ECONOMIC DEVELOPMENT INCENTIVES

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BIOGRAPHICAL INFORMATION

EDUCATION

B.A. in Government, The University of Texas at Austin, 1987
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PRACTICE EMPHASIS

Provide legal counsel to Texas municipalities and Type A and Type B economic development corporations. He currently serves as City Attorney for three (3) Texas cities located within Denton County – cities of The Colony, Roanoke and Oak Point. In addition, currently represents over forty (40) Type A and Type B economic development corporations.

PROFESSIONAL ACTIVITIES

Partner, Brown and Hofmeister, L.L.P. (2003 to present)
Assistant Attorney General, Texas, Municipal Affairs Section (1999 to 2003)
Assistant City Attorney, Austin, Texas (1992 to 1999)
Member, Texas City Attorney's Association

Assists the Texas Economic Development Council, State Comptroller's Office, Texas Attorney General's Office with the Type A and Type B Sales Tax Training Seminars mandated by Sections 502.101-502.103 of Texas Local Government Code (2001 to present)

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I. INTRODUCTION

Texas is the leader in the nation for economic development. *See,* < http://www.siteselection.com/issues/2013/may/top-comp-states.cfm > and < http://www.siteselection.com/issues/2015/mar/cover.cfm >.Nationally the state is recognized as a leader in economic development given state programs such as the Texas Enterprise Fund. *Id.* Further, the state is cited for its business climate, low taxes, and lack of state income tax as reasons for its economic development growth. Yet, almost all economic development starts at the local level, and another reason for the State of Texas' growth is the various tools available to local governments to engage in economic development. These various tools have mostly been enacted by the Texas Legislature since 1987, after the Texas voters approved article III, section 52-a of the Texas Constitution. A look at these various local economic development tools is essential if one wants to understand why Texas leads the nation in economic development.

II. CHAPTER 380 AGREEMENTS

Chapter 380 is a reference to chapter 380 of the Texas Local Government Code. This chapter authorizes Texas municipalities, both home-rule and general law municipalities to provide assistance for economic development. Texas cities may provide monies, loans, city personnel, and city services for promotion and encouragement of economic development.

A. Type of economic development assistance

Cities are authorized to "provide for the administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality." Nonetheless, the programs must serve the purpose of promoting state or local economic development by stimulating business and commercial activity within the city, within the extraterritorial jurisdiction (or "ETJ") of the city, or an area annexed by the city for limited purposes. TEX. LOC. GOV'T CODE ANN. § 380.001(a).

B. Public purpose requirement

The Texas Constitution requires all expenditures of municipal funds serve a "public purpose." TEX. CONST. art. III, § 52(a). *See also, Texas Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n,* 74 S.W.3d 377, 384 (Tex. 2002) ("A political subdivision's paying public money is not gratuitous, within meaning of state constitutional provision prohibiting gratuitous payments to individuals, associations, or corporations, if the political subdivision receives return consideration.") Accordingly, expenditures pursuant to chapter 380 programs must also serve a public purpose. Prior to 1987, Texas cities did not have constitutional authorization to provide economic assistance to businesses for economic development. In 1987, the Texas voters approved a constitutional amendment which provided that grants of monies for economic development may serve a "public purpose." Article III, section 52-a of the Texas Constitution authorizes "the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state . . . or the development or expansion of transportation or commerce in the state." TEX. CONST. art. III, § 52-a. *See also,* Op. Tex. Att'y Gen. No. GA-0529 (2007) ("Texas Constitution article III, section 52-a and Local Government Code section 380.001 authorize a city to make a loan for a housing project if the project will promote economic development within the meaning of these provisions"). Further, any transaction providing public monies must contain sufficient controls "to insure that the public purpose [is] carried out." *See,* Op. Tex. Att'y Gen. No. JM-1255 (1990) at 8-9.

C. Limitations – cannot abate delinquent taxes

There are limits however. Article III, section 55 of the Texas Constitution provides that the legislature "shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any country or defined subdivision thereof." In a Texas Attorney General opinion, the Attorney General concluded "section 380.001(a) of the Local Government Code did not authorize a municipality, as part of an economic development program, to agree to abate a taxpayer's delinquent taxes." Tex. Att'y Gen. LO 95-090 (1995).

D. Municipal sales tax rebates

Many cities may condition the grant or loan of public monies based upon estimated sales tax revenue generated by the business prospect. In a Texas Attorney General opinion, the Attorney General considered whether certain legislative changes prevented Texas cities from providing chapter 380 grants in the form of a sales tax rebate. *See,* Op. Tex. Att'y Gen. No. GA-0071 (2003). The Attorney General concluded the "Local Government Code authorizes municipalities to refund or rebate municipal sales taxes and otherwise expend public funds for certain

economic development purposes." Op. Tex. Att'y Gen. No. GA-0137 (2004) at 1. The recent legislative change "does not invalidate existing tax rebate contracts, nor does it prohibit municipalities from executing new ones." *Id.* at 4.

E. City's ability to provide Type A or Type B economic development corporations municipal funds for economic development

A home-rule municipality may provide public money to a Type A or Type B economic development corporation [formerly referred to as section 4A or section 4B corporation]. TEX. LOC. GOV'T CODE ANN. § 380.002(b).

Nonetheless, the grant of public monies must be pursuant to a contract. Further, the development corporation must use the grant money for the "development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development and expansion of commerce in the state." *Id.*

III. CHAPTER 381 AGREEMENTS

Chapter 381 is the county equivalent of chapter 380 of the Texas Local Government Code. This chapter authorizes Texas counties to provide economic development assistance similar to the assistance municipalities are able to provide.

A. Type of economic development assistance

This chapter authorizes a county commissioners court to contract with another entity for the administration of an economic development program; authorizes the program to be administered on the basis of county commissioner precincts; authorizes the use of county employees or funds for the program; and authorizes the county to accept contributions, gifts, or other resources to develop and administer the program. TEX. LOC. GOV'T CODE ANN. § 381.004(c)(1)-(4).

B. Public purpose requirement

Similar to chapter 380 of the Texas Local Government Code, all expenditures under chapter 381 of the Texas Local Government Code must serve the public purpose as expressed in Article III, section 52-a of the Texas Constitution. The Texas Constitution requires all expenditures of county funds serve a "public purpose." TEX. CONST. art. III, § 52(a).

Accordingly, expenditures pursuant to chapter 381 programs must also serve a public purpose. Again, article III, section 52-a of the Texas Constitution authorizes "the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state . . . or the development or expansion of transportation or commerce in the state." TEX. CONST. art. III, § 52-a. *See also,* Op. Tex. Att'y Gen. No. GA-0529 (2007).

IV. TAX ABATEMENT AGREEMENTS.

Tax abatements are a popular form of economic development assistance which provides the recipient the abatement of property taxes due to repairs or improvements to real property.

A. In General.

The authority to enter into tax abatement agreements is found in the Property Redevelopment and Tax Abatement Act located in chapter 312 of the Texas Tax Code. This chapter authorizes property taxing entities, excluding school districts, to limit the property taxes assessed on real property or tangible personal property located on real property due to the repairs or improvements to the property. TEX. TAX CODE ANN. § 312.204(a). Only property located within a reinvestment zone is eligible for a tax abatement agreement. A tax abatement agreement is an agreement limiting the increase in the value of the property taxes due to improvements or repairs to real property. Such agreements are limited to a maximum of ten (10) years in length. *Id.*

1. Entities which may enter into a tax abatement agreements.

Those entities which levy ad valorem taxes, excluding school districts, are authorized to execute tax abatement agreements. *Id.* § 312.002(f) (providing on or after September 1, 2001, a school district may not enter into a tax abatement agreement). *See also*, TEX. TAX CODE ANN. § 312.0025 (discussing designation of reinvestment zone by school districts in certain instances). Nonetheless, only a city can initiate the process to enter into a tax abatement agreement within the city limits of the city. *Id.* § 312.204. The county or the city may initiate the process for tax abatement agreements within the extraterritorial jurisdiction ("ETJ") of a city. *Id.* § 312.206. Further, only the county may initiate the tax abatement process outside the city limits or ETJ of a city. *Id.* § 312.401.

2. School districts.

School districts are no longer authorized to enter into tax abatement agreements. *Id.* § 312.002(f). Their authority to limit appraised values is found in the Texas Economic Development Act located in chapter 313 of the Texas Tax Code.

3. Length of tax abatement agreement.

A tax abatement agreement cannot exceed ten (10) years. *Id.* §§ 312.204(a) & 312.208(a) (any modification of an agreement cannot extend beyond ten (10) years from the date of the original agreement). In Texas Attorney General Opinion JC-0133 (1999),

the Attorney General noted a "governmental entity may not grant a tax abatement for property that previously received a ten-year tax abatement." Op. Tex. Att'y Gen. No. JC-0133 (1999) at 6. Nonetheless, this would not preclude granting a new tax abatement agreement on different property which was not subject to a prior agreement. Recently the Texas Attorney General noted, "a prior tax abatement agreement concerning specific property does not preclude a municipality from agreeing to abate taxes on different business personal property at the same location. A new abatement agreement must fully comply with chapter 312 requirements." Op. Tex. Att'y Gen. No. GA-0304 (2005) at 7. This would include the owner or lessee making specific repairs or improvements to the property as a condition for the granting of the tax abatement. TEX. TAX CODE ANN. § 312.204(a).

4. Defer commencement of tax abatement agreements.

In 2009, the Texas Legislature approved an amendment which allows the governing body of the taxing unit to defer the commencement date. TEX. TAX CODE ANN. § 312.007. *See also*, Op. Tex. Att'y Gen. No. GA-0734 (2009). Nevertheless, the duration of the abatement period may not exceed ten (10) years.

B. Procedural Steps.

There are essentially seven (7) steps which must be undertaken to enter into a tax abatement agreement.

1. The taxing unit must pass "a resolution stating that the taxing unit elects to become eligible to participate in tax abatement." *Id.* § 312.002(a).
2. The taxing unit must establish guidelines and criteria governing tax abatement agreements. *Id*.
3. The taxing unit must deliver in writing to the presiding officer of the governing body of each taxing unit that includes in its boundaries real property that is to be included in the proposed reinvestment zone notice of the public hearing designating a reinvestment zone. This notice must be delivered not later than the seventh (7^{th}) day before the date of the public hearing. *Id.* § 312.201(d).
4. The taxing unit must publish in a newspaper of general circulation with the city notice of the public hearing designating a reinvestment zone. This notice must be published not later than the seventh (7^{th}) day before the date of the public hearing. *Id.*
5. Following a public hearing, a city may designate an area within the taxing jurisdiction or ETJ of the municipality as a tax abatement reinvestment zone. The city must designate the reinvestment zone by ordinance. *Id.* § 312.201(a). Following a public hearing, the county may designate an area of the county that does not include area in the taxing jurisdiction of a city or ETJ of the city as a tax abatement reinvestment zone. *Id.* § 312.401(a)&(b).
6. At least seven (7) days before the date on which a city or county enters into a tax abatement agreement, the city or county must deliver to the presiding officer of the governing body of each other taxing unit in which the property subject to the agreement is located a written notice that the city or county intends to enter into a tax abatement agreement. *Id.* § 312.2041(a) and 312.402(a-2) (for county agreements). The notice must include a copy of the proposed agreement. Nonetheless, failure to deliver the notice does not affect the validity of any agreement. *Id.* § 312.2041(c).
7. Enter into a tax abatement agreement with the owner or lessee of real property located within the reinvestment zone. The agreement must be approved by the affirmative vote of a majority of the members of the governing body of the municipality or other taxing unit at a regularly scheduled meeting of the governing body. *Id.* § 312.207(a).

C. Property which can be Abated.

The Tax Code provides that a tax abatement agreement may provide for the exemption of the real property in each year covered by the agreement only to the extent its value for that year exceeds its value for the year in which the agreement was executed. *Id.* § 312.204(a) and 312.402(a-2). Accordingly, only the increase in value may be abated. For example, if a business has property which as of January 1 is valued at $1,000,000. Further, the entity agrees to make improvement or repairs to the property, which increases the value of the property to $1,400,000. The taxing units may abate from taxation the $400,000 increase in property value. Moreover, the taxing unit could abate from one percent (1%) to one hundred percent (100%) the property taxes paid on the $400,000 increase in property value.

1. Delinquent property taxes.

Article III, section 55 of the Texas Constitution provides that the legislature "shall have no power to release or extinguish, or to authorize the releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual, to this State or to any country or defined subdivision thereof." Consequently, a tax abatement agreement

cannot abate delinquent taxes. Tex. Att'y Gen. LO 95-090 (1995).

2. Newly added business personal property.

The Texas Attorney General concluded a prior tax abatement agreement concerning specific property does not preclude a municipality from agreeing to abate taxes on different business personal property at the same location. Nonetheless, a new agreement must fully comply with the chapter 312 of the Texas Tax Code. Op. Tex. Att'y Gen. No. GA-0304 (2005).

D. Guidelines and Criteria.

The governing body of a taxing unit may not enter into a tax abatement agreement unless the governing body finds that the terms of the agreement and the property subject to the agreement meet certain guidelines and criteria adopted by the governing body. TEX. TAX CODE ANN. § 312.002(b). A city or county may not designate an area as a reinvestment zone unless the governing body has established guidelines and criteria governing tax abatement agreements. Furthermore, the taxing unit must pass a resolution stating that the taxing unit elects to become eligible to participate in tax abatements. *Id.* § 312.002(a).

Guidelines applicable to property must provide for the availability of tax abatement for both new facilities and structures and for the expansion or modernization of existing facilities and structures. *Id.* Guidelines and criteria are effective for two (2) years from the date of adoption. *Id.* § 312.002(c). Further, during the two (2) year period, guidelines and criteria may be amended or repealed by a $3/4^{th}$ vote of the members of the governing body. *Id.*

The governing body of a taxing unit has discretion on whether to enter into a tax abatement agreement. Although, a property owner met certain guidelines and criteria, the governing body could still decide not to enter into a tax abatement agreement with a particular owner. Adoption of guidelines and criteria by the governing body does not limit the discretion of the governing body as to whether to enter into a specific tax abatement agreement. *Id.* § 312.002(d)(1). Further, adoption of guidelines and criteria does not create a property, contract or other legal right in any person to require the governing body to consider or grant a specific application or request for a tax abatement agreement. *Id.* § 312.002(d)(3).

E. Designation of Reinvestment Zone.

City council must designate a reinvestment zone by ordinance. *Id.* § 312.201(a). County commissioners court may designate a reinvestment zone by order. *Id.* § 312.401(a). The ordinance or order must describe the boundaries of the zone and the eligibility of the zone for residential tax abatement or commercial-industrial tax abatement. *Id.* §§ 312.201(b) and 312.401(b). Further, an area located with a state enterprise zone, pursuant to chapter 2303 of the Texas Government Code, constitutes designation of the area as a tax abatement reinvestment zone under chapter 312 of the Texas Tax Code, without further hearing or other procedural requirements other than those provided by chapter 2303 of the Texas Government Code. *Id.* § 312.2011. In addition, recent legislative amendments provide that counties designated as economically distressed counties by the Governor's Texas Economic Development Bank automatically qualify for designation as an enterprise zone. TEX. GOV'T CODE ANN. § 2303.101(3). City council may designate a reinvestment zone within the city's limits or within the extraterritorial jurisdiction of the city. TEX. TAX CODE ANN. § 312.201(a). County commissioners court may designate a reinvestment zone provided the area does not include an area within the taxing jurisdiction of a municipality. *Id.* § 312.401(a).

1. Reinvestment zone criteria.

The Tax Code provides that an area considered for designation as a tax abatement reinvestment zone must meet certain criteria. The Tax Code provides that the area must: (1) substantially arrest or impair the sound growth of the municipality creating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of: (A) a substantial number of substandard, slum, deteriorated, or deteriorating structures; (B) the predominance of defective or inadequate sidewalks or streets; (C) faulty size, adequacy, accessibility, or usefulness of lots; (D) unsanitary or unsafe conditions; (E) the deterioration of site or other improvements; (F) tax or special assessment delinquency exceeding the fair value of the land; (G) defective or unusual conditions of title; (H) conditions that endanger life or property by fire or other cause; or (I) any combination of these factors; (2) be predominantly open and, because of obsolete platting, deterioration of structures or site improvements, or other factors, substantially impair or arrest the sound growth of the municipality; (3) be in a federally assisted new community located in a home-rule municipality or in an area immediately adjacent to a federally assisted new community located in a home-rule municipality; (4) be located entirely in an area that meets the requirements for federal assistance under Section 119 of the Housing and Community Development Act of 1974 (42 U.S.C. Section 5318); (5) encompass signs, billboards, or other outdoor advertising structures designated by the governing body of the municipality for relocation, reconstruction, or removal for the purpose of enhancing the physical environment of the municipality, which the legislature declares to be a public purpose; or (6) be reasonably

likely as a result of the designation to contribute to the retention or expansion of primary employment or to attract major investment in the zone that would be a benefit to the property and that would contribute to the economic development of the municipality. *Id.* § 312.202(a).

F. Tax Abatement Agreements.

Agreements made with the several owners comprising a single reinvestment zone must contain identical terms with regards to the portion of the value of the property that is exempt and the duration of the exemption. *Id.* § 312.204(b) ("The agreements made with the owners of property in a reinvestment zone must contain identical terms for the portion of the value of the property that is to be exempt and the duration of the exemption. For purposes of this subsection, if agreements made with the owners of property in a reinvestment zone before September 1, 1989, exceed 10 years in duration, agreements made with owners of property in the zone on or after that date must have a duration of 10 years").

Yet, agreements made with several owners comprising a single reinvestment zone which is also located in an enterprise zone need not contain identical terms for the portion of the value of property that is to be exempt and the duration of the agreement. *Id.* § 312.204(f) ("The agreements made with owners of property in an enterprise zone that is also designated as a reinvestment zone are not required to contain identical terms for the portion of the value of property that is to be exempt and the duration of the agreement"). The remaining tax units (county, special districts, etc.) are not required to enter into a tax abatement agreement simply because the city has entered into a tax abatement agreement. *Id.* § 312.206(a) ("If property taxes on property located in the taxing jurisdiction of a municipality are abated under an agreement made under Section 312.204 or 312.211, the governing body of each other taxing unit eligible to enter into a tax abatement agreements ... **may** execute a written tax abatement agreement ..") (emphasis added).

If the city enters into a tax abatement agreement with the owner of property located in a reinvestment zone, the remaining taxing entities may enter into a tax abatement agreement with the owner. The other taxing units are not required to enter into a tax abatement agreement. Further, tax abatement agreements entered into by the other taxing units are not required to contain identical terms of those contained in the agreement with the city. *Id.* § 312.206(a) ("The agreement is not required to contain terms identical to those contained in the agreement with the municipality. The execution, duration, and other terms of an agreement made under this section are governed by the provisions of Sections 312.204, 312.205, and 312.211 applicable to a municipality . . .").

G. Public Information Act.

Certain information provided to a taxing unit in connection with a tax abatement application may be considered confidential, and not subject to public disclosure until the tax abatement agreement is executed. Nonetheless, the information must describe the specific processes or business activities to be conducted or the equipment or other property which will be brought onto the property. Information in the custody of a taxing unit is not confidential once the agreement is executed. *Id.* § 312.003.

H. State Administration of Tax Abatement Agreements.

The chief appraiser of each appraisal district that appraises property for a taxing unit that designates a reinvestment zone or executes a tax abatement agreement must deliver to the State Comptroller's office before July 1 of the year following the year in which the zone is designated or the agreement is executed a report. Further, the State Comptroller is required to maintain a central registry of reinvestment zones designated and of tax abatement agreements executed. *Id.* § 312.005(a).

1. Comptroller's office.

The report which is required to be filed by the next July 1st must contain certain information. If the taxing unit establishes a reinvestment zone the report must contain a general description of the zone, including its size; the types of property located in it; the duration of the reinvestment zone; the guidelines an criteria established for the reinvestment zone, including subsequent amendments and modifications of the guidelines or criteria; a copy of each tax abatement agreement; and any other information required by the comptroller's office. *Id.* § 312.005(a)(1)-(3). If the taxing unit enters into a tax abatement agreement the report filed with the comptroller's office must contain a copy of each tax abatement agreement to which the taxing unit is a party and any other information required by the comptroller's office. *Id.* § 312.005(a)(2)&(a)(3). The State Comptroller's office may provide assistance to a taxing unit on request by the governing body or by the presiding officer of its governing body relating to the administration of tax abatements. Further, the Governor's Office of Texas Economic Development and Tourism and the State Comptroller's office may provide technical assistance to a local governing body regarding the designation of reinvestment zones, the adoption of tax abatement guidelines, and the execution of tax abatement agreements. *Id.* § 312.005(b) (Although this Tax Code provision still references the Texas Department of Commerce, this department is now part of the

Governor's office).

V. TAX INCREMENT FINANCING.

Tax increment financing is a method cities can use to publicly finance structural improvements and infrastructure. Tax increment financing is authorized by chapter 311 of the Texas Tax Code. The "taxing unit's tax increment" is the amount of property taxes levied and assessed on property within a tax increment reinvestment zone ("TIRZ"), and collected by a participating taxing unit in a tax year on the "captured appraised value." TEX. TAX CODE ANN. § 311.012(a).

The "captured appraised value" of real property taxable by a taxing unit for a year is the total taxable value of all real property taxable by the unit and located within a TIRZ for that year less the tax increment base of the unit. *Id.* § 311.012(b).

The "tax increment base" of a taxing unit is the total taxable value of all real property taxable by the unit and located in the TIRZ for the year in which the zone was designated. *Id.* § 311.012(c).

A. Texas Constitution and Texas Counties.

In 1981, the Texas voters approved article VIII, section 1-g(b) of the Texas Constitution. This section currently reads as follows:

> The legislature by general law may authorize an **incorporated city or town to issue bonds or notes** to finance the development or redevelopment of an unproductive, underdeveloped, or blighted area within the city or town and to pledge for repayment of those bonds or notes increases in ad valorem tax revenues imposed on property in the area by the city or town and other political subdivisions.

TEX. CONST. art VIII, § 1-g(b) (emphasis added). Moreover, in 2005, the Texas Legislature amended chapter 311 of the Texas Tax Code to seemingly authorize Texas counties to publicly finance structural improvements and infrastructure through the tax increment financing statute. *See*, Tex. H.B. 2120, 79th Leg. (2005). However, the Texas constitutional provision was not amended.

In 2012, Texas Attorney General considered whether a county could issue tax increment financing bonds. *See*, Op. Tex. Att'y Gen. No. GA-0953 (2012). In this opinion the Attorney General noted the constitutional provision was not amended to authorize counties to issue bonds. Consequently, the Attorney General concluded counties cannot issue tax increment financing bonds. The power to issue tax increment financing bonds and to pledge the tax increment fund as security lies solely with Texas cities. *Id.* GA-0953 at 3. Yet, Texas counties may participate and deposit monies into a tax increment fund. *Id.* ("But the authority to levy taxes that support a tax increment fund is distinct from the authority to issue bonds"). *See also*, Op. Tex. Att'y Gen. Nos. GA-0981 (2012), GA-1076 (2014), and KP-0004(2015) at 4 ("Moreover, counties, as 'other political subdivision[s],' were authorized by the amendment [article VIII, § 1-g(b)] to only participate in tax increment financing as established by a municipality").

B. Procedural Steps – In General.

The steps or procedures required to undertake a tax increment financing reinvestment zone (hereinafter referred to as a "TIRZ") are as follows:

1. city initiates a TIRZ or city receives a petition for the creation of a TIRZ;
2. city prepares a preliminary reinvestment financing plan before adopting ordinance designating the TIRZ, *Id.* § 311.003(b);
3. city publishes notice of public hearing at least seven (7) days before the hearing on the creation of the TIRZ, *Id.* § 311.003(c);
4. city holds a public hearing on the creation of the TIRZ, *Id.* § 311.003(c);
5. after the public hearing city council may designate an area as a TIRZ, *Id.* § 311.003(a);
6. city council must designate a board of directors for the TIRZ, *Id.* § 311.009(a);
7. board of directors prepare financing plan and project plan, *Id.* § 311.011;
8. after financing plan and project plan are approved, contract with each taxing unit with regard to the percentage of the increment dedicated to the tax increment financing fund, *Id.* § 311.013;
9. once TIRZ is established, the board of directors must make recommendations to city council on the implementation of tax increment financing and agreements, *Id.* § 311.010(a);
10. city must submit annual report to chief executive officer of each taxing unit that levies taxes on property within TIRZ, *Id.* § 311.016(a); and
11. file an annual report with the State Comptroller's office. *Id.* § 311.016(b).

C. Project Costs.

The board of directors of a TIRZ may enter into an agreement to dedicate, pledge, or otherwise provide for the use of revenue in the tax increment fund to pay any "project costs" that benefit the reinvestment zone. *Id.* § 311.010(b). A city creating a reinvestment zone may issue tax increment bonds or notes, the proceeds of which may be used to make payments pursuant to

agreements entered into by the TIRZ board, to pay TIRZ "project costs." *Id.* § 311.015(a). The term "project costs" is defined to mean the following:

> expenditures made or estimated to be made and monetary obligations incurred or estimated to be incurred by the municipality . . . designating a reinvestment zone that are listed in the project plan as costs of public works, public improvements, programs, or other projects benefiting the zone, plus other costs incidental to those expenditures and obligations. "Project costs" include: (A) capital costs, including the actual costs of the acquisition and construction of public works, public improvements, new buildings, structures, and fixtures; the actual costs of the acquisition, demolition, alteration, remodeling, repair, or reconstruction of existing buildings, structures, and fixtures; the actual costs of the remediation of conditions that contaminate public or private land or buildings; the actual costs of the preservation of the facade of a public or private building; the actual costs of the demolition of public or private buildings; and the actual costs of the acquisition of land and equipment and the clearing and grading of land; (B) financing costs, including all interest paid to holders of evidences of indebtedness or other obligations issued to pay for project costs and any premium paid over the principal amount of the obligations because of the redemption of the obligations before maturity; (C) real property assembly costs; (D) professional service costs, including those incurred for architectural, planning, engineering, and legal advice and services; (E) imputed administrative costs, including reasonable charges for the time spent by employees of the municipality or county in connection with the implementation of a project plan; (F) relocation costs; (G) organizational costs, including the costs of conducting environmental impact studies or other studies, the cost of publicizing the creation of the zone, and the cost of implementing the project plan for the zone; (H) interest before and during construction and for one year after completion of construction, whether or not capitalized; (I) the cost of operating the reinvestment zone and project facilities; (J) the amount of any contributions made by the municipality or county from general revenue for the implementation of the project plan; (K) the costs of school buildings, other educational buildings, other educational facilities, or other buildings owned by or on behalf of a school district, community college district, or other political subdivision of this state; and (L) payments made at the discretion of the governing body of the municipality or county that the governing body finds necessary or convenient to the creation of the zone or to the implementation of the project plans for the zone.

Id. § 311.002(1)(A)-(L).

D. Which political subdivision can initiate a TIRZ?

The Texas Tax Code provides that a city or county may initiate a tax increment reinvestment zone. *Id.* § 311.003(a). But, as previously discussed, without an amendment to the Texas constitution it appears Texas counties are only authorized to participate in a municipal TIRZ. *See,* Op. Tex. Att'y Gen. Nos. GA-0981 (2012) and KP-0004 (2015) at 4 ("Moreover, counties, as 'other political subdivision[s],' were authorized by the amendment [article VIII, § 1-g(b)] to only participate in tax increment financing as established by a municipality"). Consequently, city council is authorized to "designate a contiguous or noncontiguous geographic area that is in the corporate limits of the municipality, in the extraterritorial jurisdiction of the municipality, or in both . . . to be a reinvestment zone." TEX. TAX CODE ANN. § 311.003(a) (Vernon 2015).

E. Can property owners petition for the creation of a TIRZ?

The Texas Tax Code also provides that property owners may petition the city for the creation of a TIRZ. A proper petition must be submitted to city council by the owners of property constituting at least fifty percent (50%) of the appraised value of the property in the proposed TIRZ area according to the most recent certified appraisal roll for the county in which the area is located. *Id.* § 311.005(a)(4).

F. Preliminary Reinvestment Financing Plan.

The city council is required to prepare a preliminary reinvestment zone financing plan prior to the adoption of the ordinance creating the TIRZ. *Id.* § 311.003(b).

G. Published Notice and Public Hearing on Creation of TIRZ.

Not later than the seventh (7^{th}) day before the date of the public hearing, notice of the hearing must be published in a newspaper having general circulation in the city. *Id.* § 311.003(c). Before adopting an ordinance or order providing for a TIRZ, the city

council must conduct a public hearing on the creation of the TIRZ, and its benefits to the city, and to property in the proposed zone. At the hearing an interested person may speak for or against the creation of the zone, its boundaries, or the concept of tax increment financing. *Id.*

H. Criteria for City Initiated TIRZ.

City Council by ordinance may designate a contiguous geographic area in the city as a TIRZ to promote development or redevelopment of the area if city council determines that development or redevelopment would not occur solely through private investment in the reasonably foreseeable future. *Id.* § 311.003(a). In addition, for city initiated TIRZ, the reinvestment zone area must meet one of the following four (4) criteria:

1. substantially arrest or impair the sound growth of the municipality . . . [removed reference to county] designating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of: (A) a substantial number of substandard, slum, deteriorated, or deteriorating structures; (B) the predominance of defective or inadequate sidewalk or street layout; (C) faulty lot layout in relation to size, adequacy, accessibility, or usefulness; (D) unsanitary or unsafe conditions; (E) the deterioration of site or other improvements; (F) tax or special assessment delinquency exceeding the fair value of the land; (G) defective or unusual conditions of title; (H) conditions that endanger life or property by fire or other cause; or (I) structures, other than single-family residential structures, less than ten percent (10%) of the square footage of which has been used for commercial, industrial, or residential purposes during the preceding 12 years, if the municipality has a population of 100,000 or more;
2. be predominantly open or undeveloped and, because of obsolete platting, deterioration of structures or site improvements, or other factors, substantially impair or arrest the sound growth of the municipality;
3. be in a federally assisted new community located in the municipality or in an area immediately adjacent to a federally assisted new community, *Id.* § 311.005(a)(1)-(3); or
4. if the proposed project plan for a TIRZ includes the use of land in the zone in connection with the operation of an existing or proposed regional commuter or mass transit rail system, or for a structure or facility that is necessary, useful, or beneficial to such a regional rail system, city council may designate such an area as a reinvestment zone. *Id.* § 311.005(a-1).

I. Criteria for Petitioned for Zones.

The Texas Tax Code provides in order to be designated as a TIRZ, an area must be an area described in a petition requesting that the area be designated as a reinvestment zone, if the petition is submitted to city council by the owners of property constituting at least fifty percent (50%) of the appraised value of the property in the area according to the most recent certified appraisal roll for the county in which the area is located. *Id.* § 311.005(a)(4). Further, in a Texas Attorney General opinion, the Texas Attorney General also concluded a petitioned for TIRZ must also be in an area considered "unproductive, underdeveloped, or blighted" within the meaning of article VIII, section 1-g(b) of the Texas Constitution. An area that satisfies the criteria of section 311.005(a)(1), (a)(2), and (a)(3) comports with this constitutional requirement. Op. Tex. Att'y Gen. No. JC-0152 (1999).

J. Limitation on Percentage of Property Used for Residential Purposes.

In city initiated TIRZ, a municipality may not designate a reinvestment zone if more than thirty percent (30%) of the property in the proposed zone, excluding property that is publicly owned, is used for residential purposes. TEX. TAX CODE ANN. § 311.006(a)(1). Further, the city could not amend the boundaries of an existing TIRZ to include more than thirty percent (30%) of the property used for residential purposes. *Id.* § 311.006(b). The thirty percent (30%) residential use limitation is not applicable to property owner initiated TIRZ. *Id.* § 311.006(e). Property is considered as residential property if it is occupied by a house having fewer than five (5) living units. *Id.* § 311.006(d).

K. Limitation on Percentage of Appraised Property Values within a TIRZ.

A city is prohibited from creating a TIRZ if the total appraised value of taxable real property in the proposed TIRZ and in existing TIRZ exceeds twenty-five percent (25%) of the total appraised value of taxable real property in the city and in industrial districts created by the city, if the city has a population of 100,000 or more. *Id.* § 311.006(a)(2)(A). In cities with a population of less than 100,000, the city is prohibited from creating a TIRZ if the total appraised value of taxable real property in the proposed TIRZ

and in existing TIRZ exceeds fifty percent (50%) of the total appraised value in the city and in industrial districts created by the city. *Id.* § 311.006(a)(2)(B). Also, city council could not amend the boundaries of an existing TIRZ to include more than twenty-five percent (25%) or fifty percent (50%) of the total appraised value of taxable real property in the city, and in industrial districts created by the city, as applicable. *Id.* § 311.006(b). The appraised values are determined according to the most recent appraisal rolls of the city. *Id.* § 311.006(d).

L. Amending Boundaries of a TIRZ.

The boundaries of an existing TIRZ may be reduced or enlarged by city council by ordinance or resolution. *Id.* § 311.007(a). However, city council may not amend the boundaries of a TIRZ to include more than thirty percent (30%) of which, excluding property dedicated to public use, is used for residential purposes. *Id.* § 311.006(b). The prohibition of thirty percent (30%) of the property being used residential purposes is not applicable to enlargement of a TIRZ by property owner petition. *Id.* § 311.007(b). In addition, in cities with a population of less than 100,000, city council could not amend the boundaries of an existing TIRZ to include more than fifty percent (50%) of the total appraised value of taxable real property in the city, and in industrial districts created by the city. *Id.* § 311.006(a)(2)(B) and (b). In cities with a population of 100,000 or more, city council could not amend the boundaries of an existing TIRZ to include more than twenty-five percent (25%) of the total appraised value of taxable real property in the city, and in industrial districts created by the city. *Id.* § 311.006(a)(2)(A) and (b).

M. Extend the Term of the TIRZ.

The city council by ordinance or resolution may extend the term of all or a portion of the TIRZ after notice and hearing in the manner provided for the designation of the TIRZ. *Id.* § 311.007(c).

N. Use of Tax Increment Funds Outside the TIRZ.

An agreement to implement the project plan and reinvestment zone financing plan may during the term of the agreement dedicate, pledge, or otherwise provide for the use of revenue in the tax increment fund to pay any project costs that benefit the reinvestment zone. *Id.* § 311.010(b). In addition, in 2013, the Texas legislature approved an amendment authorizing money in a tax increment fund to be transferred to the tax increment fund for an adjacent TIRZ provided the taxing units that participate in the TIRZ also participate in the adjacent TIRZ; each participating taxing unit has agreed to deposit the same portion of its increment in the fund; each participating taxing unit has agreed to the transfer; and the holders of any tax increment bonds or notes issued for the TIRZ have agreed to the transfer. *Id.* § 311.014(f) (as added by Tex. H.B. 2636, 83rd Leg., R.S. (2013)).

O. Board of Directors of the TIRZ.

The Tax Code provides that when city council approves an ordinance designating an area as a reinvestment zone, the ordinance, in part, must include for the creation of a board of directors for the TIRZ, and specify the number of directors of the board, consistent with Sections 311.009 or 311.0091 of the Texas Tax Code. *Id.* § 311.004(a)(2).

1. Duties of the Board of Directors.

The Texas Tax Code provides that the board of directors of a reinvestment zone shall make recommendations to city council concerning the administration of the reinvestment zone. The city council by ordinance or resolution may authorize the board to exercise any of the municipality's powers with respect to the administration, management, or operation of the zone or the implementation of the project plan for the zone, except that the governing body may not authorize the board to: (1) issue bonds; (2) impose taxes or fees; (3) exercise the power of eminent domain; or (4) give final approval to the project plan. *Id.* § 311.010(a)(1)-(4). Further, the board of directors of a TIRZ and city council that creates a reinvestment zone may each enter into agreements as the board or the governing body considers necessary or convenient to implement the project plan and reinvestment zone financing plan and achieve their purposes. *Id.* § 311.010(b).

2. Number of Board of Directors.

Generally, if the property owners petitioned for the creation of the TIRZ, the board of directors of the zone consists of nine (9) members, unless more than nine (9) members are required by the Tax Code. *Id.* § 311.009(b). Further, each taxing unit, other than the municipality that created the TIRZ, that levies taxes on real property in the zone may appoint one (1) member of the board if the taxing unit has approved the payment of all or part of the tax increment produced by the unit into the tax increment fund for the TIRZ. In addition, the member of the state senate in whose district the TIRZ is located is a member of the board, and the member of the state house of representatives in whose district the TIRZ is located is a member of the board, except that either may designate another individual to serve in the member's place at the pleasure of the member. If the TIRZ is located in more than one senate or house district, the senator or representative in whose district a larger portion of the TIRZ is located may serve or designate another individual to serve on the board. If fewer than seven (7) taxing units, other than the municipality that

designated the zone, are eligible to appoint members of the board of directors of the zone, the municipality may appoint a number of members of the board such that the board comprises nine (9) members. If at least seven (7) taxing units, other than the municipality that designated the zone, are eligible to appoint members of the board of directors of the zone, the municipality may appoint one member. *Id.*

Excluding petitioned for zones, the Texas Tax Code provides that the board of directors of a reinvestment zone consists of at least five (5) and not more than fifteen (15) members, unless more than 15 members are required to satisfy the requirements of the Tax Code. The city may appoint not more than ten (10) directors to the board unless there are fewer than five (5) directors appointed by the other taxing units, and as long as the total membership does not exceed fifteen (15) members. The other taxing units, excluding the city, may appoint one member to the board, if the taxing unit has approved the payment of all or part of the tax increment produced by the unit into the tax increment fund for the zone. *Id.* § 311.009(a). Further, a taxing unit may waive its right to appoint a director.

3. Term.

Members of the board are appointed for terms of two (2) years unless longer terms are provided under Article XI, Section 11, of the Texas Constitution. Terms of members may be staggered. A vacancy on the board is filled for the unexpired term by appointment of the governing body of the taxing unit that appointed the director who served in the vacant position. *Id.* § 311.009(c)&(d).

4. Eligibility Requirements to Serve on TIRZ Board.

In city initiated zones, to be eligible for appointment to a TIRZ board an individual must be at least eighteen (18) years of age and be a resident of the county in which the zone is located or a county adjacent to that county, or own real property in the zone, whether or not the individual resides in the county in which the zone is located or a county adjacent to that county. *Id.* § 311.009(e)(1). In a property owner petitioned for TIRZ, to be eligible for appointment to a TIRZ board an individual must be at least eighteen (18) years of age and own real property in the zone or be an employee or agent of a person that owns real property in the zone. *Id.* § 311.009(e)(2).

P. Project Plan and Reinvestment Zone Financing Plan.

The project plan means the project plan for the development or redevelopment of a TIRZ, including all amendments of the project plan. *Id.* § 311.002(2). The reinvestment zone financing plan is the financing plan for a reinvestment zone. *Id.* § 311.002(3). The board of directors of a TIRZ is required to prepare and adopt a project plan and a reinvestment zone financing plan for the zone and submit the plans to city council. *Id.* § 311.011(a). The governing body of the municipality must approve a project plan or reinvestment zone financing plan after its adoption by the board of directors of the TIRZ. The approval must be by ordinance that finds that the plan is feasible. *Id.* § 311.011(d).

1. Requirements of Project Plan.

The Tax Code requires the project plan to contain at a minimum the following: (1) a description and map showing existing uses and conditions of real property in the TIRZ and proposed uses of that property; (2) proposed changes of zoning ordinances, the master plan of the municipality, building codes, other municipal ordinances; (3) a list of estimated nonproject costs; and (4) a statement of a method of relocating persons to be displaced, if any, as a result of implementing the plan. *Id.* § 311.011(b).

2. Requirements of Financing Plan.

The reinvestment zone financing plan must contain the following information: (1) a detailed list describing the estimated project costs of the TIRZ, including administrative expenses; (2) a statement listing the proposed kind, number, and location of all public works or public improvements to be financed by the zone; (3) a finding that the plan is economically feasible and an economic feasibility study; (4) the estimated amount of bonded indebtedness to be incurred; (5) the estimated time when related costs or monetary obligations are to be incurred; (6) a description of the methods of financing all estimated project costs and the expected sources of revenue to finance or pay project costs, including the percentage of tax increment to be derived from the property taxes of each taxing unit anticipated to contribute tax increment to the zone that levies taxes on real property in the zone; (7) the current total appraised value of taxable real property in the zone; (8) the estimated captured appraised value of the zone during each year of its existence; and (9) the duration of the zone. *Id.* § 311.011(c).

3. Amendment of Project Plan.

The board of directors of the TIRZ may amend the project plan at any time. The amendment takes effect on approval by the city council. City council must approve by ordinance. If an amendment reduces or increases the geographic area of the TIRZ, increases the amount of bonded indebtedness to be incurred, increases or decreases the percentage of a tax increment to be contributed by a taxing unit, increases the total estimated project costs, or designates additional property in the zone to be acquired by the municipality, the approval must be by ordinance

adopted after a public hearing consistent with the procedural requirements of Sections 311.003(c) and (d) of the Texas Tax Code. *Id.* § 311.011(e). Further, the Texas Tax Code provides should the city amend or modify a project plan or a reinvestment zone financing plan, the city is required to deliver a copy of the amendment or modification to the State Comptroller's office before April 1 of the year following the year in which the plan was amended or modified. *Id.* § 311.019(c).

Q. Annual Report to Taxing Entities and State Comptroller's Office.

The Texas Tax Code requires the city to prepare a TIRZ annual report. The Texas Tax Code provides that on or before the 150th day following the end of the fiscal year of the city, city council shall submit to the chief executive officer of each taxing unit that levies property taxes on real property in TIRZ a report on the status of the zone. *Id.* § 311.016(a). Accordingly, if the city's fiscal year ends on September 30th, the annual report would be due at the end of February of the next year.

The Texas Tax Code provides that the TIRZ annual report must contain the following information: (1) the amount and source of revenue in the tax increment fund established for the zone; (2) the amount and purpose of expenditures from the fund; (3) the amount of principal and interest due on outstanding bonded indebtedness; (4) the tax increment base and current captured appraised value retained by the zone; and (5) the captured appraised value shared by the city and other taxing units, the total amount of tax increments received, and any additional information necessary to demonstrate compliance with the tax increment financing plan adopted by the City Council. *Id.* § 311.016(a)(1)-(5).

The TIRZ annual report should be submitted to the chief executive officer of each taxing unit that levies property taxes on real property in TIRZ. *Id.* § 311.016(a). In addition, the city shall deliver a copy of the TIRZ annual report to the State Comptroller's office. *Id.* § 311.016(b).

R. Termination of a TIRZ.

A TIRZ terminates on the earlier of: (1) the termination date designated in the ordinance designating the zone or an earlier or later termination date designated by an ordinance adopted subsequent to the ordinance creating the zone; or (2) the date on which all project costs, tax increment bonds, and interest on those bonds have been paid in full. *Id.* § 311.017(a). A city may by a subsequent ordinance provide for an earlier or later termination date. *Id.* §§ 311.017(a)(1) and 311.007(c). The city that designated a reinvestment zone by ordinance or resolution may extend the term of all or a portion of the zone after notice and hearing in the manner provided for the designation of the zone. The original participating taxing units other than the city are not required to participate in the zone or portion of the zone for the extended term unless the taxing unit enters into a written agreement to do so. *Id.* § 311.007(c).

VI. TYPE A AND TYPE B ECONOMIC DEVELOPMENT SALES TAX

Type A and Type B sales tax (formerly referred to as the Section 4A and Section 4B sales tax) are sales taxes which cities may impose for economic development. These sales taxes are authorized pursuant to the Development Corporation Act (also referred to as the "Act"). *See*, TEX. LOC. GOV'T CODE Chapters 501 – 505.

Cities must hold a sales tax election to adopt either a Type A or Type B sales tax. If adopted, the city could not exceed the two percent (2%) local sales tax limit. The sales tax for economic development is one of the most popular tools used by cities to promote economic development.

Currently, there are 216 Type A economic development corporations, and 492 Type B economic development corporations for a total of 708 corporations. TEXAS COMPTROLLER, ECONOMIC DEVELOPMENT CORPORATION REPORT, FISCAL YEARS 2012-2013, Exhibit 10 at 9 (Nov. 2014).

A. Adoption of the Tax.

To adopt either a Type A or Type B sales tax the voters must approve the sales tax at a sales tax election. TEX. LOC. GOV'T CODE ANN. §§ 504.251 & 505.251. Type A or Type B economic development sales tax may be initiated by city council approving an ordinance calling an election on the imposition of the sales tax; or by a petition signed by a number of qualified voters that equals at least twenty percent (20%) of the voters who voted in the most recent regular city election. If the city receives a petition signed by the required number of qualified voters then the city is required to pass an ordinance calling an election on the imposition of the tax. TEX. LOC. GOV'T CODE ANN. §§ 504.255 & 505.256 (as amended by Tex. H.B. 157, 84th Leg. (2015) (effective September 1, 2015)).

Type A or Type B sales tax election must be held on a uniform election date as provided by Chapter 41 of the Election Code. In 2015, the Texas Legislature amended the statute to provide that the uniform election dates are as follows: (1) the first Saturday in May in an odd-numbered year; (2) the first Saturday in May in an even-numbered year, for an election held by a political subdivision other than a county; or (3) the first Tuesday after the first Monday in November. TEX. ELEC. CODE ANN. § 41.001(a) (as amended by Tex. H.B. 2354, 84th Leg. (2015) (effective September 1,

2015)).

B. Eligible Cities.

Not every city is authorized to adopt a Type A sales tax. Yet, it appears every Texas city could adopt a Type B sales tax provided the city does not exceed two percent (2%) in local sales tax. Eligible Type A cities include a city located in a county with a population of 500,000 or fewer; a city which has a population of less than 50,000 and is located within two or more counties, one of which is Bexar, Dallas, El Paso, Harris, Hidalgo, Tarrant or Travis County; or a city which is under 50,000 population and is within the San Antonio or Dallas Rapid Transit Authority territorial limits, but has not elected to become part of the transit authority. TEX. LOC. GOV'T CODE ANN. § 504.002.

Eligible Type B cities include an eligible Type A city; a city located in a county with a population of 500,000 or more according to the most recent federal decennial census and the current combined sales tax rate does not exceed eight and one-quarter percent (8.25%) at the time the Type B tax is proposed; or a city which has a population of 400,000 or more according to the most recent federal decennial census, and is located in more than one county, and the combined state and local sales tax rate does not exceed eight and one-quarter percent (8.25%). *Id.* § 505.002. Given, an eligible Type A city is a city located in a county with a population under 500,000, and an eligible Type B city is a city located in a county with a population of 500,000 or more, it appears every Texas city is eligible to adopt the Type B sales tax provided the local sales tax rate does not exceed two percent (2%). *Id.* §§ 504.002(1), 505.002(1), 505.002(3).

C. Sales Tax Rate.

The sales tax rate for either a Type A or Type B sales tax is 1/8th, 1/4th, 3/8ths or 1/2 of one percent. The total rate of all local sales and use taxes may not exceed two percent (2%). *Id.* §§ 504.252(b) and 505.252(b) (as amended by Tex. H.B. 157, 84th Leg. (2015) (effective September 1, 2015)). The Type A sales tax may be increased or reduced if the proposition is approved by the voters at an election called and held for that purpose. A city which imposes a Type A tax may, on its own motion, call an election to increase or reduce the Type A sales tax. Further, on a petition signed by at least ten percent (10%) or more of the registered voters of the city, the city may be required to call an election on a proposed increase or decrease of the Type A tax rate. *Id.* § 504.258 (as amended by Tex. H.B. 157, 84th Leg. (2015) (effective September 1, 2015)). There is not specific statutory authority contained within the Act to increase or decrease the Type B sales tax rate after its initial adoption. Yet, a recent amendment to section 321.101 of the Texas Tax Code now authorizes the increase or reduction of the Type B sales tax rate after its initial adoption. *See*, TEX. TAX CODE ANN. § 321.101(a) (as amended by Tex. H.B. 157, 84th Leg. (2015) (effective September 1, 2015)).

D. Permissible Type A Projects.

1. Projects Requiring Creation of Primary Jobs.

In 2003, the Texas Legislature enacted a requirement that certain Type A projects create or retain primary jobs. The term "primary job" is defined further in the Act and is discussed below. *Id.* § 501.002(12). However, not all Type A projects are required to create or retain primary jobs. The Act requires the following Type A projects create or retain primary jobs: (1) Type A corporations may provide land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are for the creation or retention of primary jobs; and that are found by the board of directors to be required or suitable for the development, retention, or expansion of: *Id.* § 501.101(2)(A)-(L) (a) manufacturing and industrial facilities; (b) research and development facilities; (c) military facilities, including closed or realigned military bases; (d) recycling facilities; (e) distribution centers, (f) small warehouse facilities capable of serving as decentralized storage and distribution centers; (g) primary job training facilities for use by institutions of higher education; and (h) regional or national corporate headquarters facilities.

2. Projects Which Do Not Require Creation of Primary Jobs.

The following Type A projects are not required to create or retain primary jobs: (1) job training classes, *Id.* §§ 501.102 and 501.162; (2) certain targeted infrastructure projects necessary to promote or develop new or expanded business enterprises, limited to streets and roads, rail spurs, water and sewer utilities, and electric utilities, gas utilities, drainage, site improvements, and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico, *Id.* § 501.103; (3) land, buildings, equipment, facilities, improvements, and expenditures required or suitable for use for a career center if the area to be benefited by the career center is not located within the taxing jurisdiction of a junior college district, *Id.* § 501.105; (4) general aviation business service airport that is an integral part of an industrial park, *Id.* § 504.103(c)(1); (5) port-related facilities to support waterborne commerce, *Id.* § 504.103(c)(2); (6) development, improvement, expansion, or maintenance of facilities relating to the operation of commuter rail, light rail, or motor buses, *Id.* § 502.052; and (7) development or construction of housing facilities on or adjacent to the campus of a public state college. This particular

provision expires September 1, 2017. *Id.* § 501.164 (as redesignated by Tex. S.B. 1296, 84th Leg. (2015)).

3. Projects for Certain Cities.

In addition, certain Type A corporations meeting the requisite revenue amounts, population, and other requirements specified in the Act, may assist with certain Type A projects without the creation or retention of primary jobs. These projects include the following: (1) Type A corporations located within twenty-five (25) miles of an international border, with a city population of less than 50,000 or an average rate of unemployment that is greater than the state average rate of unemployment during the preceding twelve (12) month period may assist with land, buildings, facilities, infrastructure, and improvements required or suitable for the development or promotion of new or expanded business enterprises through transportation facilities including airports, hangars, railports, rail switching facilities, maintenance and repair facilities, cargo facilities, marine ports, inland ports, mass commuting facilities, parking facilities, and related infrastructure located on or adjacent to an airport or railport facility, *Id.* §§ 501.106 (as amended by Tex. H.B. 2772, 84th Leg. (2015)) and 504.103(c)(3); (2) Type A corporations, located in Hidalgo county, may provide certain assistance with infrastructure necessary to promote or develop new or expanded business enterprises, including airports, ports, and sewer or solid waste disposal facilities, provided Type A sales tax revenue does not support the project, *Id.* § 501.107; and (3) Type A corporations in a city with a population of 10,000 or more, located in a county bordering the Gulf of Mexico or the Gulf Intracoastal Waterway, and has, or is included in a metropolitan statistical area of this state that has, an unemployment rate that averaged at least two percent (2.0%) above the state average for the most recent two (2) consecutive years for which statistics are available, the term "project" includes expenditures found by the board of directors to be required or suitable for infrastructure improvements necessary to develop and revitalize areas in the corporation's authorizing municipality, including: streets and roads, rail spurs, water and sewer utilities, electric utilities, gas utilities, drainage, site improvements, and related improvements; telecommunications, data, or Internet improvements; or facilities designed to remediate, mitigate, or control erosion, including coastal erosion along the Gulf of Mexico or the Gulf Intracoastal Waterway. This particular provision expires September 1, 2017. *Id.* § 501.108.

In 2011, the Texas Legislature amended the statute by addressing the authority of a Type A corporation located within a city with a population of less than 7,500 and which also has a Type B corporation. The city council by ordinance may authorize a Type A corporation to undertake any project that a Type B corporation may undertake. The statute also provides that the city council by ordinance may also revoke the authority to pursue Type B projects. Yet, the revocation would not affect the authority of the Type A corporation to complete the project or to repay any debt incurred in connection with the project. *Id.* § 504.171.

E. Permissible Type B Projects.

1. Projects Requiring Creation of Primary Jobs.

Not all Type B projects are required to create or retain primary jobs. Nonetheless, certain sections of the Act require certain Type B projects create or retain primary jobs. Consequently, Type B corporations may assist with the following projects, provided the following projects create or retain a primary job: (1) Type B corporations may provide land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are for the creation or retention of primary jobs; and that are found by the board of directors to be required or suitable for the development, retention, or expansion of: (a) manufacturing and industrial facilities; (b) research and development facilities, (c) military facilities, including closed or realigned military bases; (d) transportation facilities, including airports, hangars, railports, rail switching facilities, maintenance and repair facilities, cargo facilities, related infrastructure located on or adjacent to an airport or railport facility, marine ports, inland ports, mass commuting facilities, and parking facilities; (e) sewage or solid waste disposal facilities; (f) recycling facilities; (g) air or water pollution control facilities; (h) distribution centers; (i) small warehouse facilities capable of serving as decentralized storage and distribution centers; (j) primary job training facilities for use by institutions of higher education; and (k) regional or national corporate headquarters facilities. *Id.* § 501.101.

In addition, Type B corporations may provide land, buildings, equipment, facilities, and improvements found by the board of directors to promote or develop new or expanded business enterprises that create or retain primary jobs, including a project to provide: (a) public safety facilities; (b) streets and roads; (c) drainage and related improvements; (d) demolition of existing structures; (e) general municipally owned improvements; and (f) any improvements or facilities that are related to a project described by this subsection; and any other project that the board of directors in its discretion determines promotes or develops new or expanded business enterprises that create or retain primary jobs. *Id.* § 505.155.

2. Projects Which Do Not Require Creation of Primary Jobs.

Not all Type B projects are required to create or retain primary jobs. The following Type B projects are not required to create or retain primary jobs: (1) job training classes, *Id.* §§ 501.102 and 501.162; (2) certain targeted infrastructure projects necessary to promote or develop new or expanded business enterprises, limited to streets and roads, rail spurs, water and sewer utilities, and electric utilities, gas utilities, drainage, site improvements, and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico, *Id.* § 501.103; (3) land, buildings, equipment, facilities, improvements, and expenditures required or suitable for use for a career center if the area to be benefited by the career center is not located within the taxing jurisdiction of a junior college district, *Id.* § 501.105; (4) projects consisting of professional and amateur (including children's) sports, athletic, entertainment, tourist, convention, and public park purposes and events, *Id.* § 505.152; (5) affordable housing projects, *Id.* § 505.153; (6) water supply facilities projects, with the requisite voter approval, *Id.* §§ 505.154(1) and 505.304; (7) water conservation programs, with the requisite voter approval, *Id.* §§ 505.154(2) and 505.304; (8) development, improvement, expansion, or maintenance of facilities relating to the operation of commuter rail, light rail, or motor buses, *Id.* § 502.052; (9) development or expansion of airport or railport facilities, including hangars, maintenance and repair facilities, cargo facilities, and related infrastructure located on or adjacent to an airport or railport facility, if the project is undertaken by a Type B corporation and enters into a development agreement with an entity who acquires a leasehold or other possessory interest from the Type B corporation and is authorized to sublease the entity's interest for other authorized projects; and is approved by city council by resolution, *Id.* § 505.1561; and (10) development or construction of housing facilities on or adjacent to the campus of a public state college. This particular provision expires September 1, 2017. *Id.* § 501.164 (as redesignated by Tex. S.B. 1296, 84th Leg. (2015)).

3. Projects for Certain Cities.

Moreover, certain Type B corporations meeting the requisite revenue amounts, population requirements, and other requirements specified in the Act, may assist with certain Type B projects without the creation or retention of primary jobs. These projects include the following: (1) Type B corporations located within twenty-five (25) miles of an international border, with a city population of less than 50,000 or an average rate of unemployment that is greater than the state average rate of unemployment during the preceding twelve (12) month period may assist with land, buildings, facilities, infrastructure, and improvements required or suitable for the development or promotion of new or expanded business enterprises through transportation facilities including airports, hangars, railports, rail switching facilities, maintenance and repair facilities, cargo facilities, marine ports, inland ports, mass commuting facilities, parking facilities, and related infrastructure located on or adjacent to an airport or railport facility *Id.* § 501.106 (as amended by Tex. H.B. 2772, 84th Leg. (2015)); (2) Type B corporations, located in Hidalgo county, may provide certain assistance with infrastructure necessary to promote or develop new or expanded business enterprises, including airports, ports, and sewer or solid waste disposal facilities, provided Type B sales tax revenue does not support the project; (3) Type B corporations, which have not generated more than $50,000 in revenues in the preceding two (2) fiscal years, may provide land buildings, equipment, facilities, and improvements found by the board of directors to be required or suitable for the development, retention, or expansion of business enterprises, provided city council authorizes the project by adopting a resolution following two (2) separate readings conducted at least one (1) week apart, *Id.* § 505.156; (4) Type B corporations with a population of 20,000 or less, may provide land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements found by the board of directors to promote new or expanded business development, provided projects which require an expenditure of more than $10,000 city council must adopt a resolution authorizing the project after giving the resolution at least two (2) separate readings, *Id.* § 505.158; (5) Type B corporations located wholly or partly in Dallas or Harris county and has within its city limits and extraterritorial jurisdiction less than 100 acres that can be used for the development of manufacturing or industrial facilities in accordance with the zoning laws or land use restrictions of the city, the term project also means Type B expenditures found by the board of directors to be required for the promotion of new or expanded business enterprises within the landlocked community, *Id.* § 505.157; and (6) Type B corporations in a city with a population of 10,000 or more, located in a county bordering the Gulf of Mexico or the Gulf Intracoastal Waterway, and has, or is included in a metropolitan statistical area of this state that has, an unemployment rate that averaged at least two percent (2.0%) above the state average for the most recent two (2) consecutive years for which statistics are available, the term "project" includes expenditures found by the board of directors to be required or suitable for infrastructure improvements necessary to develop and revitalize areas in the corporation's authorizing municipality, including: streets and roads, rail spurs, water and sewer utilities,

electric utilities, gas utilities, drainage, site improvements, and related improvements; telecommunications, data, or Internet improvements; or facilities designed to remediate, mitigate, or control erosion, including coastal erosion along the Gulf of Mexico or the Gulf Intracoastal Waterway. This particular provision expires September 1, 2017. *Id.* § 501.108.

F. Primary Jobs.

In 2003, the Texas Legislature amended the Development Corporation Act to require certain Type A or Type B projects create or retain primary jobs. Yet, not all projects must create or retain primary jobs. The term primary job means "a job that is . . . available at a company for which a majority of the products or services of that company are ultimately exported to regional, statewide, national, or international markets infusing new dollars into the local economy; and" is included in one of nearly sixteen (16) different North American Industry Classification System (NAICS) sector codes. *Id.* § 501.002(12).

The NAICS sector code categories include: crop production; animal production; forestry and logging; commercial fishing; support activities for agriculture and forestry; mining; utilities; manufacturing; wholesale trade; transportation and warehousing; information (excluding movie theaters and drive-in theaters); securities, commodity contracts, and other financial investments and related activities; scientific research and development services; management of companies and enterprises; telephone call centers; and correctional institutions. *Id*. Further, a job included within the national security sector code classification for the armed forces, army, navy, air force, marine corps, and military bases meet the definition of "primary job."

G. Promotional Expenditures.

Both Type A and Type B corporations may spend no more than ten percent (10%) of the corporate revenues for promotional purposes. *Id.* §§ 504.105(a) and 505.103. The Texas Attorney General considered promotional expenditures and concluded a promotional purpose is a question of fact for the board of directors to resolve in the first instance, subject to judicial review and the supervisory authority of the city council. Op. Tex. Att'y Gen. No. GA-0086 (2003). Further, the city council could approve or disapprove of a particular promotional expenditure. The Attorney General noted a corporation may not spend more than ten percent (10%) of its current annual revenues for promotional purposes in any given year. Yet, unexpended revenues specifically set aside for promotional purposes in past years may be expended for such purposes. *Id*.

H. Job Training Classes.

A Type A or Type B corporation may spend sales tax proceeds for job training offered through a business enterprise under certain conditions. The business enterprise must commit in writing to create jobs which pay wages that are at least equal to the prevailing wage for the applicable occupation in the local market area, or increase its payroll to pay wages that are at least equal to the prevailing wage for the occupation in the local labor market area. TEX. LOC. GOV'T CODE ANN. §§ 501.102 and 501.162.

In addition, Type A and Type B corporations in a city with a population of 10,000 or more, located in a county bordering the Gulf of Mexico or the Gulf Intracoastal Waterway, and has, or is included in a metropolitan statistical area of this state that has, an unemployment rate that averaged at least two percent (2.0%) above the state average for the most recent two (2) consecutive years for which statistics are available, may spend sales tax revenue for job training that consists of: (1) providing job-related life skills sufficient to enable an unemployed individual to obtain employment; and (2) providing job training skills sufficient to enable an unemployed individual to obtain employment. *Id.* § 501.163.

I. Training Seminars.

In the 2001 legislative session, the Texas Legislature amended the Development Corporation Act to require certain Type A and Type B economic development officials to complete a training seminar which ensures officials properly and legally operate the corporation and administer the tax imposed for the benefit of the Type A or Type B corporation. *Id.* § 502.101. One of the following three (3) city officials are required to attend a seminar each twenty-four (24) month period: the city attorney, the city administrator, or city clerk. Further, the executive director or other person who is responsible for the daily administration of the corporation must attend a seminar in each twenty-four (24) month period. *Id.* § 502.101(a)(1) & (2). The Development Corporation Act specifically authorizes to use of Type A or Type B sales tax proceeds to pay for the costs of attending the seminar. *Id.* § 502.101(d).

J. Performance Agreements.

In 2003, the Texas Legislature amended the Development Corporation Act to address business incentives and performance agreements. Type A and Type B corporations may not provide a direct incentive or make expenditures on behalf of a business enterprise unless the corporation enters into a performance agreement with the business enterprise. *Id.* § 501.158(a).

The performance agreement at a minimum must provide for a schedule of additional payroll or jobs to

be created or retained and the capital investment to be made as consideration for any incentives. *Id.* § 501.158(b). Further, the agreement must specify the terms for any repayment should the business fail to meet the performance requirements specified in the agreement.

K. Business Recruitment or Development.

Type A and Type B corporations may hire a third party for the purposes of conducting business recruitment or development. *Id.* § 502.051. Nonetheless, the corporation must enter into a written contract approved by the corporation's board of directors in connection with the payment of a commission fee, or thing of value to a broker, agent, or third party who is involved in business recruitment or development. This requirement does not apply to the business recruitment or development activities conducted by the executive director or other employees of the Type A or Type B corporation. Should the corporation hire a third party for the purposes of business recruitment or development without a written contract approved by the board, the corporation could be liable to the State of Texas for a civil penalty in an amount not to exceed $10,000. The Texas Attorney General's office could bring an action to recover the penalty in Travis County District Court or the district court in the county in which the violation occurred. *Id.* § 502.051(c).

L. Non-Profit Corporations.

Once the Type A or Type B sales tax is adopted, the sales tax revenues are administered by the corporations. Non-profit corporations must be created to administer these sales taxes. These corporations are governed by the Development Corporation Act, and Texas Non-Profit Corporation Act, as contained in the Texas Business Organizations Code. *Id.* §§ 504.003, 505.003 & 501.054. The corporations determine which projects to fund, with city council retaining approval authority over all expenditures of the corporation. *Id.* § 501.073(a) ("The corporation's authorizing unit [city council] will approve all programs and expenditures of a corporation and annually review any financial statements of the corporation").

M. City Council Approves All Expenditures.

The development corporation has the power to expend the proceeds of the economic development sales tax for purposes authorized by the Development Corporation Act. TEX. LOC. GOV'T CODE ANN. §§ 504.303 and 505.302. Nonetheless, city council retains authority to "approve all programs and expenditures of a corporation." TEX. LOC. GOV'T CODE ANN. § 501.073(a). City council's oversight includes the authority to approve promotional expenditures as well. *See*, Op. Tex. Att'y Gen. No. GA-0086 (2003) at 3 – 5 (concluding city council may approve or disapprove a particular promotional expenditure). City council cannot expend Type A or Type B funds on their own initiative. Approval for funding of projects begins with the board of directors. Should the board of directors decide to fund a particular project, city council approval is required. Nonetheless, city council cannot fund a project on their initiative. Op. Tex. Att'y Gen. No. JC-0488 (2002) at 3 ("Before addressing the City's principal concern, we address its assumption that the City, rather than its [Type B] development corporation, may expend the sales tax proceeds for the purposes authorized by the voters. This assumption is contrary to the Act"). The board of directors must also approve the project. The Development Corporation Act provides that city council will annually review the financial records of the corporation and at all times will have access to the books and records of the corporation. *Id.* § 501.073.

N. City Council Appoints Board of Directors.

The board of directors of a Type A corporation consists of at least five (5) directors who are appointed by city council. *Id.* § 504.051. Similarly, seven (7) directors appointed by city council serve on the Type B board. *Id.* § 505.051. Type A board of directors serve terms not to exceed six (6) years and are subject to removal at any time by city council. *Id.* § 504.051(b) & (c). *See also*, Op. Tex. Att'y Gen. No. JC-0349 (2001). Type B board of directors serve a two (2) year term and are subject to removal at any time by city council. *Id.* § 505.051(b) & (c).

The Development Corporation Act does not specify any residency requirement for a Type A board member. A Type A director is not required to be a resident of the city.

In a city with a population of 20,000 or more, the Type B board of directors must be residents of the city. *Id.* § 505.052. In a city with a population of less than 20,000, each Type B director must be a resident of the municipality; a resident of the county in which the major part of the area of the municipality is located; or reside within ten (10) miles of the municipality's boundaries and is in a county bordering the county in which most of the area of the municipality is located.

O. Public Hearing Requirements.

Generally, when Type A corporations pursue projects they are required to obtain city council approval of the project. *Id.* § 501.073(a) ("The corporation's authorizing unit [city council] will approve all programs and expenditures of a corporation and annually review any financial statements of the corporation.") Type A corporations generally do not have additional notice and hearings requirements on individual projects undertaken by the corporation. Nonetheless, there are exceptions requiring the Type A

corporation to conduct a public hearing. If a Type A corporation desires to pursue a sports venue project, or a Type B project, a public hearing is required. *Id.* §§ 504.152 and 504.153.

If the economic development corporation desires to use Type A proceeds to undertake a Type B project, it is required to conduct a public hearing prior to the election. The hearing must be held in the city and must inform the residents of the cost and impact of the project or category of projects. Additionally, the city must publish notice of the hearing in a newspaper of general circulation in the city at least thirty (30) days prior to the hearing date. The notice must indicate the date, time, place and subject of the hearing. The notice should be published on a weekly basis until the date of the hearing. *Id.*

Generally, a Type B corporation must hold at least one (1) public hearing on a proposed project. *Id.* § 505.159(a). In 2007, the Texas Legislature amended the Development Corporation Act applicable to Type B cities with a population of less than 20,000. *Id.* § 505.159(b). A Type B corporation in a city with a population of less than 20,000 is not required to hold a public hearing if the proposed project is contained in Subchapter C of Chapter 501 of the Texas Local Government Code. Additionally, the Type B corporation must obtain city council approval of the expenditure. *Id.* § 501.073(a). When required a Type B corporations could conduct one (1) public hearing to consider several projects. Nonetheless, notice of the project or projects must be published in a newspaper of general circulation in the city. After the projects have been considered at a public hearing, as necessary, and once sixty (60) days have passed since the first published notice of the projects, the Type B corporation is authorized to make expenditures related to the projects.

P. Citizens Objection to Type B Projects.

The public has a right to gather a petition objecting to a particular Type B project. *Id.* § 505.160(a). The petition must be submitted within sixty (60) days of the first published notice of a specific project or type of project, and must be signed by more than ten percent (10%) of the registered voters of the city. If the governing body of the city receives a petition from more than ten percent (10%) of the registered voters of the city requesting an election be held before that specific project or the general type of project is undertaken, the corporation may not undertake the project until the voters approve the project at an election called and held to consider the proposed Type B project. *Id.* An election is not required to be held after the submission of a petition if the voters have previously approved the specific project at an election called for that purpose or in conjunction with another Type B election.

Q. Publication of Notice.

Generally, there is not a requirement for a Type A corporation to conduct public hearings. Consequently, Type A corporations generally do not have a publication requirement. When a Type A board pursues a particular project city council must approve the project. *Id.* § 501.073(a). Yet, there is no requirement for additional public notice on individual projects undertaken by the Type A corporations. Nonetheless, there are exceptions which require publishing notice for sports venue projects, pursuing Type B projects, *Id.* §§ 504.152 and 504.153, and maintenance and operating costs of a project. *Id.* § 504.302.

Type B corporations must publish notice of all projects. *Id.* § 505.160(a). Excluding sports venue projects and absent a local provision, there is not a requirement the published notice of the hearing be published a certain number of days prior to the hearing. Type B corporations must wait sixty (60) days after first publishing notice of the specific project or category of projects before expending any monies for the Type B project. *Id.* § 505.160(a).

VII. PUBLIC IMPROVEMENT DISTRICTS.

Public improvement districts are an economic development tool where public improvement projects are constructed and paid for by assessments levied on property within the district.

A. Petition.

A petition is a prerequisite for the establishment of a public improvement district. State statute provides that the city or county may initiate or receive a petition. Nonetheless, the petition for the creation of a public improvement district must comply with section 372.005 of the Texas Local Government Code. This provision governs the contents of the petition, the requisite number of petition signatures required, and the submission of the petition. TEX. LOC. GOV'T CODE ANN. § 372.002 (Vernon 2005). *See also* Tex. Att'y Gen. LO-96-129 (1996) ("The petition referenced in section 372.002 of the Local Government Code and described in section 372.005 of the Local Government Code is a prerequisite for the establishment of a public improvement district.")

1. <u>How many property owners must sign a petition?</u>

A petition is sufficient if signed by owners of taxable real property representing more than fifty percent (50%) of the appraised value of taxable real property liable for assessment, and represents fifty percent (50%) or more of all the record owners of property liable for the assessment. TEX. LOC. GOV'T CODE ANN. § 372.005(b)(1)&(2)(A). Alternatively, the petition is sufficient if signed by owners of taxable real

property representing more than fifty percent (50%) of the appraised value of taxable real property liable for assessment, and represents record owners of real property who own fifty percent (50%) or more of the area that is liable for assessment. *Id.* § 372.005(b)(1)&(2)(B). Essentially you need a petition signed by owners of fifty percent (50%) of the appraised value and fifty percent (50%) of the owners. Or, a petition signed by owners of fifty percent (50%) of the appraised value, and by owners constituting fifty percent (50%) of the area liable for the assessment.

2. Requirements of proper petition

A petition for the establishment of a public improvement district must state: the general nature of the proposed improvement; the estimated cost of the improvement; the boundaries of the proposed assessment district; the proposed method of assessment, which may specify included or excluded classes of assessable property; the proposed apportionment of cost between the public improvement district and the municipality or county as a whole; whether the management of the district is to be by the municipality or county, the private sector, or a partnership between the municipality or county and the private sector; that the persons signing the petition request or concur with the establishment of the district; and that an advisory body may be established to develop and recommend an improvement plan to the governing body of the municipality or county. *Id.* § 372.005(a)(1)-(8).

3. Filing of petition

The petition may be filed with the municipal secretary or other officer performing the functions of the municipal secretary. *Id.* § 372.005(c).

4. Factual findings

If a petition complies with the requirements of state law, city council or the county commissioners court may make findings by resolution as to the advisability of the proposed improvement, its estimated cost, the method of assessment, and the apportionment of cost between the proposed improvement district, the city, or the county. *Id.* § 372.006.

5. Home-rule municipality objection to the establishment of a public improvement district by the county

A county may establish a public improvement district unless within thirty (30) days of a county's action to approve such a district, a home-rule municipality objects to its establishment within the municipality's corporate limits or extraterritorial jurisdiction. *Id.* § 372.003(d).

B. Public Improvement Projects

Authorized public improvement projects include the following:

1. landscaping;
2. erection of fountains, distinctive lighting, and signs;
3. acquiring, constructing, improving, widening, narrowing, closing, or rerouting of sidewalks or of streets, any other roadways, or their rights-of-way;
4. construction or improvement of pedestrian malls;
5. acquisition and installation of pieces of art;
6. acquisition, construction, or improvement of libraries;
7. acquisition, construction, or improvement of off-street parking facilities;
8. acquisition, construction, improvement, or rerouting of mass transportation facilities;
9. acquisition, construction, or improvement of water, wastewater, or drainage facilities or improvements;
10. the establishment or improvement of parks;
11. projects similar to those listed in Subdivisions (1)-(10);
12. acquisition, by purchase or otherwise, of real property in connection with an authorized improvement;
13. special supplemental services for improvement and promotion of the district, including services relating to advertising, promotion, health and sanitation, water and wastewater, public safety, security, business recruitment, development, recreation, and cultural enhancement; and
14. payment of expenses incurred in the establishment, administration, and operation of the district.

Id. § 372.003(b)(1)-(14).

C. Procedural Steps to Create Public Improvement District

1. Receipt of a Petition

A city or county must receive a petition signed by the appropriate number of property owners requesting the creation of the public improvement district. *Id.* § 372.002.

2. Preparation of a Report

Second, the city or county could have a report prepared concerning the petition for the creation of a public improvement district. Before conducting a public hearing on the creation of a public improvement district, the city council or county commissioners court may but is not required to use the services of its

employees or consultants to prepare a report to determine whether an improvement should be made as proposed by the petition or whether the improvement should be made in combination with other improvements. The governing body may also require that a preliminary estimate of the cost of the improvement or combination of improvements be made. *Id.* § 372.007.

3. Establish an Advisory Board

Third, the city or county may but is not required to establish an advisory body to develop and recommend to the governing body an improvement plan. *Id.* § 372.008. The advisory body must be comprised of the following: (1) owners of taxable real property representing more than fifty percent (50%) of the appraised value of taxable real property liable for assessment under the proposal, as determined by the current roll of the appraisal district in which the property is located; and (2) record owners of real property liable for assessment under the proposal who: (A) constitute more than fifty percent (50%) of all record owners of property that is liable for assessment under the proposal; or (B) own taxable real property that constitutes more than fifty percent (50%) of the area of all taxable real property that is liable for assessment under the proposal.

4. Published Notice of Public Hearing to Create District

Fourth, notice of the public hearing on the creation of the public improvement district must be given in a newspaper of general circulation in the municipality or county and must be published at least fifteen (15) days before the date of the public hearing. If any part of the improvement district is to be located in the municipality's extraterritorial jurisdiction or if any part of the improvements is to be undertaken in the municipality's extraterritorial jurisdiction, the notice must also be given in a newspaper of general circulation in the part of the extraterritorial jurisdiction in which the district is to be located or in which the improvements are to be undertaken. The published notice must contain the following: the time and place of the hearing; the general nature of the proposed improvement; the estimated cost of the improvement; the boundaries of the proposed assessment district; the proposed method of assessment; and the proposed apportionment of cost between the public improvement district, and the city or county as a whole. *Id.* § 372.009(c).

5. Mailed Notice to Property Owners on Public Hearing to Create District

Fifth, written notice of the public hearing on the proposed public improvement district must also be mailed before the fifteenth (15^{th}) day before the date of the public hearing. The notice must be addressed to "Property Owner" and mailed to the current address of the owner, as reflected on tax rolls, of property subject to assessment under the proposed public improvement district. *Id.* § 372.009(d).

6. Public Hearing to Create District

The city or county must conduct a public hearing on the proposed public improvement district. The public hearing may be adjourned from time to time until the city council or county commissioners court makes findings by resolution as to the advisability of the improvement; the nature of the improvement; the estimated cost of the improvement; the boundaries of the public improvement district; the method of assessment; and the apportionment of costs between the district and the municipality or county as a whole. *Id.* § 372.009(a) and (b).

7. Resolution Authorizing the Public Improvement District

Within six (6) months after the conclusion of the public hearing, city council or county commissioners court may authorize the public improvement district provided a majority vote of all members of the governing body approves a resolution authorizing the district in accordance with its finding as to the advisability of the improvement. *Id.* § 372.010(a). The authorization takes effect when it has been published one time in a newspaper of general circulation in the city or county. If any part of the public improvement district is located in the city's extraterritorial jurisdiction or if any part of the improvements is to be undertaken in the municipality's extraterritorial jurisdiction, the authorization does not take effect until the notice is also given one time in a newspaper of general circulation in the part of the extraterritorial jurisdiction in which the public improvement district is located or in which the improvements are to be undertaken. *Id.* § 372.010(b).

8. Construction of Improvements

Actual construction of the public improvements may not begin until after the 20^{th} day following the date the resolution takes effect authorizing the public improvement district. *Id.* § 372.010(c). Further, construction of the public improvements may not begin if during the 20-day period a written protest is signed by at least two-thirds of the owners of record of property within the improvement district or by the owners of record of property comprising at least two-thirds of the total area of the district.

9. 5 Year Service Plan

The advisory body shall prepare an ongoing service plan and present the plan to city council or county commissioners court for review and approval.

The governing body may assign responsibility for the plan to another entity in the absence of an advisory body. The service plan must cover a period of at least five (5) years and must also define the annual indebtedness and the projected costs for improvements. The service plan is required to be reviewed and updated annually for the purpose of determining the annual budget for improvements. *Id.* § 372.013. An assessment plan must be included in the annual service plan. *Id.* § 372.014(a).

10. Determination of Assessment

The governing body shall apportion the cost of an improvement against property within a public improvement district. The apportionment shall be made on the basis of special benefits accruing to the property because of the improvement. State statute provides that the cost of the improvements may be assessed in the following manner:

a. equally per front foot;
b. equally per square foot;
c. according to the value of the property as determined by the governing body, with or without regard to any improvements to the property; or
d. any other manner that results in imposing equal shares of the cost on property similarly benefitted. *Id.* § 372.015(b)(1)-(3).

11. Published Notice on Proposed Assessment Roll

After the total cost of an improvement is determined, the city council or county commissioners court is required to prepare a proposed assessment roll. The roll must state the assessment against each parcel of land in the district, as determined by the method of assessment chosen by the governing body. The city is required to file the proposed assessment roll with the city secretary or other officer performing the functions of the city secretary. The county is required to file the proposed assessment roll with the county tax assessor-collector. *Id.* § 372.016(b). The proposed assessment roll is subject to public inspection. The governing body shall require the city secretary or other officer performing the functions of the city secretary or county tax assessor-collector, as applicable, to publish notice of the governing body's intention to consider the proposed assessments at a public hearing. The notice must be published in a newspaper of general circulation in the city or county before the 10th day before the date of the hearing. The notice must state: (1) the date, time, and place of the hearing; (2) the general nature of the improvement; (3) the cost of the improvement; (4) the boundaries of the assessment district; and (5) that written or oral objections will be considered at the hearing. *Id.* § 372.016.

12. Public Hearing on Proposed Assessment Roll

The city council or county commissioners court is required to consider the proposed assessment roll at a public hearing. *Id.* § 372.016(b). At or on the adjournment of the public hearing on the proposed assessments, the governing body must hear and pass on any objection to a proposed assessment. The governing body may amend a proposed assessment on any parcel. *Id.* § 372.017(a). After all objections have been heard, the governing body by ordinance or order shall levy the assessment as a special assessment on the property. The governing body by ordinance or order is required to specify the method of payment of the assessment. The governing body may provide that assessments be paid in periodic installments. However, the installments must be in amounts necessary to meet annual costs for improvements and must continue for a period necessary to retire the indebtedness on the improvements. *Id.* § 372.017(b).

D. Homestead Property and the PID Assessment

The Texas Attorney General concluded assessments are not "taxes" as that term is used in the Texas Constitution. Consequently, a homestead may not be subjected to forced sale for nonpayment of a public improvement district assessment, pursuant to article XVI, section 50 of the Texas Constitution. *See*, Op. Tex. Att'y Gen. No. JC-0386 (2001). However, the Texas Attorney General also concluded a public improvement district assessment may be enforced by foreclosure of a homestead provided that the statutory lien created by section 372.018(b) of the Local Government Code predates the date the property became a homestead and the amounts to be collected fall within the lien's scope. *See*, Op. Tex. Att'y Gen. No. GA-0237 (2004).

VIII. MISCELLANEOUS PROVISIONS

A. Undocumented workers provision - Chapter 2264 of the Texas Government Code

Approved in 2007, Chapter 2264 of the Texas Government Code provides restrictions on the use of "public subsidies" to employ undocumented workers. TEX. GOV'T CODE ANN. chapter 2264.

1. Public Subsidies

The term "public subsidy" means

> [a] public program or public benefit or assistance of any type that is designed to stimulate the economic development of a corporation, industry, or sector of the state's economy or to create or retain jobs in this state. The term includes grants, loans, loan guarantees, benefits relating to an enterprise or empowerment zone, fee waivers, land price subsidies, infrastructure development

> and improvements designed to principally benefit a single business or defined group of businesses, matching funds, tax refunds, tax rebates, or tax abatements. TEX. GOV'T CODE ANN. § 2264.001(3).

2. Public Agency

This chapter applies to Type A and Type B economic development corporations, as well as, a public agency. The term "public agency" means the state or an agency, instrumentality, or political subdivision of the state, including a county, a municipality, a public school district, or a special-purpose district or authority. TEX. GOV'T CODE ANN. § 2264.001(2).

3. Statement Required in Applications

A public agency, state or local taxing jurisdiction or Type A or Type B economic development corporation shall require a business that submits an application to receive a public subsidy to include within said application a statement certifying that the business, or a branch, division, or department of the business does not and will not knowingly employ an undocumented worker. TEX. GOV'T CODE ANN. § 2264.051. The statement required must state

> that if, after receiving a public subsidy, the business, or a branch, division, or department of the business, is convicted of a violation under 8 U.S.C. Section 1324a(f), the business shall repay the amount of the public subsidy with interest, at the rate and according to the other terms provided by an agreement under Section 2264.053, not later than the 120th day after the date the public agency, state or local taxing jurisdiction, or economic development corporation notifies the business of the violation. TEX. GOV'T CODE ANN. § 2264.052.

4. Undocumented Worker Provision within Agreements

A public agency, state or local taxing jurisdiction, or economic development corporation, before awarding a public subsidy to a business is required to enter into a written agreement with the business specifying the rate and terms of the payment of interest should the business be required to repay the public subsidy. TEX. GOV'T CODE ANN. § 2264.053.

B. Conveyance of real property

1. Section 272.001(b)(6) of the Texas Local Government Code - Tax Increment Financing.

A municipality's land that is located in a reinvestment zone designated as provided by law and that the municipality desires to have developed under a project plan adopted by the municipality for the zone is exempt from the notice and bidding requirements contained in chapter 272 of the Texas Local Government Code.

2. Section 253.009 of the Texas Local Government Code

This section authorizes a city to convey to a Type A or Type B economic development corporation created under the Development Corporation Act real property that has been conveyed by gift to the municipality or conveyed to the municipality as part of a legal settlement and that is adjacent to an area designated for development by the corporation. The City may convey property for any fair consideration approved by city council.

For the conveyance to be effective, the city council must adopt an ordinance that: (1) describes the property to be conveyed; (2) requires the conveyance to comply with the requirements of Section 5.022, Property Code, except a covenant of general warranty is not required [i.e. conveys fee simple estate]; and (3) states the consideration paid.

A city may convey the property under this section without complying with the other notice or bidding requirements prescribed by other law, including Section 272.001 of the Texas Local Government Code.

3. Section 253.012 of the Texas Local Government Code

This provision applies to cities with a population of 20,000 or less, and authorizes a city to convey to a Type A or Type B economic development corporation, for consideration described below, real property or an interest in real property without complying with the notice and bidding requirements of Section 272.001(a) of the Texas Local Government Code or other law. However, a city may not transfer property to an economic development corporation under this statute if the city acquired the property through eminent domain.

The consideration is in the form of an agreement between the parties that requires the economic development corporation to use the property in a manner that primarily promotes a public purpose of the municipality. If the economic development corporation at any time fails to use the property in that manner, ownership of the property automatically reverts back to the city.

The city must transfer the property by an appropriate instrument. The instrument must include a provision that: (1) requires the economic development corporation to use the property in a manner that primarily promotes a public purpose of the municipality; and (2) indicates that ownership of the property automatically reverts back to the city if the nonprofit organization at any time fails to use the property in that manner.

C. Sales tax information

1. City provision - Section 321.3022 of the Texas Tax Code

The State Comptroller's office on request shall provide to a municipality or "other local governmental entity" that has adopted a sales and use tax under chapter 321 of the Tax Code information relating to the amount of tax paid to the city or other local governmental entity during the preceding or current calendar year by each person doing business within the city or other local governmental entity who annually remits to the State Comptroller state and local sales tax payments of more than $5,000. For a city or other local governmental entity which does not impose ad valorem taxes and has adopted a tax pursuant to chapter 321 of the Tax Code, the State Comptroller's office on request shall provide information relating to the amount of tax paid to the city or other local governmental entity during the preceding or current calendar year by each person doing business within the city or other local governmental entity who annually remits to the State Comptroller state and local sales tax payments of more than $500. TEX. TAX CODE ANN. § 321.3022(a-2).

a. "Other local governmental entity"

The term "other local governmental entity" means "any governmental entity created by the legislature that has a limited purpose or function, that has a defined or restricted geographic territory, and that is authorized by law to impose a local sales and use tax. The term does not include a county, county health services district, county landfill and criminal detention center district, metropolitan transportation authority, coordinated county transportation authority, economic development district, crime control district, hospital district, emergency services district, or library district." TEX. TAX CODE ANN. § 321.107.

b. Type of agreements

The State Comptroller's office on request shall provide to a city or other local governmental entity that has adopted a tax under chapter 321 of the Tax Code information relating to the amount of sales tax paid to the city or other local governmental entity during the preceding or current calendar year by each person doing business in an area, as defined by the city or other local governmental entity, that is part of: (1) an interlocal agreement; (2) a tax abatement agreement; (3) a reinvestment zone; (4) a tax increment financing district; (5) a revenue sharing agreement; (6) an enterprise zone; (7) a neighborhood empowerment zone; (8) a crime control and prevention district; (9) a fire control, prevention, and emergency medical services district; (10) any other agreement, zone, or district similar to those listed in Subdivisions (1)-(9); or (11) any area defined by the city or other local governmental entity for the purpose of economic forecasting. TEX. TAX CODE ANN. § 321.3022(b)(1)-(11). The State Comptroller will provide the information as an aggregate total for all persons doing business within the defined area without disclosing individual tax payments. *Id.* at § 321.3022(c).

c. Area report involving not more than three (3) persons

If the request for sales tax information involves not more than three (3) persons doing business in the defined area who remits sales taxes, the State Comptroller shall refuse to provide the information to the municipality or other local governmental entity unless the Comptroller receives permission from each of the persons. *Id.* at § 321.3022(d).

d. Annual requests for sales tax information

A separate request for sales tax information must be made in writing by city's mayor or chief administrative officer or by the governing body of the other local governmental entity each year. *Id.* at § 321.3022(e).

e. Confidentiality of sales tax information

Information received by a city or other local governmental entity is confidential, and is not open to public inspection. The information may be used only for the purpose of economic forecasting, for internal auditing of the sales tax paid to the city or other local governmental entity, or for the purpose of assisting in determining revenue sharing under a revenue sharing agreement or other similar agreement. *Id.* at § 321.3022(f)&(g).

f. Texas Open Meetings Act

Section 321.3022(i) of the Texas Tax Code authorizes the city or other local governmental entity to confer in executive session regarding sales tax information. This subsection provides the following:

> Notwithstanding Chapter 551, Government Code, the governing body of a municipality or other local governmental entity is not required to confer with one or more employees or a third party in an open meeting to receive information or question the employees or third party regarding the information received by the municipality or other local governmental entity under this section.

2. County provision – Section 323.3022 of the Texas Tax Code

Similar to the municipal provision, the county provision found in section 323.3022 of the Texas Tax Code, the State Comptroller's office on request shall provide to a county or "other local governmental

entity" that has adopted a sales and use tax under chapter 323 of the Tax Code information relating to the amount of tax paid to the county or other local governmental entity during the preceding or current calendar year by each person doing business within the county or other local governmental entity who annually remits to the State Comptroller state and local sales tax payments of more than $5,000. TEX. TAX CODE ANN. § 323.3022(b).

a. "Other local governmental entity"

The term "other local governmental entity" means "any governmental entity created by the legislature that has a limited purpose or function, that has a defined or restricted geographic territory, and that is authorized by law to impose a local sales and use tax the imposition, computation, administration, enforcement, and collection of which is governed by [chapter 323 of the Texas Tax Code]." *Id. at* § 323.3022(a).

b. Type of agreements

The State Comptroller's office on request shall provide to a county or other local governmental entity that has adopted a tax under chapter 323 of the Texas Tax Code information relating to the amount of tax paid to the county or other local governmental entity during the preceding or current calendar year by each person doing business in an area, as defined by the county or other local governmental entity, that is part of: (1) an interlocal agreement; (2) a tax abatement agreement; (3) a reinvestment zone; (4) a tax increment financing district; (5) a revenue sharing agreement; (6) an enterprise zone; (7) any other agreement, zone, or district similar to those listed in Subdivisions (1)-(6); or (8) any area defined by the county or other local governmental entity for the purpose of economic forecasting. *Id. at* § 323.3022(c)(1)-(8).

c. Area report involving not more than three (3) persons

If the request for sales tax information involves not more than three (3) persons doing business in the defined area who remits sales taxes, the State Comptroller shall refuse to provide the information to the county or other local governmental entity unless the Comptroller receives permission from each of the persons. *Id.* at § 323.3022(e).

d. Annual requests for sales tax information

A separate request for sales tax information must be made in writing by the county judge or by the governing body of the other local governmental entity each year. *Id.* at § 323.3022(f).

e. Confidentiality of sales tax information

Information received by a county or other local governmental entity is confidential, and is not open to public inspection. The information may be used only for the purpose of economic forecasting, for internal auditing of the sales tax paid to the county or other local governmental entity, or for the purpose of assisting in determining revenue sharing under a revenue sharing agreement or other similar agreement. *Id.* at § 323.3022(g)&(h).

f. Texas Open Meetings Act

Section 323.3022(i) of the Texas Tax Code authorizes the county or other local governmental entity to confer in executive session regarding sales tax information. This subsection provides the following:

> Notwithstanding Chapter 551, Government Code, the commissioners court of a county or the governing body of the other local governmental entity is not required to confer with one or more employees or a third party in an open meeting to receive information or question the employees or third party regarding the information received by the county or other local governmental entity under this section.

D. Competitive bidding requirements

Generally, when a governmental entity (city, county, or school district) desires to procure goods and services the governmental entity is required to utilize competitive bidding or other procurement methods. Yet, there are exceptions to the competitive bidding or procurement requirements.

1. Tax Increment Financing

In 2005, the Attorney General was asked to consider whether a city may use its tax increment fund to reimburse a private developer for certain project costs when those expenditures had not been competitively bid. *See*, Op. Tex. Att'y Gen. No. GA-0305 (2005). In reviewing chapter 252 of the Texas Local Government Code, the Attorney General noted a municipality must comply with chapter 252's competitive bidding requirements before entering into a contract that required an expenditure of more than, at the time, $25,000.00 or more. *Id.* GA-0305 at 5 (The threshold now is $50,000.00 or more). Consequently, the Attorney General concluded a tax increment fund is a municipal fund and chapter 252 of the Texas Local Government Code's requirements may apply to expenditures from the fund. This result led to an amendment of the statute in 2005. *See*, Tex. S.B. 771, 79th Leg., R.S. (2005). Currently, section 311.010(g) of the Texas Tax Code provides that "[c]hapter 252, Local Government Code, does not apply to a dedication, pledge, or other use of revenue in the tax increment fund for a reinvestment zone under Subsection (b) [a reference to the authority to enter into

tax increment financing agreements the board or the governing body considers necessary or convenient to implement the project plan and reinvestment zone financing plan and achieve their purposes]". There is not a similar provision for counties.

2. Public Improvement Districts

Section 252.022 of the Texas Local Government Code provides exceptions to the municipal competitive bidding requirements. In particular, section 252.022(a)(9) provides that the competitive bidding requirements do not apply to an expenditure for "paving drainage, street widening, and other public improvements, or related matters, if at least one-third of the cost is to be paid by or through special assessments levied on property that will benefit from the improvements." TEX. LOC. GOV'T CODE ANN. § 252.022(a)(9). There is not a similar provision for counties under chapter 262 of the Texas Local Government Code.

3. Chapter 381 of the Texas Local Government Code Agreements

Section 262.024(a)(10) of the Texas Local Government Code provides that the county commissioners court by order may grant exemptions to the county competitive bidding requirements for "any work performed under a contract for community and economic development made by a county under Section 381.004 [of the Texas Local Government Code]." There is not a similar provision for cities under chapter 380 of the Texas Local Government Code.

4. Type A and Type B Economic Development Corporations

Section 252.021(a) of the Texas Local Government Code provides that "[b]efore a municipality may enter into a contract that requires an expenditure of more than $50,000 from one or more municipal funds, the municipality must" comply with the competitive bidding or other municipal procurement methods prescribed by state law. Yet, state statute provides that these nonprofit corporations, Type A and Type B corporations, are not considered "a political subdivision or a political corporation for purposes of the laws of this state, including Section 52, Article III, Texas Constitution." TEX. LOC. GOV'T CODE ANN. § 501.055(b) Accordingly, a strong argument can be made that the requirements of chapter 252 of the Texas Local Government Code do not apply to these non-profit corporations. Further, in a related opinion, the Attorney General concluded a Type B economic development corporation was not subject to the notice and bidding requirements of chapter 272 of the Texas Local Government Code, applicable to municipalities, when selling real property. Op. Tex. Att'y Gen. No. JC-0109 (1999).

E. Public Information Act

1. Public Information Act

Section 552.131 of the Texas Government Code provides the ability for governmental bodies to except from disclosure pursuant to the Public Information Act certain information which relates to economic development negotiations involving a governmental body and a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and the information relates to: (1) a trade secret of the business prospect; or (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained.

Unless and until an agreement is made with the business prospect, information about a financial or other incentive being offered to the business prospect by the governmental body or by another person is excepted from disclosure under the Public Information Act. TEX. GOV'T CODE ANN. § 552.131(b). Once an agreement is made with the business prospect the information about a financial or other incentive being offered to the business prospect is public information. Id. § 552.131(c).

2. Tax Abatement Agreements

In addition, to the economic development exception contained in the Public Information Act there is a provision addressing tax abatement agreements. Section 312.003 of the Texas Tax Code provides for the confidentiality of tax abatement agreements. This confidentiality provision includes information that is provided to a taxing unit in connection with an application or request for tax abatement and information that describes the specific processes or business activities to be conducted or the equipment or other property to be located on the property for which tax abatement is sought. However, once an agreement is executed this information is subject to public disclosure.

F. Texas Open Meetings Act

Section 551.087 of the Texas Government Code authorizes governmental bodies to go into executive session regarding economic development negotiations. This section provides that a governmental body is not required to conduct an open meeting:

> "(1) to discuss or deliberate regarding commercial or financial information that the governmental body has received from a business prospect that the governmental body seeks to have locate, stay, or expand in or near the territory of the governmental body and with which the governmental body is

> conducting economic development negotiations; or
> (2) to deliberate the offer of a financial or other incentive to a business prospect described by Subdivision (1)."

TEX. GOV'T CODE ANN. § 551.087.

G. Use of Bond Proceeds to Acquire Real Property – Appraisal Requirement

In 2011 the Texas Legislature approved legislation requiring an appraisal of real property when using bond proceeds. *See*, Tex. H.B. 782, 82nd Leg., R.S. (2011). The bill provides that a city may not purchase property wholly or partly with bond proceeds until the city obtains an independent appraisal of the property's market value. TEX. LOC. GOV'T CODE ANN. § 252.051. In addition, the bill provides that a Type B corporation may not purchase property for a project wholly or partly with bond proceeds until the corporation obtains an independent appraisal of the property's market value. TEX. LOC. GOV'T CODE ANN. § 505.1041. There is not a comparable provision for Type A corporations.

IX. CONCLUSION.

The State of Texas leads the nation in economic development because of the various economic development tools available to local governments. Chapter 380 Agreements, Chapter 381 Agreements, tax abatement agreements, tax increment financing, Type A and Type B sales tax corporations, and public improvement districts lead the way by providing an array of assistance.