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Development Agreements: Basics and Beyond

Reid C. Wilson

with contributions by
James L. Dougherty, Jr.

Author contact information:

Reid C. Wilson
Wilson, Cribbs & Goren, P.C.
Houston, TX
rwilson@wcglaw.net
713-222-9000

James L. Dougherty, Jr.
Attorney at Law
Houston, TX
jim@jldjr.com
713-880-8808

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DEVELOPMENT AGREEMENTS: BASICS AND BEYOND

I. INTRODUCTION

Development Agreements are in increasingly frequent use in Texas. Since Development Agreements meld private real property law (based upon contract law principles) with local government law (based upon public law principles), they present unique issues a lawyer might not otherwise encounter. This paper addresses important issues in structuring, negotiating, and drafting Development Agreements.

II. WHAT ARE DEVELOPMENT AGREEMENTS?

In this paper, a “Development Agreement” is any contractual agreement between a municipality (city, town or village)¹ and the owner of real property relating to development or redevelopment of that property. The scope could cover “land development” (planning, platting, zoning, engineering, and infrastructure), “vertical” improvements (buildings and other structures for human occupancy), or both. Vertical improvements could include not only new construction but also renovation, remodeling or adaptive reuse of existing improvements.

Benefits often sought by land owners:

- Money (including reimbursements for development costs)
- Land (or removal of encumbrances like public easements or rights of way)
- Public infrastructure (or related reimbursement), e.g., water, sewer, drainage, streets, etc.
- Regulatory relief (or stability)
- Deferral of annexation (where applicable)

Benefits often sought by municipalities:

- Increased tax base – property and sales tax
- Economic development: additional jobs and/or diversification of job base
- Community amenities: entertainment, shopping, work force housing, etc.
- Public infrastructure: installed and paid for by developer (sometimes reimbursed by the city)
- Higher-quality development

A key purpose of almost any Development Agreement is to encourage and support the type of development described in the agreement. A core principle is the concept that “but for” the agreement, the development would either not occur at all or would occur with a different form, quality or timing. For example, the City of Austin has entered "Planned Development Area Agreements" (or "PDA Agreements") to recruit major employers, especially in "high-tech"

¹ Similar contracts can be made with other local government units, e.g., a county or any of the proliferating types of special districts such as municipal utility districts, tax increment reinvestment zones, municipal management districts, etc. The governing laws will vary depending upon the type of unit.

industries. Typically, such agreements would involve large tracts of land, designate industrial districts and provide. . .

. . . for the extension of city water and wastewater services to the property (generally financed with substantial funds paid by the city for the cost of such extensions). These agreements have also placed a restriction on the ability of the city to annex the property. In exchange for obtaining city services and avoiding city ad valorem taxes for a period of years, the city has been able to include provisions in the PDA Agreements that limit the uses of the property to specific "clean" industrial or research and development uses generally consistent with a general land use plan. These provisions impose "performance standards" related to noise, smoke, emissions, the handling and use of hazardous materials, and other city zoning ordinances otherwise applicable only to properties within the city limits, such as height, setback, parking, building coverage, landscaping, sign, and lighting limitations. The provisions in the PDA Agreements also address issues related to providing access, traffic regulation, subdivision, drainage, and water quality facilities. R. Alan Haywood & David Hartman, *Legal Basics for Development Agreements*, 32 Texas Tech Law Review 955, 959 (2001) ("Haywood & Hartman").

Traditional land-use regulations---planning, zoning and building codes---restrict and control development. Development Agreements can permit local governments to support, entice and encourage development, and they sometimes attempt to limit traditional land-use regulations. This is a new world for many local governments, profoundly different from the traditional model of local land-use regulation. One academic commentator has observed that a contract-based model "fundamentally alters the foundational principles of land use regulation." Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. LAW REV. 591, 595 (2011) ("Selmi"). As more fully discussed in this paper, legal doctrines developed over the years for the traditional model of land-use regulation are difficult to reconcile with contract-based regulation---and this creates an atmosphere of uncertainty about the validity and enforceability of Development Agreements. That uncertainty is anathema to the private sector, which often seeks to use Development Agreements to reduce risk and to provide material economic benefits critical to a planned project.

III. STATE-LAW AUTHORITY FOR DEVELOPMENT AGREEMENTS

A. Common Law Agreements & General Statutes

In general, cities have the power to enter into contracts as part of their authority to operate and perform municipal functions. *See, for example:* TEX. LOC. GOV'T CODE §51.014 (Type A general-law cities may "contract with other persons"); TEX. LOC. GOV'T CODE §51.053 (Type B general law cities generally have same authority as Type A general law cities); TEX. LOC. GOV'T CODE §51.051(b) (Type C general law cities with 201 to 500 inhabitants generally have same authority as Type B general law cities). TEX. LOC. GOV'T CODE §51.072(a) (home-rule cities have "full power of local self-government"). *See, also, Haywood & Hartman.*²

A statute may authorize the "municipality" to enter into agreements. Another statute may authorize the "governing body," usually the city council. Regardless of the wording of the statute, it is wise to obtain specific approving action *by express vote of the governing body*. An

² The *Haywood & Hartman* article focuses on enforceability of a "common law" development agreement (*i.e.*, one that does not have a basis under any of the many statutory provisions supporting development agreements). Key issues covered are: (1) whether a city is legally contracting away its legislative authority or (2) scope of municipal authority within extraterritorial jurisdiction---whether cities have only the powers expressly granted by the legislature. *See, City of Austin v. Jamail*, 662 S.W.2d 777, 782 (Tex. Civ. App.—Austin 1983, writ dismissed), *City of West Lake Hills v. Westwood Legal Defense Fund*, 598 S.W.2d 681, 683 (Tex. Civ. App.—Waco 1980, no writ).

ordinance may be required by statute or charter, but even if not: (i) an ordinance bestows a higher dignity of approval than a motion or resolution, and (ii) an ordinance can repeal all ordinances, motions and resolutions in conflict.³ Applicable procedural rules (*e.g.*, notice, quorum, number of votes, minutes, possible vetoes and referenda) and execution formalities (signatures, attestations, seals) should be checked carefully.⁴

A critical procedural detail is the description of a proposed agreement in required meeting notices and agendas. Rulings under the Texas Open Meetings Act, TEX. GOV'T CODE, Chapter 551, indicate that a generally-worded notice may not be sufficient, particularly for agenda items "of special interest to the public." *See, for example, Cox Enterprises, Inc. v. Board of Trustees*, 706 S.W.2d 956, 958 (Tex. 1986). A Development Agreement, especially for a large-scale development or for a long term, could easily be considered "of special interest to the public." Therefore, some detail about the agreement would usually be required to be shown in each meeting notice, to avoid violating Chapter 551.⁵

In addition to the general contracting authority of cities, there are countless statutes authorizing municipal agreements. Examples of statutes particularly applicable to Development Agreements are listed and described below.

B. Economic Development or "380" Agreements (TEX. LOC. GOV'T CODE Chapter 380)

In 1989, cities⁶ were granted specific statutory authority for "economic development programs." The Development Agreements based upon these statutory provisions have become commonly known as "380 Agreements." These provisions provide broad authority for Development Agreements by cities if a proposed project is within the city's limits or extraterritorial jurisdiction. The purpose of the program is broadly stated as "to promote state or local economic development and to stimulate business and commercial activity in the

³ This is a common provision in ordinances. It might repeal "to the extent of the conflict only."

⁴ *See City of Bonham v. Southwest Sanitation*, 871 S.W.2d 765, 767 (Tex. App.--Texarkana 1994) where the court wrote: "A city or county may contract only upon express authorization of the city council or commissioners court by vote of that body reflected in the minutes. *Hill Farm, inc. v. Hill County*, 425 S.W.2d 414 (Tex. 1968); *City of Bryan v. Page*, 51 Tex. 532 (1879); *Corpus Christi v. Bayfront Associates*, 814 S.W.2d 98 (Tex. App.--Corpus Christi 1991, writ denied); *Stirman v. City of Tyler*, 443 S.W.2d 354 (Tex. Civ. App.--Tyler 1969, writ ref'd n.r.e.); *First Nat'l Bank of Marlin v. Dupuy*, 133 S.W.2d 238 (Tex. Civ. App.--Waco 1939, writ dism'd judgm't cor.); 52 TEX. JUR. 3D Municipalities § 360, at 426-27 (1987). Statements or acts of the mayor or other officers or governing body members are ineffectual. *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451 (1948); *Alamo Carriage v. City of San Antonio*, 768 S.W.2d 937 (Tex. App.--San Antonio 1989, no writ). Persons or entities contracting with the governmental unit are charged by law with notice of the limits of their authority and are bound at their peril to ascertain if the contemplated contract is properly authorized. *State v. Ragland Clinic-Hospital*, 138 Tex. 393, 159 S.W.2d 105, 107 (1942). Proof of the governing body's acts may only be supplied by the authenticated minutes of the meeting at which the action occurred, unless the minutes have been lost or destroyed. *Wagner v. Porter*, 56 S.W. 560 (Tex. Civ. App. 1900); 52 TEX. JUR. 3D Municipalities § 360, at 427. A plaintiff suing to establish a contract with a city has the burden to both plead and prove that the minutes show the council's act in authorizing or ratifying the contract. *Wagner v. Porter*, 56 S.W. at 561." *See, also*, the requirements for establishing a waiver of immunity from suit for breach of contract under TEX. LOC. GOV'T CODE §271.152.

⁵ See TEX. GOV'T CODE § 551.141: "An action taken by a governmental body in violation of this chapter is voidable." In *Save Our Springs Alliance, Inc. v. City of Dripping Springs*, 304 S.W.3d 871, 888 (Tex. App. Austin 2010), the following description in a meeting notice was held sufficient: "Consider Approving a Development Agreement with Cypress-Hays, L.P., including adopting Ordinance No. 1280.1 Designating a District under Section 42.044 of the Texas Local Government Code."

⁶ TEX. LOC. GOV'T CODE Chapter 381 is a similar statute for counties.

municipality.” The city may make “loans and grants of public money” and provide “personnel and services of the municipality.”

Home rule cities with populations over 100,000 may make grants to certain tax exempt non-profits for “development and diversification of the economy of the state, elimination of unemployment or underemployment in the state and development or expansion of commerce in the state.” Any home rule city may contract with a development corporation created under the Development Corporation Act, TEX. LOC. GOV’T CODE Chapter 501, *et. seq.* (originally adopted in 1979) and grant funding for “development and diversification of the economy of the state, elimination of unemployment or any employment of the state and development and expansion of commerce in this state.” The specific grant authority referenced in the prior sentences may not be funded by bond proceeds or other municipal obligations payable from ad valorem taxes.

Because of the broad statutory authority, 380 Agreements have become the preferred type of Development Agreement when a local government desires to financially incentivize development. Some cities use 380 Agreements in lieu of the creation of special districts such as tax increment reinvestment zones, which have burdensome statutory requirements for creation and cumbersome (and expensive) bureaucracies. A 380 Agreement can be structured to become the financial equivalent of a tax increment reinvestment zone.

C. Development Participation Agreements (TEX. LOC. GOV’T CODE §212.071)

In 1989, cities with populations of 5,000 or more were authorized to make developer participation contracts without following the competitive sealed bidding procedure. Such contracts can be made “with a developer of a subdivision or land *in the municipality* to construct public improvements, *not including a building*, related to the development.” (emphasis added). Under this statute, the developer would typically construct the improvements and the city would participate in their costs. The city’s cost participation is limited by its population and the type of development.

City participation permitted	City population limitation
Up to 30 %	less than 1.8 million
Up to 70%	1.8 million or more
Up to 100% (for drainage improvements for affordable housing*)	1.8 million or more-
Up to 100% (for over-sizing of improvements)	No limit

*defined as “housing which is equal to or less than the median sales prices, as determined by the Real Estate Center at Texas A&M University, of a home in the Metropolitan Statistical Area (MSA) in which the municipality is located”

However, a 2005 statute now codified as TEX. LOC. GOV'T CODE §212.904, could impose an overlapping restriction on developer participation, in some cases. If a city, “as a condition of approval for a property development project,” requires a developer to bear costs of “municipal infrastructure improvements,” the developer’s share may not exceed an amount that is “roughly proportionate” to the proposed development. The statute requires an engineer retained by the city to determine that amount. The statute sets up appeal procedures---including an appeal to district or county court---and prohibits a city from requiring a developer to waive the right of appeal.

The developer must provide a performance bond and make records available for city inspection. A city, by ordinance, may require additional safeguards against “undue loading of cost, collusion, or fraud.”

Development Participation Agreements can resemble municipal utility district reimbursement agreements typically used outside city limits.

D. ETJ Development Agreements (TEX. LOC. GOV'T CODE §212.172)

In 2003, cities smaller than 1.9 million population were authorized to enter into Development Agreements with a land owner *in their extraterritorial jurisdiction*. Although this statute is the most comprehensive legislative authorization for Development Agreements, *it does not apply within the city limits of any city*.

Statutory requirements/limitations:

- In writing
- Legal description of the affected land
- Approved by the governing body
- Recorded in the real property records
- Maximum 45-year term

Specific language about binding nature:

- “Binding on the municipality and the land owner and on their successive successors and assigns for the term of the agreement”
- “Not binding on, and does not create any encumbrances to title as to, any in-buyer of a fully developed and improved lot within the development, except for land use and development regulations which may apply to a specific lot.”

Authorized subject matter:

- Agreement not to annex, and/or plan for annexation and the terms thereof
- City planning authority under a “development plan ... under which certain general uses and development of the land are authorized”
- City’s current land use and development regulations enforced by the city
- Additional land use and development regulations enforced by the city
- “Provide for infrastructure for the land including (a) streets and roads; (b) street and road drainage; (c) land drainage; and (d) water, wastewater and other utility systems”
- Environmental regulations enforced by the city
- “Specify the uses and development of the land”
- “Other lawful terms and consideration the parties consider appropriate”

An ETJ Development Agreement is specifically deemed a “permit” under TEX. LOC. GOV’T CODE Chapter 245 (sometimes called the “vested rights” law). Prior agreements which meet the requirements of this section are validated. A city may not require such an agreement as a condition for providing utility service.

The breadth of authority for ETJ Development Agreements should be sufficient for any Development Agreement in the extraterritorial jurisdiction of any city *other than Houston* (only city with over 1.9 million population).

E. Industrial District Agreements (TEX. LOC. GOV’T CODE §§42.044, 43.136)

In 1987, cities were authorized to designate any parts of their extraterritorial jurisdictions as “industrial districts” and to enter into agreements with land owners in those districts.

An “industrial district” was not specially defined, but the section states it “has the meaning customarily given to the term but also includes any area in which tourist-related businesses and facilities are located.”

The definition of “industrial” includes: “of or resulting to industry;” and “a company engaged in industrial production or service;” and “a company engaged in industrial enterprises.” See, e.g., Merriam-Webster’s Dictionary, available at <http://www.merriam-webster.com>; *Wall Street Words*. Houghton Mifflin Company; Dictionary.com <http://dictionary.reference.com/browse/industrial>>).

The definition of “industry” includes “any general business activity or commercial enterprise. See, e.g., *Dictionary.com Unabridged (v 1.1)*; Random House, Inc.; Dictionary.com <http://dictionary.reference.com/browse/industry>).

Industrial uses typically include manufacturing, distribution, warehouse, and storage, as well as uses related thereto. In a zoned city, the zoning ordinance may contain a definition of “industrial” use as an indication of what that city might consider appropriate in an industrial district. Case law implies a broad meaning. See *SWEPI LP v. Railroad Commission of Texas*, 314 S.W.3d 253 (Tex. App.--Austin 2010, pet. denied), which relied on zoning authorities to conclude that the term “industrial use” could include “landfill.” See, also, *Florida v. Jacksonville Port Authority*, 305 So.2d 166 (1974), which dealt with the issue of whether

particular capital projects constituted an “industrial plant” within the meaning of the Florida Constitution, which did not define this term. *Id.* at 167. The projects included a proposed food distribution center and a commercial laundry facility. *Id.* The court held that the term “industry” has a broad definition in common usage. Both uses were held within the definition of “industrial plant.” *Id.* at 168-69.

An agreement under §42.044 may include the following provisions:

- Agreement not to annex for up to 15 years
- “Other lawful terms and considerations that the parties agree to be reasonable, appropriate and not unduly restrictive of business activities”
- Renewal for successive periods not to exceed 15 years each (no limit on renewals); All owners within an industrial district must be given the opportunity for renewal

An older statute, now codified as TEX. LOC. GOV’T CODE §43.136, was originally adopted to allow the City of Houston to annex territory around the Houston Ship Channel and the Port of Houston--but only for limited purposes like navigation, transportation and wharves. The statute actually applies to any “special law municipality located along or on a navigable stream,” and it allows the annexing city to designate “industrial districts” in such limited-purpose annexation areas. In a designated industrial district, the city may enter into contracts with land owners including: (i) guarantees of immunity from general-purpose annexation, and (ii) “other terms considered appropriate by the parties.” This statute is the likely basis for TEX. LOC. GOV’T. CODE §42.044, which has similar wording. The City of Houston has entered many such agreements along the Houston Ship Channel.

F. Planned Unit Development District Agreement (TEX. LOC. GOV’T CODE §42.046)

Effective in 1989, if a city dis-annexes land previously annexed for limited purposes, the city may enter into a Planned Unit Development District Agreement with the land owner.

Requirements:

- Written agreement
- Minimum 250 acres
- Maximum 4 land owners
- Recorded where the land is located

Subject matter:

- Agreement not to annex for up to 15 years
- “Authorize certain land uses and development”
- Extension of “certain municipal land use and development regulations to the land and enforced by the city”
- “Vary any watershed protection regulations”
- “Authorize or restrict the creation of political subdivisions on the land”
- “Other terms and considerations the parties deem appropriate”

Binding character:

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- The agreement is “binding upon all subsequent governing bodies of the municipality and subsequent owners of the land”

An ETJ Development Agreement can have similar provisions, but a Planned Unit Development District Agreement can theoretically be used in the extraterritorial jurisdiction of Houston, where an ETJ Development Agreement cannot.

G. Neighborhood Empowerment Zone Agreement (TEX. LOC. GOV'T CODE CHAPTER 378)

In 1999, cities were authorized to create, by resolution, one or more “Neighborhood Empowerment Zones” to promote (i) affordable housing, (ii) economic development, or (iii) social services, education or public safety. The agreements may:

- Waive construction, inspection and impact fees
- Refund sales tax (max. 10 years)
- Abate property taxes (subject to limits in TEX. TAX. CODE §312.204)
- Set baseline performance standards (such as Energy Star)

H. Utility System Agreements (TEX. LOC. GOV'T CODE CHAPTER 552)

Cities have longstanding, broad authority to provide utility systems, including water, sewer, gas, and electricity systems. Any city may “purchase, construct, or operate a utility system *inside or outside the municipal boundaries.*” TEX. LOC. GOV'T CODE § 552.001(emphasis added). The statute includes special authority for a municipality “to contract with persons outside its boundaries to permit them to connect with those utility systems on terms the municipality considers to be in its best interest.”

I. Impact Fee Agreements (TEX. LOC. GOV'T CODE CHAPTER 395)

In 1989, municipal impact fees (sometimes called “capital recovery fees” or “subsequent user fees”) were restricted by an intricate regulatory scheme under Chapter 345. Chapter 345 also:

- authorizes cities to enter into agreements with landowners of platted land regarding “time and method of payment”
- recognizes that developers may agree to construct improvements or expansions of facilities covered by impact fees, but requires that the city either:
 - (i) credit the costs incurred by the developer against the developer’s impact fees, or
 - (ii) reimburse the developer from other impact fees.

J. Economic Development Corporations, Public Improvement Districts, Etc. (TEX. LOC. GOV'T CODE Chapters 372, 501, ET SEQ.)

Financing and other support for Development Agreements can sometimes be obtained through agreements involving economic development corporations (*see* TEX. LOC. GOV'T CODE, Chapters 501, et seq.), public improvement districts (*see* TEX. LOC. GOV'T CODE

Chapters 501, *et seq.*) and other special districts and financing vehicles. For more information, see materials listed in Exhibit C of this paper (Additional Resources, Forms & Materials).

K. Tax Increment/Tax Abatement Agreements (TEX. TAX CODE CHAPTERS 311 & 312)

Since 1981, cities have been authorized to enter into special tax agreements. Under TEX. TAX. CODE Chapter 311, a city can create a “tax-increment reinvestment zone” or “TIRZ,” for a development area. The city can apply the increase in property tax revenues that results from a development to support the development, typically by paying for public infrastructure. Since 1983, the “Property Redevelopment and Tax Abatement Act” (now codified in TEX. TAX. CODE Chapter 312) has allowed cities to adopt guidelines for tax abatements and enter into agreements with individual owners and lessees to abate taxes on specific properties, typically for a term of years. Although TIRZ agreements or tax abatement agreements, by themselves, are not usually thought-of as Development Agreements, they can be combined with other types of Development Agreements. For more information, see materials listed in Exhibit C of this paper (Additional Resources, Forms & Materials).

L. Public-Private Partnership Agreement (Tex. Gov’t Code Chapters 2267 and 2268)

In 2011, the Legislature adopted a comprehensive public-private partnership statute, codified in TEX. GOV’T CODE Chapters 2267 and 2268. It authorizes cities (and other governmental entities) to join with private entities to provide “qualified facilities” for public use, which may include:

- (i) water supply and waste treatment facilities,
- (ii) other public facilities, such as hospitals, schools, recreational facilities, public buildings, some transportation facilities (but not highways), and
- (iii) “any improvements necessary or desirable” to publicly-owned “unimproved real estate.”

Clearly intended to encourage private investment in public facilities, the new law:

- Requires adoption of guidelines for analyzing proposed projects
- Allows solicitation of proposals or bids
- *Authorizes dedications and conveyances of public property and grants or loans of public funds*
- Allows private entities to own, lease, use and operate projects (and set “user fees”)
- Requires submission of proposed agreements to the “Partnership Advisory Commission (composed of eight Legislative-branch members plus three appointed by the Governor)
- *Requires a “comprehensive agreement” with a governmental entity, for each project*
- Requires performance and payment bonds for construction, remodeling, etc.
- Requires private entities to pay costs of eminent domain and relocation of utilities
- Allows private entities to “design and construct” projects, if they generally follow public procurement laws.
- Requires public notice of proposed projects

A city or other governmental entity must adopt a resolution to “elect” to operate under Chapter 2267. In the context of Development Agreements, the new law would apply best to projects focused on facilities for “public use” (even if they are privately owned and operated).

IV. VALIDITY AND ENFORCEABILITY

A. Private vs. Public Parties

If the parties to a Development Agreement were all private persons and entities, there might be little concern about validity and enforceability, but Development Agreements involve local governments. Local governments can raise unique and potent legal defenses, even in the face of an unambiguous contract.

Concerns about validity or enforceability can undermine the effectiveness of Development Agreements to incentivize worthy projects. For example, if a Development Agreement requires the city to reimburse the developer for infrastructure, the developer may pledge the expected reimbursements as collateral for a development loan. In effect, the developer will try to convince a lender that the reimbursement funds are the equivalent of “equity” contributed by the developer. In the current lending environment, development loans receive close scrutiny, both in underwriting and documentation. Lenders and their counsel will closely review Development Agreements for conditional language and are aware of validity and enforcement issues. Lenders often ask for legal opinions from the developer’s counsel relating to validity and enforceability and may request an opinion on a Development Agreement. Serious doubts about validity or enforceability can scuttle a loan, sinking the financing for an otherwise-worthy project.

B. Constitutional Restrictions

1. Granting public funds or lending credit

The Texas Constitution generally forbids granting public funds or lending public credit to private parties. Article III, Section 51 proclaims: “ The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever; . . .” Section 52 echoes the same rule: “Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company. [. . .]”

However, courts have interpreted these sections to allow some payments to private parties. In *Tex. Mun. League v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383-384 (Tex. 2002), the Supreme Court wrote:

. . . [S]ection 52(a) does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: (1) serves a legitimate public purpose; and (2) affords a clear public benefit received in return. See *Edgewood IV*, 917 S.W.2d at 740; *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex. 1972)(citing *Davis v.*

City of Lubbock, 160 Tex. 38, 326 S.W.2d 699 (Tex. 1959)); Brazos River Auth. v. Carr, 405 S.W.2d 689, 694 (Tex. 1966); Byrd, 6 S.W.2d at 740. A three-part test determines if a statute accomplishes a public purpose consistent with section 52(a). Specifically, the Legislature must: (1) ensure that the statute's predominant purpose is to accomplish a public purpose, not to benefit private parties; (2) retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and (3) ensure that the political subdivision receives a return benefit. See Atkinson v. City of Dallas, 353 S.W.2d 275, 279 (Tex. Civ. App.-Dallas 1961, writ ref'd n.r.e.); Gillham v. City of Dallas, 207 S.W.2d 978, 983 (Tex. Civ. App.-Dallas 1948, writ ref'd n.r.e.). See generally Mike Willatt, Constitutional Restrictions on Use of Public Money and Public Credit, 38 TEX. B.J. 413, 421 (1975).

A 1987 decision indicated that a public agency must retain “some form of continuing public control” to ensure that it “receives its consideration: accomplishment of the public purpose.” *Key v. Commissioners Court of Marion County*, 727 S.W.2d 667, 669 (Tex. App.--Texarkana 1987, no writ). The opinion noted that a contract could be the means of exerting such continuing control and satisfying the constitution.

Also in 1987, a constitutional amendment expressly authorized loans or grants to attract to promote economic development. Article III, Section 52-a of the Texas Constitution, which was further amended in 2005, now reads as follows:

Sec. 52-a. LOAN OR GRANT OF PUBLIC MONEY FOR ECONOMIC DEVELOPMENT. Notwithstanding any other provision of this constitution, *the legislature may provide for* the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state. Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue. A program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character.(emphasis added)

Section 52-a requires legislative authorization. It is cited as authority for Chapter 380, TEX. LOC. GOV'T CODE, and much of the language is repeated in that Chapter. Texas Attorney General Opinion No. DM-185 (1992) concluded that Chapter 380 implements Section 52-a. As a result, a Development Agreement that closely tracks Section 52-a and Chapter 380 should avoid constitutional difficulties under the public grant or loan restrictions of Sections 51 and 52.

2. Creating unfunded debts

In matters of municipal finance, Texas is a “pay-as-you-go” state. Sections 5 and 7 of the Texas Constitution prohibit a city from incurring any “debt” without simultaneously levying a tax to cover interest and create a sinking fund to repay principal. The term “debt” covers more than a bond or note. The term covers “any pecuniary obligation imposed by contract.” *Texas & N.O.R.R. Co. v. Galveston County*, 169 S.W.2d 713, 715 (1943). That case recognized a “current funds” exception to the unfunded-debt rule, if an obligation was . . .

. . . at the time of the agreement, within the lawful and reasonable contemplation of the parties, to be satisfied out of the current revenues for the year or out of some fund then within the immediate control of the county. In other words, if the obligation does not arise as an item of ordinary expenditure in the daily functioning of the county government or if it is not to be paid out of funds then in the county treasury legally applicable thereto, it is a debt and falls under the

condemnation of the Constitution, unless the required provision for its payment is made at the time the obligation is incurred. *McNeal v. City of Waco*, 89 Texas 83, 33 S.W., 322; *Stevenson v. Blake*, 131 Texas, 103, 113 S.W. (2d) 525. *Id.*

Courts have sometimes recognized a “special fund” exception to the unfunded-debt rule. *City of Brownsville v. Mun. Admin. Servs.*, 1998 Tex. App. LEXIS 3559, 9-11 (Tex. App. Corpus Christi June 11, 1998)(no pub.) upheld a contingency fee contract in which the city promised to pay only from revenues it might gain as a result of a franchise audit. The court wrote: “Contracts may be made without incurring a debt when the debt is made payable out of a special fund raised or to be raised,” citing *City of Laredo v. Frishmuth*, 196 S.W. 190, 193 (Tex. Civ. App.--San Antonio 1917, writ dismissed). *But see, City of Bonham v. Southwest Sanitation*, 871 S.W.2d 765, 769 (Tex. App. Texarkana 1994), which did not recognize future revenues or funds:

Southwest contended that the City could have and should have increased the fee for nonresidents' use of the landfill to \$2.50 per cubic yard and then it would have had sufficient revenues to pay its alleged contract. Such an action, however, would not have satisfied the constitutional requirement unless it was lawfully in force and dedicated at the time the alleged contract with Southwest was negotiated.

The Supreme Court has ruled that a city's obligation to pay, if carefully limited to non-tax sources, is not necessarily a “debt.” In a 1934 case, the court upheld the validity of a city's bonds that were expressly made payable only from non-tax revenues. The court wrote: “In other words the holder of these bonds merely has a claim against the sewer system, its franchise, and the revenues of such system, and the water system. *He can never have any claim against tax funds.* It is settled that such an obligation does not [c]ome within the term debt as used in the above quoted constitutional provision.” *Dayton v. Allred*, 123 Tex. 60, 71-72, 68 S.W.2d 172 (1934)(emphasis added). A later case, *Nederland v. Callihan*, 299 S.W.2d 380, 382 (Tex. App.--Beaumont 1957, writ refused n.r.e.) followed the *Dayton* case and upheld a contract calling for a developer to construct water and sewer lines and requiring the city to reimburse from water and sewer revenues.

In the context of real estate acquisitions and leases by local governments, TEX. LOC. GOV'T CODE §271.903 addresses the unfunded-debt problem. Under that statute, a contract may be held valid, but only as to “current revenues,” so it may not provide long-term stability for a seller or lessor. It reads as follows:

If a contract for the acquisition, including lease, of real or personal property retains to the governing body of a local government the continuing right to terminate at the expiration of each budget period of the local government during the term of the contract, is conditioned on a best efforts attempt by the governing body to obtain and appropriate funds for payment of the contract, or contains both the continuing right to terminate and the best efforts conditions, the contract is a commitment of the local government's current revenues only.

This provision authorizes contracts which are “subject to annual appropriation”. If the payment for the contract is not appropriated in each year's budget, then the local government may terminate the contract.

3. Contracting away governmental power

In a leading case, the Commission of Appeals invalidated an agreement between the City of Taylor and a railroad company. *Bowers v. City of Taylor*, 16 S.W.2d 520, 522 (Tex. Comm'n App. 1929, holding approved). The agreement was embraced in an ordinance calling for the City

to close a public street for 15 years for the exclusive use of the railroad. The Commission reviewed both federal and out-of-state authorities and announced, as a general rule, that “the legislative power vested in municipal bodies is something which cannot be bartered away in such manner as to disable them from the performance of their public functions.”

This general rule has been applied to invalidate: (i) a city’s agreement allowing a free connection to its sewer system; *see Fidelity Land & Trust Co. v. West University Place*, 496 S.W.2d 116 (Tex. Civ. App.--Houston [14th Dist] 1973, writ ref’d n.r.e.), (ii) a water authority’s perpetual agreement to meet all of the water and sewage needs of another utility; *see Clear Lake City Water Authority v. Clear Lake Util.*, 549 S.W.2d 385, 392 (Tex.1977), and (iii) an agreement apparently inhibiting a municipal water authority from collecting revenues from its system; *see Cibolo Creek Municipal Authority. v. City of Universal City*, 568 S.W.2d 699 (Tex.Civ.App.-- San Antonio 1978, no writ). The court in *Pittman v. Amarillo*, 598 S.W.2d 941, 945 (Tex. Civ. App. Amarillo 1980, writ ref’d n.r.e.) summed-up the rule this way: “In short, a municipality cannot, by contract or otherwise, transfer control of its governmental functions to another entity, *absent specific constitutional authorization.*” (emphasis added). *See* TEX. CONST. ART. I, §2 (reserving the people’s “inalienable right to alter, reform or abolish government”) and §17(forbidding “irrevocable or uncontrollable grant of special privileges or immunities”) and *Texas Boll Weevil Eradication Found. v. Lewellen*, 952 S.W.2d 454, 469 (Tex. 1997)(delegation of governmental authority to private parties).

Courts have made exceptions, especially when a City has received benefits under an agreement. In *Pitzer v. Abilene*, 323 S.W.2d 623, 627 (Tex. Civ. App. Eastland 1959), the City of Abilene was held to have received “substantial benefit and advantage in consideration of its promise not to annex East Abilene for a period of three years,” and therefore the City was estopped from annexing that area (in violation of its promise not to annex). *See, also, Austin v. Garza*, 124 S.W.3d 867 (Tex. App. – Austin 2003, no pet.)(City bound to agreement in plat note due to having accepted the right of way dedicated by the plat).

However, the general rule remains in use, especially in the context of zoning. In *City of Pharr v. Pena*, 853 S.W.2d 56, 62 (Tex. App. Corpus Christi 1993), the court wrote: “The passage of a zoning ordinance or amendments thereto is an exercise of legislative power, and a city may not by contract or otherwise barter or surrender its governmental or legislative functions or its police power.” *2800 La Frontera No. 1A, Ltd. v. City of Round Rock*, 2010 Tex. App. LEXIS 243 (Tex.App.—Austin 2010)(mem.op.) involved a Development Agreement that was claimed to inhibit the City from amending the zoning for a 194-acre planned unit development. The court held the agreement “unenforceable.”

C. Governmental Immunity

1. Types of Governmental Immunity

According to the Supreme Court, governmental immunity in Texas has two components: (i) “immunity from liability, which bars enforcement of a judgment against a governmental entity,” and (ii) “immunity from suit, which bars suit against the entity altogether.” *See Tooke v. City of Mexia*, 197 S.W.3d 325, 332-333 (Tex. 2006). A city can waive the first component (immunity

from liability) by entering into a contract. *Id.* However, the Supreme Court has ruled that *only the Legislature* can waive the second component (immunity from suit), and such a waiver must be “clear and unambiguous.” *Id.*

2. Waiver of Immunity From Suit

The legislative waiver (of immunity from suit) that relates most directly to Development Agreements is contained in TEX. LOC. GOV'T CODE §271.152. That statute waives a local government's immunity from suit when it enters into a contract for “providing goods or services.” In *City of North Richland Hills v. Hometown Urban Partners Ltd.* 25, 340 S.W.3d 900 (Tex. Civ. App.—Ft. Worth 2011, no pet.) the court applied the statute to a Development Agreement for a substantial mixed-use project. The agreement covered a broad array of issues relating to the design, construction and city acceptance of public improvements in the context of a large, long term mixed use project. The developer conveyed land to the city for a recreation center and granted the city an easement for 400 parking spaces (to be constructed by the city) adjacent to the recreation center. A city library was built within the project, and zoning, platting and other approvals consistent with the original development intent occurred. However, the recreation center was never constructed because the city decided to move it to another site. Additionally, the city amended the zoning ordinance to require “specific use permits” for multi-family uses within the project. Allegedly, the amendment occurred without the developer's knowledge, and when the developer sought a specific use permit, the city allegedly imposed “impossible conditions” and eventually denied the permit. The developer invested substantial sums in land development, park improvements, land dedicated to the city for public improvements and private building and structures.

The City did not deny it executed the agreement, or that it was authorized to enter into the agreement, or that it was liable thereunder, but instead asserted immunity from suit. Among other duties, the agreement required the developer to:

- prepare “all plans and designs” for public and private use improvements;
- provide public bidding for any third-party contracts;
- “supervise and oversee all such contracts”;
- “exercise due diligence and good faith efforts to insure compliance” with city requirements;
- use “reasonable efforts to guard against any defects or deficiencies in the work of contractors or subcontractors”;
- “reject any work or materials” that do not conform to the contract documents”;
- obtain lien waivers or “bills paid affidavits” from contractors;
- “establish and maintain a central file for all design, construction, and related contractual documents”;
- “coordinate with the appropriate contractors the performance and completion of any unfinished items,”
- “follow the good faith recommendations of the engineer”

The City argued that the Development Agreement was “ultimately a contract for the conveyance of real property,” not for goods or services. Nevertheless, the court held that §271.152 “waives the City's immunity from suit with regard to the Development Agreement

because the Development Agreement is a contract for the provision of services to the City within the meaning of that statute.” The court relied upon two Supreme Court cases, *Kirby Lake Dev., Ltd. v. Clear Lake City Water Auth.*, 320 S.W.3d 829 (Tex.2010) (agreement requiring developers to provide for construction of water and sewer facilities held to be an agreement for provision of services under §271.152) and *Ben Bolt–Palito Blanco Consol. Indep. Sch. Dist. v. Tex. Political Subdiv. Prop./Cas. Joint Self-Ins. Fund*, 212 S.W.3d 320 (Tex.2006)(agreement requiring members to provide some limited services to insurance fund held to be an agreement for services under §271.152).

Other recent cases finding waiver of immunity from suit: *Clear Lake City Water Auth. v. Friendswood Dev. Co.*, 256 S.W.3d 735 (Tex. App.–Houston [14th Dist.] 2008, pet. dismissed) and *Town of Flower Mound v. Rembert Enterprises, Inc.*, 2011 WL 6141584 (Tex. App.–Fort Worth, December 8, 2011, no pet.) (immunity dispute over Development Agreement). *But see SE Ranch Holdings, Ltd. v. City of Del Rio*, No. 04–06–00640–CV, 2007 WL 2428081 (Tex. App.–San Antonio Aug. 29, 2007, pet. denied) (mem. op.) (immunity from suit not waived in dispute over Development Agreement) and *East Houston Estate Apartments, L.L.C. v. City of Houston*, 294 S.W.3d 723 (Tex. App.–Houston [1st Dist.] 2009, no pet.) (immunity from suit not waived in dispute over low-income housing agreement).

The *City of North Richland Hills* opinion included other rulings that could be important in any litigation involving Development Agreements. The court ruled that money-damage limitations in TEX. LOC. GOV'T CODE SEC. §271.153 (limiting claims to “the balance due” and excluding “consequential damages”) do not affect or limit jurisdiction, but they could still limit the amount of a money judgment against a municipality. Also, the court ruled that the developer’s request for a declaratory judgment was an improper “recasting” of a breach-of-contract claim, apparently an attempt to collect attorneys’ fees (which failed). However, the court went on to rule that the developer could maintain a takings claim---independent of the contract claim---even though the alleged taking was based, in part, upon the City’s alleged breach of the contract. The court wrote:

... Appellees allege that the City deprived them of their reasonable investment-backed expectations, and they contend that they had a reasonable expectation—based on seventy-percent of the development being constructed in accordance with the zoning, plats, building permits, Development Agreement, and TIF financing documents and all of which having been in place for several years—that the recreation center and parking spaces would be developed in accordance with those documents. These allegations are sufficient to allege a regulatory taking that unreasonably interfered with Appellees’ investment-backed expectations. See *El Dorado*, 195 S.W.3d at 246-47; *McPhee*, 2009 Tex. App. LEXIS 6625, 2009 WL 2596145, at *2. While the City’s alleged breach of the Development Agreement, standing alone, cannot form the basis of an inverse condemnation claim because it would be nothing more than a recasting of Appellees’ breach of contract claim, see *Holland*, 221 S.W.3d at 643-44, Appellees reference the Development Agreement as only one evidentiary factor to consider in determining whether the City’s actions as a whole constitute a regulatory taking. See *El Dorado*, 195 S.W.3d at 246-47; *McPhee*, 2009 Tex. App. LEXIS 6625, 2009 WL 2596145, at *2. We therefore overrule the City’s seventh issue. *Id.* at p. 916 (emphasis added).

3. Estoppel

City of Austin v. Garza, 124 S.W.3d 867 (Tex. App. – Austin 2003, no pet.) applied the doctrine of equitable estoppel in the context of a development dispute over the enforceability of plat notes. In *Garza*, the city approved a plat for a new development. Subsequently, the owner sought to develop in accordance with the plat, including specific plat notes granting certain benefits to the property. The city sued to invalidate the plat previously approved by the city.

The court held that the city was estopped to deny the validity of the plat since it had accepted the benefits of the plat, including dedicated streets and easements.

An earlier case, *Pitzer v. City of Abilene*, 323 S.W.2nd 623 (Tex. App.- Eastland 1959, no writ), dealt with a non-annexation agreement breached by the city. The court ignored the city's defenses to enforceability of the agreement and applied estoppel despite the city's assertion that the city had abrogated its governmental power of annexation, rendering the contract unenforceable. The court enforced the contract and held that the city's annexation was void, since the city acquired substantial benefits under the contract, and it would be unjust and inequitable to repudiate the agreement.

However, the general rule is that municipalities are not subject to estoppel, except in extraordinary circumstances. See *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3rd 770 (Tex. 2006).

4. Takings

No legislative waiver of immunity is necessary to maintain a claim, like a takings claim, directly authorized by the constitution. *City of N. Richland Hills v. Home Town Urban Partners, Ltd.*, 340 S.W.3d 900, 916 (Tex. App.--Fort Worth 2011, no pet.) held that a takings claim can be based in part upon breach of a Development Agreement. See discussion and excerpt, *infra*. However, another court has ruled that a developer waived potential takings claims by entering into a Development Agreement. In *Rischon Dev. Corp v. City of Keller*, 242 S.W.3d 161, 169 (Tex. App. 2007, pet. denied), the developer urged a taking claim based upon City requirements for sidewalks, fire sprinklers, hike and bike trails and a perimeter fence, apparently all covered by the agreement with the City. The developer did not object to the requirements until late in development process, long after the agreement was signed. The court rejected the developer's taking claim because the developer consented to the City's requirements:

We hold that by proposing, adopting without objection, or agreeing in the Developer's Agreement without objection to all of the Rolling Wood "requirements," Rischon consented to those requirements. Therefore, the trial court did not err by rendering a take-nothing judgment on Rischon's claims. *Id.*

See, also, *Selmi*, at pp. 624-627, for a discussion of governmental exactions, takings and development agreements.

V. NEGOTIATION OF DEVELOPMENT AGREEMENTS

A. Basic Approach

Approaching negotiation of a Development Agreement, it is important to recognize that the "world view" of local government is fundamentally different from that of a typical private land owner. In the normal real estate transaction, all parties are profit motivated. No so in a Development Agreement. Although the land owner may have a purely profit orientation, the local government does not. The local government is working for the "public" and is engaged in the effort to cause development which is "in the best interests of the public". Further, the

attorney for the local government may be on staff: under paid, over worked and not necessarily a real estate law or business specialist.

The land owner view of the world:

- Need it done NOW
- It's all about maximizing financial return
- Let's be practical
- Everyone for themselves
- Push for the most

The local government view of the world:

- Better to delay and let there be more process
- Money isn't everything; the "Public Interest" is.
- CYA (cover your aspects)
- Don't try to take advantage of us
- Let's be fair

Recognizing these differences will help private parties understand how a public-sector lawyer (and a municipality) handles a Development Agreement. Much frustration can be avoided if the private sector parties put themselves in the position of the public sector parties to understand their view of the world.

B. Money and Land

1. Land

Some local governments, particularly cities or their economic development corporations, are willing to convey land, either free or at bargain price, to support economic development activities, particularly those generating good jobs. The conveyance of land is not typically a problematic transaction since the conveyance occurs immediately.⁷ The local government may wish to impose restrictive covenants regarding the use, which would typically be acceptable to the recipient. However, conditional conveyances may not be acceptable to the recipients, as they impair the finance-ability of the project.

2. Money

a. How much to ask for?

The developer must usually prove to the local government that the amount of incentives requested is necessary to "plug a gap" in the pro forma for the project. The developer's argument is often that "but for" the monetary incentives, either the project would not go forward or would go forward in a diminished or delayed manner.

⁷ See TEX.LOC.GOV'T CODE Chapter 272, which restricts some conveyances by cities. See also, discussion *infra* regarding constitutional restrictions on granting public funds, which could apply to transfers of public property.

Cities typically prefer to reimburse for the cost of specific items. Sometimes the cost is estimated, based upon actual bids. Alternatively, the actual cost of a particular item of infrastructure can be reimbursed by a local government to the developer, often with a cap (based upon a bid, and perhaps some variance factor). Specific items typically included within a developer list for reimbursement are as follows:

- (1) Public infrastructure (on and off site)
 - Roads
 - Water and sewer
 - Drainage
 - Sidewalks
 - Lighting
 - Landscaping
 - Monument project
 - Monument signage,
 - Traffic facilities (signalized intersections, etc.)
 - Oversizing the foregoing
- (2) Quasi-public amenities
 - Plazas and other gathering places
 - Greenspace / parks
 - Trails
- (3) Subsidy for desired tenants
 - Entertainment venue
 - Convention center / facilities
 - Specific retailers
- (4) Design upgrades
 - Architectural/materials
 - landscaping
- (5) Site development costs
 - unusual site costs – cut/fill, drainage, etc.
- (6) Reduced Density

b. Sources of Funding

There are a number of sources for funding to a developer in a Development Agreement. See discussion, *infra*, above regarding economic development statutes, tax increment financing, public improvement districts, etc. Regarding payments from municipal tax funds and other revenues, see discussion, *infra*, regarding “debts” and exceptions to the constitutional limitations.

VI. DRAFTING POINTS

A. Forms and Checklist

Many complete forms for Development Agreements as well as supporting documents and specialized checklists are available within the materials listed in Exhibit C (Additional Resources, Forms and Materials), attached. Most are available online. See, especially, contract forms and clauses in these individual papers (referred to by author and date):

BOJOUQUEZ 2005 (includes ETJ agreements)

DAHLSTROM 2011 (economic development)

McDONALD 2008 (master development agreement for mixed-use, guaranty, etc.)

SMITH 2010 (Chapter 380, economic development, sample clauses, etc.).

See Exhibit A for a general checklist. More-specialized checklists are included in the materials listed in Exhibit C (Additional Resources, Forms and Materials).

B. Risk Issues; Drafting Approaches

See Exhibit B, attached, for a list of risk issues and drafting approaches to address them.

Exhibit A
General Checklist For Development Agreements

This checklist contemplates a traditional type of agreement calling for a “Developer” to undertake a project that may include facilities to be constructed by the Developer for the City and reimbursed by the City (at least in part). Many of the papers listed in Exhibit C contain discussion of relevant issues, and they are referred in this checklist by author last name and date, e.g., “BOJOUQUEZ 2005.”

Item	Note or Comment
Parties	State full names and types of business organizations, states of organization, etc. State type of municipality and governing laws. Identify all guarantors, escrow agents and parties to related agreements.
Authority	Cite key authorizing statutes, especially for economic development projects. TEX. LOC. GOV'T CODE Ch. 380 has the broadest authority and strongest constitutional basis.
Property	Include full legal description, maps and drawings. Many Development Agreements say that they “run with the land” and should be recorded.
Project	Describe fully. Include drawings, land plan, tables, renderings, etc. Include key data, e.g., capacities, sizes and service areas of utility and drainage facilities. Identify any agreed-upon phases.
Other documents	Identify and link to all related documents, e.g., PUD/PDD ordinances, financing documents, separate/related agreements (economic development, tax abatement, financing), etc.
Plats, plans, Etc.	State who will prepare plats, plans, etc., who has the right to review and approve, etc., and require all construction to comply with plans as approved. Provide for plan changes including field changes.
Land and ROW	State who will be responsible for acquiring (or providing, dedicating, etc.) all land and ROW, how it will be paid for, etc. If street or utility abandonments are required, state who will be responsible and whether any special payments are required; see TEX. LOC. GOV'T CODE Ch. 272. See “Risk Issue Chart” in this paper regarding TEX. LOC. GOV'T CODE §212.904.
Regulatory approvals	Identify all regulatory approvals and say who is responsible for obtaining them, when they must be obtained and the consequences of not obtaining them. If zoning, platting or discretionary City approvals are required, state who will apply and provide time for hearings and decisions. See “Risk Issue Chart” in this paper. State consequences of an unfavorable outcome.
Competitive bidding	Provide for bids, except for items clearly exempt. See <i>McDONALD 2008</i> .
Deliverables and timetable	Specify deliverable items, e.g., studies, appraisals, plats, plans, specifications, facilities, reports, certifications, audits, etc. Provide a timetable, including any

	agreed-upon phasing. Provide for timetable changes and updates. Consider catchall time of performance clauses (“within a reasonable time, taking into account . . . “ or “as soon as reasonably practicable”).
Project halts, cleanup; force majeure	If project is halted, provide for orderly shut-down and site clean-up. <i>See McDONALD 2008.</i> Provide for “force majeure”.
Construction	State who will handle construction, how inspections and reports will be handled, etc. Require surety bonds. Provide for construction close-out items, like “as-built” plans, “bills paid” affidavits, certificates of completion, warranties, consents of sureties, etc. Provide for conveyances of facilities to city, as appropriate.
Payments by City (<i>providing other things of value</i>)	Identify amounts and “triggers” precisely. Consider escrows, guarantors, tax levies, special funds, and other risk-reduction measures. <i>See “Risk Issue Chart” in this paper.</i>
Costs	State who will bear costs such as engineering, audit, appraisals, legal, surveying, permits, advertising, etc. Provide for cost-shifting, deposits, security.
“Goods and Services”	To qualify under TEX. LOC. GOV’T CODE §271.152 for legislative waiver of sovereign immunity from suit, include delivery of “goods and services” to City. Tie the goods and services to a core aspect of the agreement, so it can’t easily be dismissed as “ancillary” or immaterial.
Approved Consultants	Where approval of consultants is necessary, consider listing at least one pre-approved consultant, in each area.
Payments by Developer	Identify amounts and “triggers” precisely. Consider escrows, guarantors, bonds, etc. <i>See “Risk Issue Chart” in this paper regarding TEX. LOC. GOV’T CODE §212.904</i>
Performance security	Consider surety bonds, letters of credit, etc. State circumstances when City can take over and finish the project. Provide for access, equipment, funds, etc. <i>See McDONALD 2008.</i>
Chapter 245 “vesting,” etc.	Identify any existing ordinances and regulations that are agreed to be “frozen.” Tie the issues to TEX. LOC. GOV’T CODE §§245.002 and 245.004, particularly (2) & (3), which list items which may be “frozen” under zoning regulations or non-zoning land use regulations. (<i>Note: “Property classification” and “building size” have promise for broad vesting.</i>) State any agreements regarding non-conforming uses. <i>See “Risk Issue Chart” in this paper.</i>
Subject to laws, etc.	Include broad clause and state an intention to comply with all laws, rules, regulations, etc. Consider reserving the City’s full powers to regulate, legislate, etc. <i>See “Risk Issue Chart” in this paper.</i>
Severability	Consider special “non-severability” language for any doubtful clauses that, if

	stricken, could harm one party severely. Consider severability clauses allowing reformation. <i>See, e.g.</i> sample clauses in <i>SMITH 2010</i> . <i>See</i> “Risk Issue Chart” in this paper.
Special waivers	Consider waivers of confidentiality (trade secrets, sales tax) and waivers of takings impact assessments required by TEX. GOV’T CODE Ch. 2007 (if any). <i>See SMITH 2010</i> and <i>BOJOURQUEZ 2005</i> .
ETJ, annexation, etc.	Provide for annexation, non-annexation, payments in lieu of taxes, etc. as may be agreed upon. Check all special provisions listed in TEX. LOC. GOV’T CODE §212.171 <i>et. seq.</i> Check TEX. GOV’T CODE Ch. 2007(takings impacts).
Remedies; estoppels letters, etc.	Consider limitations of remedies customized for the project, <i>e.g.</i> , limiting of money claims, consequential or punitive damages, allowing specific performance (or not). <i>See</i> TEX. LOC. GOV’T CODE §271.153 (limits on city liability-“balance due”, no consequential damages). Consider stabilization provisions like notice and opportunity to cure (in case of breach) and mediation prior to litigation (all claims). Provide for recoupment and “clawback” of public funds, as appropriate. Provide for “estoppel letters” or “comfort letters” from the city for the benefit of lenders or buyers relating to the project regarding the status of performance from time to time.
Recording, etc.	State whether the agreement will be recorded (sometimes recording is required, <i>e.g.</i> , TEX. LOC. GOV’T CODE §212.172) or if another document will be recorded. Require acknowledgments by all parties.
Illegal aliens	<i>See</i> TEX. GOV’T CODE Ch. 2264. Statement or certification may be required.
Attorneys fees	Check TEX. GOV’T CODE §2252.904 (“two-way” requirement) and TEX. GOV’T CODE §271.153.
Successors and assignments	<p><i>Generally:</i> Address the procedure and discretion for assignments.</p> <p><i>Partial Assignments:</i> Consider whether and to what extent rights can be bifurcated, taking into consideration the expected development of the project and the likelihood of separate ownership. Consider limiting assignments to just owners of substantial holdings. Be wary of allowing agreements to run too freely with ownership; it could result in too many parties (but certain benefits should run with ownership).</p> <p><i>Collateral Assignments:</i> Permit the right to payments to be collaterally assigned to a lender. Lender will likely not assume any liabilities, except after foreclosure and then only for ongoing issues. New owners and assignees should expressly assume all obligations relating to ongoing operations, but beware of liability relating to development activities which a passive investor won’t accept. Consider limiting liability to the term of ownership.</p> <p><i>Specific Provisions for ETJ Development Agmts:</i> TEX. LOC. GOV’T CODE §212.172(f) states that ETJ Development Agreements are “binding on the municipality and the landowner and on their respective successors and assigns for the term of the agreement” but frees an “end-buyer of a fully developed and improved lot” from any burdens except “land use and development regulations”.</p>

Term, survival	Check and follow governing statutes carefully for maximum terms, <i>e.g.</i> , TEX. LOC. GOV'T CODE §212.172(limits terms for ETJ development agreements). Consider having some covenants survive termination, or even “run with the land” for the life of the structures. <i>But see</i> TEX. LOC. GOV'T CODE §212.172(f). Be careful not to knock out any “trailing” duty (<i>e.g.</i> , the duty to make a payment that accrues during the last year of the term---as a practical matter, the payment may have to be made after the term expires).
Approvals	Consider identifying an agreed approval authority for the City, such as the City Manager or Planning Director, for discretionary approvals provided in the agreement. Consider a general standard such as “All approvals shall not be unreasonably withheld, conditioned or delayed”. A time for approval after which a requested approval is deemed approved is unlikely to be acceptable to a city, but there may be ministerial approvals where it is appropriate.
Variations (substantial compliance)	Sometimes, an agreement has detailed drawings, renderings, specifications and the like. It may be appropriate to allow a City staff member, usually the City Manager, to make an administrative determination that offered facilities or equipment or variations (or even substitutions) “substantially comply” with the agreement or are “substantially equivalent” to what the agreement requires. Usually, this authority will be limited to specified matters, such as color, type of material and the like.
Other	Include other necessary or useful contract clauses. See, also, approaches to risk issues mentioned in the “Risk Issue Chart” in this paper.

**Exhibit B
Risk Issue Chart**

In this chart, "LGC" means Texas Local Government Code. For potential risk estimates, ♦ = low, ♦♦♦♦ = high.

Type of covenant	Potential risk (est.)*	Drafting ideas to mitigate potential risk	Comment
City and Developer agree . . .	♦♦	Recite the authorizing constitutional provisions and statutes. Use statutory words and phrases in the agreement.	Especially important for general-law cities, which have only those powers granted by the Legislature.
City shall--- ---make a grant or gift. . . ---lend money . . . ---assist [private business] . . .	♦♦♦	(1) Link covenant tightly to LGC Ch. 380 or other economic development statute. (2) State the public purpose to be achieved---and achieve it. (3) State real consideration; make it substantial and proportionate. (4) Identify points at which city can exercise "control" over the project, and include a general residual right of public control.	Chapter 380 has broad, undefined authority, while most other statutes have specific authority.
City shall--- ---pay money . . . ---obtain [thing of value] . . . ---provide [thing of value]. . .	♦♦♦♦	Recite that sufficient funds are on hand and appropriated for the agreement, <i>but see Brodhead v. Forney</i> , 538 S.W.2d 873, 875 (Tex. Civ. App.--Waco 1976, writ ref'd n.r.e), where an ordinance ratifying a Development Agreement recited that the City had set aside sufficient money, but the City actually had "no money on hand to meet the terms of the contract and did not assess a tax for that purpose." Developer took nothing.	<i>Brodhead</i> opinion put the burden upon developer to "plead and prove" compliance with constitutional requirements for validity of debt.
		Recite that sufficient funds are on hand, appropriated, etc. <i>and</i> put them on deposit with an escrow agent for purposes of the agreement	Escrow with a third party like a title co, with a clear process for release of funds based on progress in the project.
		In ordinance authorizing agreement, levy a tax in an amount sufficient---and refer to it in the agreement. <i>See</i>	Tax levy reduces risk if funds are not actually on hand.

		<p><i>Brown v. Jefferson County</i>, 406 S.W.2d 185 (Tex. 1966)(upholding unfunded contract supported by tax levy)</p>	<p><i>Brown</i> opinion quotes actual tax levy language.</p>
		<p>Delegate payment obligations to a third-party (or get a guaranty or letter of credit)</p>	<p>The payment obligation may be supported by a “standby” letter of credit (very limited defenses to payment of drafts) or by a guaranty from third party like an Economic Development Corporation.</p>
		<p>Make the obligation payable only from a non-tax source of revenues, identify the source and include covenants to assess and collect those revenues.</p>	<p>Check bonds and other senior pledges; add waivers and subordinations, if necessary.</p>
		<p>Link the payment to a duty of the Developer (so that they are performed simultaneously) or make a duty of the Developer contingent upon payment.</p>	
<p>City shall--- ---re-zone . . . ---grant variances . . . ---amend ordinances . . .</p>	<p>◆◆◆◆½</p>	<p>Beware!</p> <p>(1) Take all legislative and regulatory action <i>before</i> the agreement is signed. (2) The agreement would adopt the regulations in effect at the time of the agreement and acknowledge that LGC Ch. 245 “freezes” them.</p> <p>Consider listing key Developer duties as conditions in a PUD or other discretionary regulatory approval, i.e., use conditional zoning.**</p> <p>A different approach, suggested in <i>Haywood & Hartman</i> at 32 Tex. Tech L. Rev. 955, 977: (1) “reflect specific land uses as part of the development or preliminary plan that is approved as part of the</p>	<p>Same problem with promises <i>not</i> to re-zone, <i>not</i> to grant variances, etc. Legislative acts are unlikely to be restrained.</p>

		development agreement, (2) declare developer's agreements to be covenants running with the land "required by the city to assure compliance," and (3) record the agreement.	
City may zone, rezone or not, but--- ---existing uses are "grandfathered" ---proposed uses are "grandfathered"	◆◆◆	(1) Amend ordinance to grant prior non-conforming status (to existing or proposed uses) <i>before</i> the agreement is signed. (2) Agreement would refer to the prior non-conforming regulations and acknowledge that LGC Ch. 245 "freezes" them. Consider listing key developer duties as conditions in a PUD or other discretionary regulatory approval, <i>i.e.</i> , use conditional zoning.**	A different approach suggested in <i>Haywood & Hartman</i> , at 32 Tex. Tech L. Rev. 955: Agree that uses in the approved development plan or preliminary plan should be allowed to continue as legal, non-conforming uses.
City shall--- ---review/approve plans . . . ---approve permits . . .	◆◆	Limit the duty to ministerial, non-discretionary acts, <i>i.e.</i> , duty only applies if permits clearly comply with applicable regulations Recite that City may refuse to approve discretionary permits, also that third parties may appeal the granting of permits and administrative bodies may reverse, modify, revoke, etc. (and this is not a breach of the agreement)	
Developer shall--- ---build a library . . . ---re-pave asphalt road using concrete . . . ---provide [something else that exceeds a roughly proportionate share of infrastructure] . . .	◆	<i>See</i> anti-waiver clause in LGC §212.904. Get engineer's determination of rough proportionality <i>before</i> the agreement, then recite in the agreement that everyone agrees with the engineer's determination, developer does not want to appeal, etc. List developer duties as conditions in a PUD or other discretionary regulatory approval, <i>i.e.</i> , use conditional zoning.**	Probably OK, if developer agrees., even though unilateral imposition of the same obligation by the city might be a taking or violate LGC §212.904. <i>See, Rischon, infra, and Selmi.</i>
City waives sovereign and governmental immunities	◆	Restrict this clause to the waivers allowed by law, and tie any waiver of <i>immunity from suit</i> to a specific,	Consider backing-up non-monetary promises to perform

		<p>cited statute.</p> <p>If LGC §271.152 and §271.153 are cited for the waiver, the agreement should identify---</p> <p>---all the “goods and services” to be provided</p> <p>---the “balance due” and how to compute it.</p>	<p>with contingent promises to pay money, <i>i.e.</i>, City shall either perform, or else pay a liquidated sum of money as the “balance due.”. <i>But see</i> discussions, <i>infra</i>, regarding unfunded debt.</p>
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* *Estimates of potential risk are not intended to show that a particular covenant will be invalid, but to show that it should be addressed with care due to the state of the law as of January 2012.*

** *See Super Wash, Inc. v. City of White Settlement, 131 S.W.3d 249, 257 (Tex. App.--Fort Worth 2004), rev'd in part by City of White Settlement v. Super Wash, Inc., 198 S.W.3d 770 (Tex. 2006):*“Conditional zoning, however, occurs when the city unilaterally requires a landowner to accept certain restrictions on his land without a prior commitment to rezone the land as requested. Because conditional zoning does not involve a promise to rezone that bypasses any procedure required by the Local Government Code, the Texas Constitution, or the United States Constitution, conditional zoning is not invalid per se. Therefore, conditional zoning is valid if it is not arbitrary or capricious and if it reasonably relates to the public welfare.”

Exhibit C
Additional Resources, Forms & Materials

Note: Many of the following are available either at the website for the Real Estate, Probate & Trust Law Section of the State Bar of Texas www.reptl.org, or the State Bar CLE website www.statebarcle.org.

Institutions

Texas Municipal League. A large number of development agreement/economic incentive articles and example documents are on the website of the Texas Municipal League. http://www.tml.org/legal_topics/legal_finance.asp. It also has links to the Comptroller' and Attorney General's website materials on economic incentives.

Attorney General of Texas, ECONOMIC DEVELOPMENT HANDBOOK 2008. Available on the Attorney General's website. <https://www.oag.state.tx.us/newspubs/publications.shtml>

Papers, Presentations, Etc.

Bojorquez, "Development Agreements," UT Law Land Use Conference 2005 (Topics: Tex. Loc. Gov't Code §212.071 Developer Participation Agreements: Authority and Negotiation – Forms: Checklist for §212.071 Developer Participation Agreement)("BOJORQUEZ 2005")

Dahlstrom, "Drafting Guidelines for Economic Development Agreements," St. Bar Advanced Real Estate Drafting Course 2011 (Topics: 380 Agreements, Tax Abatements, dealing with economic development corporations and tax increment financing and drafting considerations – Forms: (i) 380 Agreement, (ii) Tax Abatement Agreement, (iii) Pre-Annexation Agreement and (iv) Checklist for drafting considerations (Sec. A of article))("DAHLSTROM 2011")

Fort, "Annexation Development Agreements," UT Land Use Conference 2010 (Topics: Tex. Loc. Gov't Code §212.172 Developer Participation Agreements, Tex. Loc. Gov't Code §43.035 Development Agreements – Forms: (i) §43.035 Notice Letter to property owner, and (ii) §43.035 Development Agreement)

Green, "380 Development Agreement," State Bar Advanced Real Estate Drafting 2009 (Topics: Tex. Loc. Gov't Code §380 Economic Development Agreements – History: AG Opinions and negotiations – Forms: Municipal Economic Development Program and 3 different 380 Agreement forms)

Haywood, "Development Agreements from Landowner/Developer Perspective," UT Law Land Use Conference 2005 (Topics: Tex. Loc. Gov't Code §212.071 Development Participation Agreements – Authority, Drafting and Negotiation – Forms: §212.071 Development Participation Agreement)

McDonald, "Development Agreements," UT Law Land Use Conference 2008 (Topics: Negotiating tips for development agreements, proposed "compromising" language on several important issues – Forms: (i) Letter of Intent, (ii) Master Development Agreement for large mixed use project including tax increment financing, 380 payments, parking garage lease to the city, public improvement district, (iii) Parking Garage Lease to city, (iv) Developer Completion Guaranty, (v) Tax Increment Financing District Developer Reimbursement Agreement)("McDONALD 2008")

Moore, "Chapter 380," <http://www.bhlaw.net/articles> (Topic: Chapter 380 programs – Forms: none)

Smith, Peter, "Economic Development Incentives," St. Bar Advanced Real Estate Law 2004 <http://www.njdhs.com/CM/Articles> (Topics: Broad review of Economic Development Agreements – Forms: Tax Abatement Checklist, Tax Abatement Agreement – TTC Sec. 313.027 with School District). Also available at the same website are 3 Development Agreements used by the cities of De Soto (High Star project), Prosper (Blue Star project) and Allen (Village at Allen project).

Smith, Peter, "Economic Development." UT Law Land Use Conference 2005 (Topics: Tex. Loc. Gov't Code §212.071 Developer Participation Agreements: Authority and Negotiation – Forms: Checklist for §212.071 Developer Participation Agreement)

Smith, Peter, "The Municipal/Governmental Perspective of Economic Development Incentive Agreement Provisions." UT Law Land Use Conference 2010 (Forms: sample clauses, Chapter 380 agreement, tax abatement, etc.)("SMITH 2010").

Smith, Peter, "[ECONOMIC DEVELOPMENT TOOLS IN THE NEW NORMAL, PART I: Understanding the role of special districts and alternatives to special districts, including TIFs and 380 agreements.](#)" UT Law Land Use Planning Conference 2011(Topics: Broad review of Economic Development incentives including hotel occupancy taxes – Forms: none) ("SMITH 2011").

Welch and Brown, "Economic Development," <http://www.bhlaw.net/articles> (Topics: Tax increment financing, 380 Agreements, tax abatements and dealing with 4A and 4B corporation – Forms: none)

Zech, "Development Agreements," UT Law Land Use Conference 2008 (Topics: Broad review of Development Agreements of all types – Forms: (i) Infrastructure Reimbursement Agreement, (ii) Tex. Loc. Gov't Code §42.044 Industrial District Agreement, (iii) Tex. Loc. Gov't Code §212.172 Development Agreement, and (iv) Tex. Loc. Gov't Code §43.035 Non-Annexation Development Agreement)