International Municipal Lawyers Association
2012 Annual Conference
Austin, Texas

Development Agreements and Telecommunications and Broadband Related Issues

"*Development Agreements: A Discussion Regarding the Use of Development Agreements and Broadband*"

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Introduction

- Development Agreements have been used for years between local governments and private land use developers to overcome obstacles or barriers due to numerous zoning and local regulatory requirements, process and hearings and significant time delays.

- Use of a Development Agreement can provide the flexibility needed by local government to make it possible to encourage or offer incentives to private developers for development desirable for the community.

- A Development Agreement is a public/private partnership to address current community need for Broadband (voice, video and data).

- In this larger context, franchises and rights-of-way (ROW) issues are pieces of a larger puzzle, i.e., not the whole puzzle itself.

Introduction

- Development Agreements represent a way for communities to address needs in a larger multidimensional context, i.e., dealing with everything that it may take for public and private sectors in a community to benefit mutually .
- When dealing with ROW issues as part of the broad scope of Broadband and use of Development Agreements, state and federal law need to be complied with, i.e., non-discrimination and competitive neutrality – Section 253 Telecommunications Act.
- Need to identify and document unique features of the Agreement, otherwise, the incumbents may insist on similar benefits without necessarily offering comparable community benefits.

Introduction

- Need to weigh potential benefits to community against potential jobs from both new and incumbent providers

Background

- The Mall of America, my role, and a Development Agreement that included city commitments – land acquisition, write down of conveyance to private developer.
- Redevelopment bonds for land acquisition and site clearance.
- Tax increment financing to construct major public improvements and developer needed facilities.

Background

- What the city received in return from the private developer.
  - Use of under-utilized property abandoned as a prior stadium site
  - A single use development having a value of not less than $1.2 billion
  - Economic development providing jobs, increased tax base and achieving community benefit

Background

- What the developer received from the city.
  - A positive working relationship with the city.
  - City support and assistance with required approvals, licenses and permits.
  - Coordination of legislative regulations of the city, metropolitan government and the State of Minnesota.
  - Financial and other significant local incentives.

Lessons Learned

- Local governments have needs and interests unique to it and special assets or resources, and most importantly the ROW, that will benefit private developers and encourage development that might not otherwise be possible.

- Development Agreements ensure a solid working relationship between a local government and private developers and will fulfill community needs.

Changing Trends

- The FCC has established national guidelines and goals for Broadband services and the availability of capacity to all local interest groups, including business, institutions, educational facilities, and residents.
- Cultural change from a paper driven society to a largely electronically one fueled by the Internet and portable electronic devices.

Changing Trends

- Over 20 states have passed legislation in the past five years in an attempt to reduce the overall burden to private developers of communication services and, in particular, cable service providers and to encourage competition and lower rates.
- The changes to state laws have not resulted in or encouraged competition for competitive communication services, Broadband or rate reductions.

Changing Trends

- Economic conditions over the past several years have reduced private expenditure of significant capital to achieve new and innovative competitive services and expansion of Broadband.

What is the Answer?

- The creative use of Development Agreements may be the answer.
- Development Agreements will provide a way to address issues of a private developer and encourage a private developer to work together with a community to meet the community needs in a broad scope mutual arrangement instead of focus to a limited piece of the larger scope.
- Local government ROW is a valuable resource and only available for use for private purposes at a significant cost which may discourage property development.
- To overcome issues to private use, local governments may consider leveraging the public ROW in a Development Agreement to achieve development (we believe the potential to encourage Broadband expansion to meet the needs of communities).

Recent Example

- A recent example of a Development Agreement demonstrates that local Broadband goals can be achieved by local governments working together with a private provider.
- Example: Kansas City, Missouri
  - State law removed local cable service franchise authority
  - ROW authority retained
  - Significant local interest and demand for modern Broadband and with significant capacity

Recent Example

- Development Agreement with Google.
- City encouraged by local interest and business and residential commitments, including financial contributions.
- City waiver of ROW permit fees (state law required similar waivers for the incumbent cable service provider).
- City waiver of conditions relating to procedures that may delay construction or activation of Google Broadband.

The End Result

- Based on my experience, I am advocating a new approach for local government to step back and evaluate creative ways to achieve local government purposes and, in particular, the expansion and availability of new and modern Broadband service capabilities.

The Concept

- The terms of a Development Agreement will vary significantly and must incorporate the understanding or mutual agreement between city and private developer.
- There needs to be mutuality of obligation – fair compensation (ROW is held in trust for the public and cannot be given away free).
- In addition to a full description of the project and public and private commitments, an outline of the process and time schedule agreed to, important terms and conditions and commitments as well as approval requirements.

The Concept

- Being aware of incumbent commitments, “level playing field.”
- A ROW Use Agreement to comply with a reasonable ROW Construction and Administration Ordinance.
- Project description, commitments, process and time schedule for completion and performance and other important terms as agreed to.

Conclusion

Changing times, including cultural, technological and legal change dictate a rethinking of local ROW use and how a city can best approach achieving significant local improvements. A Development Agreement – public/private partnership arrangement – may be the answer and through the creative development of such an agreement, a city may overcome disincentives by recognizing that it, as a partner, can offer a great deal in the way of incentives that will invite interest on the part of private developers to, for example, develop a Broadband system and achieve local community goals and needs.

Adrian E. Herbst

Adrian E. Herbst is a principal with the Washington, D.C. based firm The Baller Herbst Law Group, P.C., in charge of its Minneapolis, Minnesota office. He has over 40 years of experience in municipal and governmental work. Adrian has been extensively involved in representing local governments throughout the country on cable and telecommunications franchising and rights-of-way regulations and governmental ownership alternatives, compliance audits, and service issues. He has also been extensively involved in the development of ordinances to assist local governments with Broadband development plans, including planning for local needs and expanding Broadband service as outlined by the FCC National Broadband Plan. Adrian was a City Councilmember for the City of Bloomington, Minnesota and its City Attorney. He has served as a past President of the Minnesota Trial Lawyers Association and Vice President of the League of Minnesota Cities. Adrian is a charter member of the National Association of Telecommunications Officers and Advisors (NATOA), the International Municipal Lawyers Association (IMLA), the Federal Communications Bar Association, and the Telecommunications Committee of the Minnesota State Bar Association.

Adrian's legal and consulting representations on behalf of local governments, regarding communications systems, ROW use and Broadband networks and services includes the following:

- Local government planning and creative studies to identify current and future local needs
- Identification and coordination with required technical and financial consultants
- Franchise licenses and ROW use ordinances and agreements for wired as well as Wi-Fi
- Negotiation
- Administration and enforcement
- Municipal ownership
- Rate regulation
- Litigation
- Public, educational and governmental operations
- Programming agreements
- Customer service standards