

APA MONTHLY WEBCAST

October 9, 2009

*Fundamentals of
Redevelopment Agreements*

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Previews of coming attractions

- *Next month's sponsor: Florida Chapter*
- *Topic: Community Vision: Creating the Framework for Florida's Tomorrow*
- *Date: November 6th 1-2:30 pm EST*
- *For registration information visit: www.utah-apa.org for details*



Introduction

- *Scope of presentation*
- *“Full disclosure:” local government perspective/orientation*
- *General applicability – Missouri/Illinois examples & illustrations*
- *Presentation objectives & expectations*
 - *Familiarity & context*
 - *“Issue spotting” & agreement language*
 - *“Good” decisions*

Presentation outline

- *Redevelopment agreement basics*
- *Maintaining control & reducing risks*
- *Assuring performance*
- *Land acquisition & assembly*
- *Project financing overview*
- *Other issues*



Basic governmental authority to contract

- *General corporate contracting authority*
- *Express authority for cooperative agreements*
 - *Mo. Rev. Stat. § 70.220.1*

*“**Any municipality** or political subdivision of this state...**may contract** and cooperate with any other municipality or political subdivision, or with an elective or appointive official thereof...or **with any private person, firm, association or corporation**, for the planning, development, construction, acquisition or operation of any public improvement or facility, or for a common service; **provided, that the subject and purposes** of any such contract or cooperative action made and entered into by such municipality or political subdivision **shall be within the scope of the powers of such municipality or political subdivision.**”*

Enabling statutes & scope of authority

- *What law governs?*
- Example: *Missouri TIF Act*

“A municipality may:...

*(2) ...make and enter into all contracts
necessary or incidental to the implementation and
furtherance of its redevelopment plan or project;”*

BUT...

Enabling statutes & scope of authority

- *Missouri TIF Act cont'd.*
BUT...

“(3) ...No conveyance, lease, mortgage, disposition of land or other property, acquired by the municipality, or agreement relating to the development of the property shall be made except upon the adoption of an ordinance by the governing body of the municipality....no... agreement relating to the development of property shall be made without making public disclosure of the terms of the disposition and all bids and proposals made in response to the municipality's request. Such procedures for obtaining such bids and proposals shall provide reasonable opportunity for any person to submit alternative proposals or bids;”

Enabling statutes & scope of authority

- Example: *Missouri Urban Redevelopment Corporations Law*

*“Notwithstanding any other provision of law to the contrary, **payments in lieu of taxes may be imposed by contract between a city and an urban redevelopment corporation** which receives tax abatement or exemption on property....”*

- Example: *Illinois Annexation Agreements*

*“...any municipality may enter into an annexation agreement with one or more of the owners of record of land in unincorporated territory....The agreement shall be valid and binding for a period of **not to exceed 20 years** from the date of its execution.”*

*“Any such **agreement may provide for the following as it relates to the land which is the subject of the agreement:...[a]ny other matter not inconsistent with the provisions of this Code, nor forbidden by law.**”*

Attributes of contract required by law

- Example: *Missouri local government contracts to be in writing*

- *Mo. Rev. Stat. §432.070.*

*“No county, city, town, village, school township, school district or other municipal corporation shall make any contract, unless the same shall be within the scope of its powers or be expressly authorized by law, nor **unless such contract be made upon a consideration wholly to be performed or executed subsequent to the making of the contract; and such contract, including the consideration, shall be in writing and dated when made, and shall be subscribed by the parties thereto, or their agents authorized by law and duly appointed and authorized in writing.**”*

Other limits on contract authority

- *Constitutional limits*

- *Mo. Const. Article VI, Section 23. Limitation on ownership of corporate stock, use of credit and grants of public funds by local governments.*

“No county, city or other political corporation or subdivision of the state shall own or subscribe for stock in any corporation or association, or lend its credit or grant public money or thing of value to or in aid of any corporation, association or individual, except as provided in this constitution.”

- *III. Const. Article VIII, Finance, Section 1, General Provisions.*

“(a) Public funds, property or credit shall be used only for public purposes.”

Other limits on contract authority

- *Public Policy*

*...on the basis of **public policy**, execution will not lie against the property of a municipality to satisfy a judgment debt....*

...were we to hold otherwise, fire engines, police cars, water works, sewer systems and other property essential to the operation of the city and the safety and health of its residents could be seized, placing city residents in danger....

*...Where a particular item of municipal property is **not needed to perform any particular municipal function**, execution thereon would not impair the municipality's ability to carry out its duties and there is no reason that execution should be precluded.... (emphasis added)*

Holding: Applying public policy, city hall may not be used to satisfy judgment debt, but vacant city land may be so used.

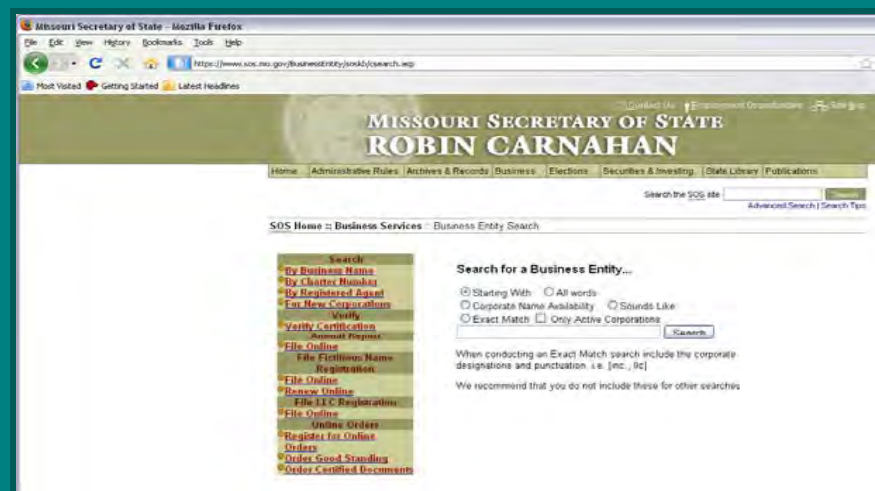
Estate of DeBow v. City of East St. Louis, 228 Ill.App.3d 437, 592 N.E.2d 1137, (1992)

Parties in interest: your “side”

- *In the name of the municipality?*
- *Using a “proxy”*
 - *Redevelopment Authority*
 - *Redevelopment Corporation*
 - *“On behalf of” entity*
 - *TIF Commission*
 - *Is authority delegable?*
 - *Benefits of insulation from liability*
 - *Loss of control*

Parties in interest: the “other side”

- *Due diligence required*
 - *Proper (legal) name*
 - *Competent to contract*
 - *Authorized to do business/subject to service & lawsuit in jurisdiction*
- Resource: <http://www.secstates.com>



Parties in interest: “future” parties

- *THIS DEVELOPMENT AGREEMENT (this “Agreement”) is made and entered into as of _____, 2009, by and among the CITY OF _____ (the “City”); _____ (the “Developer”); and, upon its formation and ratification of this Agreement by its Board of Directors, the _____ COMMUNITY IMPROVEMENT DISTRICT (the “District”).*
- *As a condition precedent to the obligations of the parties under this Agreement, the District, through its Board of Directors, shall have ratified this Agreement within sixty (60) days of the effective date of this Agreement.*
- *In the event the District fails to ratify this Agreement within the aforesaid sixty-day period, the parties hereto shall promptly take all required steps to cause the District to be dissolved..., and upon such dissolution, this Agreement shall be deemed terminated and no party shall have any further obligation to any other party hereunder.*

Parties in interest: non-parties

- *Covenants “running with the land”*
 - *Contemporaneous with the execution of this Agreement, Developer shall place against the Property in the records of the office of the _____ County Recorder of Deeds a **covenant running with the land** containing the requirement, applicable to any persons acquiring any fee or leasehold interest in any portion of the Property, to....*
 - *Developer shall record...promptly, upon any subsequent acquisition by Developer or any affiliate of Developer of any other portions of real property within the District against such portion, a **declaration of restrictions** containing the following provisions:*

Issues & objectives

- *Issues “on the table” & “off the table”*
- *Local “strategic” objectives*
 - *New economic activity*
 - *Preserving/maintaining level of economic activity*
 - *Particular improvements*
 - *Development “enhancements”*
- *Priorities?*
- *Establishing “walking numbers”*

Maintaining control & allocating risk

- *Risk begins with Developer contact*
 - *Speculative development*
 - *Termination of negotiations*
- *Initial funding agreements*
 - *Limit financial/political risk*
 - *Assures “skin in the game”*
 - *Developer reimbursed if project occurs*

Initial funding agreements

- *Use and control of Initial Funds*
 - 1. Advance of Funds. The City hereby acknowledges receipt from the Developer of funds in the amount of \$_____ **to be used as preliminary funding in connection with consideration by the City of the legality and appropriateness of the use of the Public Incentives in connection with the Development and the Property....**
 - 3. Copies of Disbursement Requests. Upon written request, the City shall forward a summary of such Disbursement Request to the Developer. In the event the Developer has questions regarding any such summary Disbursement Request, the Developer shall direct such questions to the City; provided, however, that **the City shall not be required to obtain the Developer's approval for payment of any Disbursement Request...**

Initial funding agreements

- *Developer accommodations/protections*
 - *7. Reimbursement of Initial Funds. ...the amount of the **Initial Funds shall be considered reimbursable costs** to be added to the principal amount of any revenue notes or obligations issued by the City or other entity at the City's direction to the Developer as evidence of the obligation to reimburse the Developer....*
 - *...In the event that the City terminates this Agreement ...and in the event of **approval by the City of the Public Incentives for the Property and for substantially the same Development** (whether or not proposed by the Developer) within _____ years of the effective date of this Agreement, the amount of **Initial Funds actually expended shall be added to the principal amount of and paid to the Developer from any revenue notes issued for such development** by the City or by other development entity acting on behalf of the City....*

Initial funding agreements

- *Limiting City's duty to good faith, reasonableness*
 - *5. Negotiation of Development Agreement. The City further agrees to in good faith consider the application of the Public Incentives, and to negotiate in good faith and use reasonable efforts to agree upon a mutually acceptable definitive development agreement provided, however that **nothing in this Agreement shall be deemed to obligate the City to approve the Public Incentives** or any of them or to approve any redevelopment plan for the Property, and the parties acknowledge and agree that **such decisions and determinations shall remain within the sole discretion of the governing body of the City...***

Initial funding agreements

- *Avoiding waiver of privilege, conflict of interest*
 - 3. Copies of Disbursement Requests. ...in **no** event shall the Developer be entitled to obtain copies of actual **attorney invoices**, it being understood that such invoices remain subject to **attorney-client privilege which is not being waived by the City** hereunder.
 - 4. THE DEVELOPER UNDERSTANDS AND ACKNOWLEDGES THAT THIS ARRANGEMENT IS AN ACCOMMODATION TO THE DEVELOPER IN WHICH NEITHER THE CITY NOR THE CITY'S SPECIAL LEGAL COUNSEL IS PROVIDING LEGAL REPRESENTATION TO THE DEVELOPER AND THAT **NO ATTORNEY-CLIENT RELATIONSHIP BETWEEN THE DEVELOPER AND THE CITY'S SPECIAL LEGAL COUNSEL SHALL EXIST** BY ANY REASON INCLUDING, BUT NOT LIMITED TO, THE DEVELOPER'S PAYMENT OF THE CITY'S LEGAL COSTS.

Development agreements: performance

- *Performance milestones/schedules*
 - *“Milestones Schedule” shall mean the **development milestones schedule** set forth on Exhibit X, attached to and incorporated by reference in this Agreement.*
 - *Developer shall perform the Work, undertake the capital program for the Public Improvements, and implement the Redevelopment Project **all in substantial and material accordance with the Milestone Schedule**, the Redevelopment Plan, and this Agreement.*

Milestone schedule - example

<i>Phase 3: (Total 110,000 s.f. of net leasable retail space)</i>	
<i>Complete Lease Negotiations and Lease-up</i>	<i>Feb.1, 2010</i>
<i>Complete and Submit Construction Documents</i>	<i>Mar.1, 2010</i>
<i>Building Permits Issue</i>	<i>Apr.1, 2010</i>
<i>Begin Site Construction and Pad Preparation</i>	<i>Apr.1, 2010</i>
<i>Begin Footings/Foundations</i>	<i>May 1, 2010</i>
<i>Begin Erection of Building Shell</i>	<i>June 1, 2010</i>
<i>Complete Building Shell/Begin Tenant Improvements</i>	<i>Aug. 1, 2010</i>
<i>Obtain Certificate of Occupancy</i>	<i>Oct. 1, 2010</i>

Performance security

- *Construction escrows, surety bonds*
- *Reimbursement schedules & requirements*
 - *For each request for reimbursement, Developer shall provide a Certificate of Reimbursable Project Costs accompanied by itemized invoices, receipts or other information as required by the City to document the eligibility for reimbursement of such cost items.*
 - *Certificates of Reimbursable Project Costs may be submitted not more frequently than quarterly by Developer and reviewed for acceptance and approval by the City which approvals shall not be unreasonably delayed or denied; provided that in no event shall any reimbursement be made until the corresponding Reimbursable Project Cost has actually been expended by Developer.*

Certifications required

- **Each item listed was incurred** *by or on behalf of and paid by Developer in connection with performance of the Redevelopment Project and/or with Developer's obligations under the Agreement;*
- **Each item and cost amount has not previously been paid or reimbursed to Developer** *and no part thereof has been included in any other certificate previously submitted to the City;*
- **There has not been served upon Developer any notice of lien,** *attachment upon or claim affecting the right of any person to receive payment of the amounts stated in this Certificate, except to the extent such lien is being contested in good faith;*
- **All necessary permits and approvals** *required for the portion of the Work to which this Certificate relates have been issued or obtained and are in full force and effect;*
- **All Work for which reimbursement is requested has been performed in a good and workmanlike manner,** *and lien waivers for the Work to which this Certificate relates are attached;* and
- **Developer is not in default** *or breach of any term or condition of the Agreement.*

Insurance requirements

■ *Coverages*

- *Developer shall maintain and shall ensure that any contractor and subcontractor engaged by Developer shall maintain at all times during construction with insurance companies reasonably acceptable to the City*
 - *(i) all-risks form of **builder's risk** insurance covering the completed value of the Improvements,*
 - *(ii) **owner's liability** insurance with limits of not less than \$3,000,000 combined, per occurrence,*
 - *(iii) **contractor's liability, workers' compensation, employer's liability, and automobile** insurance,*
 - *(iv) **professional liability** insurance for any engineer or architect providing services in connection with the Improvements, and*
 - *(v) **flood insurance** if applicable.*
- *All policies shall name the **City as an additional insured.***

Non-performance remedies

- *Clawbacks*

- *In the event that, following the City's expenditure of the Local Match, Developer fails to construct the Facilities and complete the Redevelopment Project in accord with the time limits set forth in this Agreement, Developer hereby agrees and covenants to **pay to the City immediately and without further demand an amount equal to the Local Match...***
- *...If during any portion of any year in which the grant of tax abatement remains in effect Developer shall fail to maintain 100 "full time equivalent jobs" at the Redevelopment Area, Developer shall make with respect to all real property in the Redevelopment Area owned by the Developer **payments in lieu of taxes** equal to that amount which would have been levied and collected on the land and improvements to such real property in and **for the year in which such failure occurred.***

Non-performance remedies

- *Liquidated Damages*
 - *Notwithstanding any other remedy available to the City, **liquidated damages** in the amount of One Thousand Dollars (\$1,000.00) for each month of **unexcused delay** in the completion of the Improvements may be assessed in favor of the City in the event of failure of Developer to complete the portions of the Improvements within the times provided in this Agreement.*
 - *The City shall be entitled to enforce the terms of this provision by civil action. The parties hereto each represent and warrant to the other that in the event of unexcused delay of the completion of the Improvements, the City shall suffer in each such month **material damages, the amounts of which are difficult to ascertain**, and, accordingly, the amounts assessed under this paragraph constitute **liquidated damages and not a penalty for non-performance**.*

Project completion

- *Acceptance of improvements*
 - *Upon satisfactory completion of the Improvements (or portions thereof, as applicable), **Developer shall convey to the City all of its right, title and interest in the Improvements** (including, without limitation, such permanent easements for use, access and maintenance as may be reasonably required) and the City shall accept same....*
 - *...the Improvements shall be deemed **complete only upon dedication to and acceptance by the City**; provided that, the City may elect at its sole discretion, to accept portions of the Improvements if deemed to be in the City's interest.*
 - *From the date of substantial completion of the Improvements through the date of acceptance by the City, **Developer shall maintain at Developer's sole cost and expense the Improvements** as constructed in a condition satisfactory to permit public dedication and acceptance.*

Risk mitigation

■ *Indemnification*

- *The Developer shall **indemnify, defend and hold harmless** the City, its officials, agents, employees and representatives acting in any capacity from any cause, action, proceeding, demand, arising out of...*
- *...upon written request of the City, shall promptly and at no cost to the City provide assurances satisfactory to the City, which **assurances may be provided through the obtaining by Developer of an irrevocable letter of credit** in favor of the City in a form acceptable to the City and drawn on a local financial institution or by other means acceptable to the City, that the Developer has committed sufficient financial resources to satisfy all indemnification obligations hereunder.*
- *Developer's **indemnification obligations** hereunder shall **survive termination of this Agreement** for any reason.*

Risk mitigation

- *“Third Party Action”*
 - *“...shall mean any action, proceeding or demand initiated by a party other than a party to this Agreement and **directed to the City, or naming the City as a party** and arising out of the approval of the Development Plan or any portion thereof...”*
 - *Developer shall have the **right, but not the obligation, to assume the costs of defense** of any Third Party Action; provided that the City shall have no obligation to defend or to assume the costs of defense of any such action. All costs of any such defense, whether incurred by Developer or the City shall be deemed **additional Reimbursable Project Costs**...*
 - *In each such event, **Developer shall indemnify** and hold the City harmless from all such Third Party Actions...*

Risk mitigation

- *Limiting liability to Developer*

- *5. Public Liability Limited. The parties hereto agree that **neither the City nor any official**, agent, employee, or representative thereof **shall have** any liability in damages or any other **monetary liability to Developer** or its successors, assigns, heirs and personal representatives in respect of any suit, claim, or cause of action arising out of this Agreement.*
- *7. City Representatives Not Personally Liable. **No official**, agent, employee, or representative of the City **shall be personally liable to Developer** in the event of any default or breach by any party under this Agreement, or for any amount which may become due to any party or on any obligations under the terms of this Agreement other than for intentionally wrongful conduct of such party.*

Land acquisition & assembly

- *Eminent domain*
 - *Understanding scope of risk*
 - *Financial*
 - *Developer non-payment*
 - *Exceptions/increased costs*
 - *Political*
 - *When to initiate (“trigger”)*
 - *Limits/fairness to condemnees*

Allocating financial risk

- *Unwinding condemnation*

- *Developer covenants and agrees in connection with any condemnation proceeding initiated by the City that: (i) Developer shall first **satisfy all jurisdictional prerequisites** necessary for the initiation of such proceeding, and (ii) **Developer shall indemnify, defend, and hold the City harmless** from any counter suits, claims or actions from owners of property interests or other claims or awards of damages or attorneys' fees or costs resulting from or arising out of the condemnation proceedings.*
- *Upon the rendering of any condemnation award, Developer, on behalf of the City, shall promptly pay into court the full amount of such award. **If Developer fails for any reason to pay into court the full amount** of such condemnation award within thirty (30) days of such order, **then the City shall promptly take any and all such actions necessary to cause the withdrawal and vacation of all condemnation petitions** filed by or on behalf the City.*

Allocating financial risk

- *Initial security*

- *...shall mean an **irrevocable letter of credit payable to the City on demand** (or automatically, in the event not extended for the period required by this Agreement) in a form and substance acceptable to the City and provided by Developer pursuant to this Agreement, in an initial aggregate total amount equal to One Hundred Thousand Dollars (\$100,000.00).*
- *Provision of the Initial Security shall be a **precondition of the City's initiation of any action in condemnation** and may be drawn upon by the City to satisfy Developer's obligations, including any obligations of indemnification, and, once issued, the Initial Security shall remain in force until six (6) months after all awards are conclusively determined, whether by settlement or by final, non-appealable order.*

Allocating financial risk

- *Pending awards*

- *...shall mean an award for any parcel or portion which has been taken by eminent domain in accordance with this Agreement and for which such **award is not yet final** as a result of any objection or **exception filed or appeal taken**.*
- *Contemporaneous with payment by the City on behalf of Developer of an award and acquisition of legal title to any parcel, Developer shall provide an irrevocable letter of credit naming the City as beneficiary, or such other collateral or bond which the City may accept in the City's sole discretion, in an aggregate total amount equal to **150 percent of the amounts of all Pending Awards** which shall remain in force until such time as all **Pending Awards have been liquidated, settled, compromised, or otherwise resolved and paid**.*

Mitigating political risk

- *Required negotiation period*
 - *Within ten (10) days of the date of this Agreement, Developer shall commence reasonable efforts to acquire each of the parcels comprising the Property by negotiation. **Developer shall have a period of six (6) months from the date of this Agreement to obtain agreements or contracts for acquisition by negotiation** whether by obtaining written purchase options, or by obtaining the right to acquire the properties, or both.*
- *Limiting eminent domain to “holdouts”*
 - *Provided that Developer has obtained written **consent to acquisition of at least 75 percent of the property owners** of the Property to be developed, Developer may request in writing that the City initiate eminent domain proceedings to acquire the balance of the Property at the sole expense of Developer.*

Project financing basics

- *When to use:*
 - *“Pay-as-you-go;” notes; bonds*
 - *Impact of cancellation*
- *Selection of financing team*
 - *Conflicts of interest*
 - *Costs of issuance, scope*
 - *Public offering and private placement*

Other state/federal requirements

- *Prevailing wage*

- *To the full extent that prevailing wage or other wage and hour statutes or requirements apply to any of the Improvements, **Developer hereby covenants and agrees to take all such actions as are necessary** to apply for wage and hour determinations and to otherwise comply with such laws, regulations or requirements.*

- *Bonding requirements*

- *Developer (together with any contractors engaged or employed by Developer) **hereby covenants and agrees to take all such actions as are necessary** to obtain and furnish all applicable payment bonds pursuant to chapter 107 of the Revised Statutes of Missouri, as amended, or other bonding requirements.*

- *E-verification, etc.*

Future cooperation

- *Determining future revenues*
 - *The City and Developer agree to cooperate and take all reasonable actions necessary to cause TIF revenues to be paid into the Special Allocation Fund. To assist the City in calculating TIF revenues, **Developer shall use reasonable efforts to supply** or cause to be supplied to the City, copies of the following:*
 - (i) **State sales tax returns** filed with the Department of Revenue promptly after filing by “sellers” located on the Property; and
 - (ii) **Monthly invoices received for utility services** provided to the Property including, but not limited to electric, natural gas, and telephone services.
 - *Developer shall cause the foregoing reporting obligations to be a **covenant running with the land** specifically enforceable by the City against any purchaser, lessee, transferee, or other user of any portion of the Property...*

Maintaining immunity, releases

- *Sovereign immunity*
 - **Nothing** in this Agreement shall be construed or deemed to constitute a waiver of the City's sovereign immunity.
- *Releases*
 - **Developer hereby releases** from and covenants and agrees that the City shall not be liable **for damages or injury to Developer** or any other person who may be about the Property or the Work or **for any loss or damage to property** or any injury to or death of any person occurring about or resulting from the construction of the Work or **for claims arising from acquisition of the Property**, including, but not limited to, location of hazardous wastes, hazardous materials or other environmental contaminants on the Property or **for any loss, damage or penalty respecting non-compliance by Developer with applicable state, federal and local environmental laws, regulations and ordinances.**

Maintaining police power authority

- *Generally*

- *...provided that **nothing in this Agreement shall require the City to grant any permit approvals**, other than as may be required of the City exercising the City's police power under applicable law.*

- *Reviews of plans & specifications*

- *If the City rejects the Plans and Specifications, said rejection shall specify any and all deficiencies in the Plans and Specifications relating to lack of conformity with the Development Plan or this Agreement or with applicable City codes, ordinances and regulations; provided that the City's **failure to specify deficiencies in the Plans and Specifications relating to City codes, ordinances, and regulations shall not relieve the Developer of the Developer's obligations** to construct the Improvements in accordance therewith.*

Limiting assignment

- *Developer affiliates*
 - *The rights, duties and obligations of this Agreement shall be assignable by Developer **only to an entity “controlled by” or “affiliated with” Developer.***
- *Other successors*
 - *Any other **assignment shall be subject to the prior written approval of the City,** which approval shall not be unreasonably withheld or delayed; provided that the City shall consider the approval of a proposed assignee **based upon such assignee’s experience and financial capability** to undertake and complete the Redevelopment Project in accordance with this Agreement.*

“Boiler plate”

- *Choice of law, venue*
- *Notices*
- *Severability*
- *Amendment*
- *Binding effect*
- *Headings*
- *Entire agreement*
- *Term of agreement*

Questions & answers

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