing with, for example, techniques for maintaining defensible space around individual cabins.

A development agreement between **Eagle County** and the Fox Follow Planned Unit Development created in 2017 communicated a number of conditions for the PUD, including one for rockfall hazard mitigation along the southern border of the proposed development. The agreement was amended in 2018, but the hazard mitigation provision remained. The document stated that Fox Hollow would be required to follow specific recommendations provided by the Colorado Geological Survey to install a rockfall fence, an open space parcel, or a combination of mitigation interventions to address the hazard. Additionally, the plat was required to be updated with an advisory note that the land may be susceptible to subsidence and sinkholes in the future.

Advantages and Key Talking Points

Development agreements allow communities a degree of flexibility not otherwise available per existing regulations. Advantages include:

- Creation of a separate contract from the zoning code and other ordinances allows all parties to negotiate any aspects of the development. However, this can be just as much of a challenge as a benefit.
- Ability to tailor specific mitigation actions and tie them to conditions of approval, thereby securing the commitment.
- The agreement can prescribe periodic reviews for compliance. This is especially helpful for site development standards such as landscaping or parking.
- Allows developer to obtain “vested rights” protected from any changes to existing zoning or land use laws during the term of the agreement.

Challenges

Critics of development agreements claim that they circumvent traditional development review processes. Other challenges include:

- Requires trained land use or real-estate attorney to draft and implement.
- The public can perceive these as “back-door deals” with little to no opportunity for input.
- Difficult for planners to track over time.
- Amendments to development agreements can be time-intensive. Once both parties enter into the agreement, they are locked into those provisions unless they both agree to an amendment.

Model Code Language and Commentary

Development agreements are negotiated on a case-by-case basis. Because each development agreement is

Commentary

unique and based on a particular development site and/or project, such agreements vary widely in content and the specific terms negotiated. The agreement depends largely on specific site conditions and/or mitigation objectives sought.

Many agreements contain the following basic elements at a minimum:

- **Recitals** – These function similar to a purpose statement. What is the intent of the development agreement? How are the parties authorized to enter into such agreement?
- **General Provisions** – This section describes the project and use of the property, definitions of key terms, process for amending or terminating the agreement, and the relationship of the agreement to other regulations.
- **Obligations** – This section outlines the specific terms of the agreement. For example, are there fiduciary responsibilities? Site maintenance obligations? The agreement should include both developer and local government responsibilities.
- **Exhibits or Attachments** – These typically include a legal description of the property, any specific costs related to the obligations in the agreement, and other necessary supporting documents.

The following sections describe each of these elements and provide standard language regarding hazard mitigation that can be considered by Colorado local governments. Model language is in blue shading. Commentary is located in *italics* in the column at the right. The model language used in this document is based on existing ordinances from several communities around the state, including municipalities and counties. The language is illustrative only; consult local counsel to tailor language for your jurisdiction.

A development agreement is a legally-binding document, and should therefore be carefully reviewed and/or drafted by the local government's attorney.

***Negotiating and Drafting
Development Agreements:***

Development agreements allow local governments to achieve greater community benefits not otherwise required by adopted regulations. The local government attorney(s) should be involved in direct negotiations and drafting the agreement.

Recitals

Below are some basic recitals that could be applicable to development agreements pertaining to hazard mitigation.

- WHEREAS, [*the developer*] seeks permission to [type of approval sought – e.g., subdivision, site development] the property as described on [*Exhibit A*].
- WHEREAS, the [*governing body*] seeks to protect the public health, safety, and welfare of the community.
- WHEREAS, the [*governing body*] seeks to implement policies from the [*comprehensive plan, local hazard mitigation plan, or other adopted policy*] regarding [*hazard mitigation, or similar*].
- WHEREAS, the mutual promises and obligations in this agreement are authorized by State law and the [*local government*] regulations.

Recitals: Other recitals may be applicable to the agreement, depending on the history of the property, the application under review, suggestions by local attorney(s), and the obligations included in the agreement.

General Provisions

This section of the agreement should describe the general terms of the agreement including:

- A. Legal description of the property.
- B. Definitions (e.g., “development” or “geologic hazard area”).
- C. Description of parties (local government, developer or applicant, etc.).
- D. Process for amending, terminating, or extending the timeframe for the agreement.
- E. Does the agreement prevail over other zoning and/or subdivision regulations where there is conflict?
- F. Noticing requirements to comply with state and local laws.

General Provisions: This section may or may not include additional sections for legal framework depending on the attorney and/or terms of the agreement. For example, the agreement may include interpretation, severability, remedies, no third-party beneficiary, and other paragraphs deemed necessary for an effective binding contract.

Obligations or Terms of the Agreement

For the specific terms of the agreement, local governments should consider the following as they pertain to hazard mitigation:

- A. Geographic location.** Where are the terms of the agreement applicable? Do they apply to the entire property? A portion of the property?
- B. Applicability.** At what point do the terms of the agreement go into effect? Do they apply to new structures? Existing structures? Are they limited to a specific time period?
- C. Duration.** At what point in time do the terms of the agreement expire? Are the terms effective for three years? Until completion of the first phase of development? In perpetuity?
- D. Responsibility.** Which party is responsible for specific terms of the agreement? Does the developer bear the cost of all mitigation activities? Are there inspections of improvements by the local government? If so, how often, and are there penalties for noncompliance?
- E. Sensitive lands and/or hazard areas.** Specific hazard areas, such as seismic zones, the wildland-urban interface (WUI), geologic hazard areas, or floodways, can be specifically addressed in the agreement. Reference to hazard areas requires that some level of mapping exist or be performed. For developments in a mapped hazard area, the community may require avoiding development in those areas and/or require adequate mitigation techniques to reduce risk.
- F. Additional documentation.** To protect lives and property, a development agreement can require additional documentation be prepared and submitted prior to certain development activities. For example, an evacuation plan might be required for subdivision in the WUI, or a soils report for development in areas with subsidence.
- G. Procedures.** Just like procedures in a development code, a development agreement can establish specific procedures for permitting development within a defined area or time period.

Obligations or Terms of the Agreement: This section does not have to be labeled “obligations.” There might be several sections following the recitals that are dedicated to the individual terms of the agreement, such as “limitation on number of structures,” or “long-term maintenance of landscaping.” For the purposes of this model, we title the section “obligations” as a catch all for the terms of the agreement.

H. Maintenance. Requiring mitigation activities as a condition for development approval can be effective for some time; however, including long-term maintenance provisions will ensure that effective mitigation is achieved for decades or longer. For example, a development agreement can require that defensible space required by the agreement be maintained and inspected annually, or that new structures in a development use fire-resistant building materials, or require the construction of safe-rooms (shelter against tornadoes and other wind events) for uses where large numbers of people congregate.

Maintenance: Maintenance provisions can help achieve one of the greatest challenges in planning for hazard mitigation – addressing existing development. Addressing hazard mitigation for future development is easier – by avoiding hazard areas all together or imposing stricter standards on development within known hazard areas. But strengthening already approved developments through long-term maintenance provisions helps communities be more resilient to future hazard events.

Key Facts

Administrative capacity	Experienced planners; land use or real estate attorney
Mapping	Depends on terms of agreement
Regulatory requirements	N/A
Maintenance	Yes, requires maintenance and enforcement of agreed terms
Adoption required	No adoption required, but formal agreement between local government and developer
Statutory reference	Colorado’s Vested Property Rights Act (C.R.S. § 24-68-101, et. seq.)
Associated costs	Potentially high costs for attorneys and analysis of issues to address in agreement

Examples

La Plata County Agreement between the county and Electra Sporting Club	https://laplatacountyco.igq2.com/Citizens/FileOpen.aspx?Type=15&ID=1561&Inline=True
Town of New Castle Agreement between the Town and the Lakota Canyon Ranch for wildfire mitigation plan	newcastlecolorado.org/wp-content/uploads/2014/03/Lakota-Canyon-Ranch-Annexation-Agreement-copy.pdf (p.8 of 14)

City of Black Diamond, WA Agreement between the city and BD Village Partners, L.P.	ci.blackdiamond.wa.us/Depts/CommDev/planning/MPDDevAgreements/June2011/TV/Villages%20MPD%20DA%20v4%20June%202011.pdf
Eagle County Covenants controlling wildfire mitigation regulations for the Cordillera property owner's association	http://www.erfpd.org/assets/_orsd/p/49/cordillera-cwpp-update-2014-small.pdf Not a development agreement, but a good example of how to achieve a similar result through private controls
