

ECONOMIC DEVELOPMENT FOR TEXAS CITIES

**Texas City Attorneys Association's
Riley Fletcher Basic Municipal Seminar
Austin, Texas
February 13, 2009**

Presented by:

Jeff Moore

**Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
(214) 747-6100
www.bhlaw.net**

Jeff Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
(214) 747-6100
jmoore@bhlaw.net

Jeff Moore is a partner with the Dallas area law firm of Brown & Hofmeister, L.L.P. Mr. Moore has been with the firm since August of 2003 and specializes in municipal law.

Mr. Moore served as an Assistant Attorney General with the Texas Attorney General's office from August 1999 to July 2003, the last three years of which he served as the chief of the Municipal Affairs Section. As an assistant attorney general he provided legal assistance to municipalities regarding municipal law issues, including the Open Meetings Act, the Public Information Act, competitive bidding laws, municipal court issues, annexation laws, and land use issues. Additionally, Mr. Moore has provided assistance on economic development issues, including the section 4A and 4B sales tax, hotel occupancy tax, tax increment financing, and tax abatement. He was responsible for revising and updating the *Attorney General's Economic Development Laws for Texas Cities Handbook* for 2000-2001, and 2002-2003.

In conjunction with the Texas Economic Development Council, State Comptroller's office and the Office of the Attorney General, Mr. Moore has assisted with the Section 4A/4B Sales Tax Training Seminars mandated by the Texas Legislature in the 77th legislative session (HB 3178).

Before joining the Attorney General's office, Mr. Moore was an assistant city attorney for the City of Austin from 1992 to 1999.

Mr. Moore earned a B.A. degree in Government at the University of Texas at Austin in 1987, and a J.D. degree from the Texas Tech University School of Law in 1991. He is a member of the State Bar of Texas, and is admitted to the U.S. District Court for the Northern District of Texas and the U.S. District Court for the Eastern District of Texas. Additionally, Mr. Moore is a member of the Dallas Bar Association, and Texas City Attorneys Association.

Type A and Type B Sales Tax

**Texas City Attorneys Association's
Riley Fletcher Basic Municipal Law Seminar
Austin, Texas
February 13, 2009**

Prepared by:

Jeff Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
(214) 747-6100

Table of Contents

General:

What is Type A and Type B Sales Tax.....	1
How Many Cities Have Adopted Type A and Type B Sales Tax	1

Adoption of Tax:

How are Type A or Type B Sales Tax Adopted	1
Who Can Initiate Type A or Type B Sales Tax Election.....	1
When Must Type A or Type B Sales Tax Election Be Held	1
Eligible Type A and Type B Cities.....	2
Frequency of Sales Tax Elections.....	2

Tax Rate:

Tax Rate for Type A and Type B Sales Tax	3
Limited Ability to Increase or Decrease Type A or Type B Sales Tax	3
Cannot Create More Than One Type A or Type B Sales Tax Corporation.....	3

Permissible Expenditures of Sales Tax Proceeds:

Type A Projects	
Type A Projects Which Must Create or Retain Primary Jobs	4
Type A Projects Not Required to Create or Retain Primary Jobs.....	4
Type B Projects	
Type B Projects Which Must Create or Retain Primary Jobs.....	6
Type B Projects Not Required to Create or Retain Primary Jobs.....	7
Type B Projects for Corporation Receiving \$50,000 or Less	
In Revenue	9
Type B Projects in City with Less Than 20,000 in Population	9
Type B Projects in Landlocked Communities	10
Primary Jobs.....	10
Type A Pursuing a Type B Project	10
Promotional Expenditures.....	11
Job Training Classes	11
Training Seminars.....	11
Performance Agreements.....	12
Third Party Business Recruitment	12
Cleanup of Contaminated Property.....	13
Water Supply Facility	13
Water Conservation Program.....	13
Ability to Undertake Project Outside City Limits	14

Ballot Wording:

Type A Sales Tax:

Adopt Type A Sales Tax.....	14
Increase/Decrease Type A Sales Tax.....	14
Abolish Type A Sales Tax	15
Impose Type A Sales Tax for Certain Period of Time	15

Limit Use of Type A Sales Tax for Certain Projects	15
Reduce Sales Tax for Property Tax Relief to Adopt Type A Sales Tax....	15
Reduce/Abolish Type A to Adopt Type B Sales Tax	16
Cleanup of Contaminated Property.....	16
Type B Sales Tax:	
Adopt Type B Sales Tax	16
Increase/Decrease Type B Sales Tax	17
Abolish Type B Sales Tax	17
Impose Type B Sales Tax for Limited Period of Time.....	17
Limit Use of Type B Sales Tax for Certain Projects	18
Reduce Sales Tax for Property Tax Relief to Adopt Type B Sales Tax....	18
Reduce/Abolish Type A to Adopt Type B Sales Tax	18
Cleanup of Contaminated Property.....	18
Water Supply Facilities.....	19
Water Conservation Programs	19
 Administration of Sales Tax:	
General Administration:	
Economic Development Corporations Administer the Sales Tax	20
Must Have Separate Corporations for Type A and Type B Sales Tax	20
Role of City Council:	
City Council Approval of Expenditures	20
City Council Cannot Fund Projects	21
City Council Attendance at Type A or Type B Meeting	21
City Council Access to Financial Records.....	21
City Council Appointment of Type A or Type B Directors	21
Discussing Type A or Type B Directors in Executive Session	22
City Council Removal of Type A or Type B Directors	22
Limited Ability of City to Provide Services or Money to Corporation	22
Receipt of Type A or Type B Sales Tax Proceeds.....	23
City Council Cannot Sell Real Estate of Corporation	23
Type A and Type B Board of Directors:	
Number of Board of Directors	23
Term	24
Removal	24
Reappointment to Subsequent Term.....	24
Filling of Vacancies	24
Appointment of Officers - President, Secretary.....	24
Residency Requirements for Type A Board	24
Residency Requirements for Type B Board	25
Ability of Council Members to Serve on Board	25
Limited Ability of Governing Body to Serve in Paid Positions	25
Quorum Requirements	26
Board of Directors Are Not Paid	26
Nepotism Statute.....	26
Open Meetings Act	27
Board of Directors Must Take Action in a Meeting	27

Public Information Act	27
Conflicts of Interest Statute	27
Corporation Powers and Duties:	
Certificate of Formation (i.e. Articles of Incorporation)	28
Amending the Certificate of Formation.....	28
Bylaws.....	28
Amending Bylaws.....	29
Texas Non-Profit Corporation Act.....	29
Assuming Debt.....	29
Sale of Real Property	29
Role of Citizens:	
Ability to Initiate Type A or Type B Sales Tax Election	30
Limited Ability to Object Type A Expenditure	30
Ability to Object to Type B Expenditure	30
Inability to Force Funding of Particular Project	31
Ability to Abolish a Type A Sales Tax.....	31
Ability to Abolish a Type B Sales Tax	31
<u>Procedural Requirements for Funding Projects:</u>	
Hearing Requirements:	
Type A Hearing Requirements in General.....	32
Type A Pursuing Type B Project.....	32
Type B Hearing Requirements in General.....	33
Citizens Right to Object to Type B Expenditures.....	33
Type B Hearing Requirements for Sports Venue Projects	33
Publication of Notice Requirements:	
Type A Notice Requirements in General.....	34
Type A Notice Requirements for Sports Venue Projects	34
Type A Notice Requirements for Maintenance and Operating Costs.....	35
Type B Notice Requirements in General	35
Type B Notice Requirements for Sports Venue Projects.....	36
Type B Notice Requirements for Maintenance and Operating Costs.....	36

General:

1. What is Type A and Type B 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”).¹ 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, 550 cities have either a Type A, Type B sales tax, or both.

2. How many cities have adopted a Type A or Type B sales tax?

Currently, 123 cities have adopted a Type A economic development sales tax. 330 cities have adopted a Type B economic development sales tax, and 97 cities have adopted both a Type A and a Type B sales tax.

Adoption of Tax:

3. How are Type A or Type B sales tax adopted?

To adopt either a Type A or Type B sales tax the voters must approve the sales tax at a sales tax election.²

4. Who can initiate a Type A or Type B sales tax election?

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.³

5. When must a Type A or Type B sales tax election be held?

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. Effective October 1, 2005, for elections ordered on or after

¹ TEX. LOC. GOV'T CODE Chapters 501 - 505 (formerly Art. 5190.6 of the Texas Revised Civil Statutes).

² TEX. LOC. GOV'T CODE ANN. §§ 504.251 & 505.251 (formerly §§ 4A(d) and 4B(d)).

³ TEX. LOC. GOV'T CODE ANN. §§ 504.255 & 505.256 (formerly §§ 4A(e) & 4B(f)).

October 1, 2005, the uniform election dates are the second Saturday in May, or the first Tuesday after the first Monday in November.⁴

6. Can every city adopt a Type A or Type B sales tax?

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.⁵

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%).⁶ 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%).⁷

7. If the Type A or Type B sales tax proposition fails at a sales tax election when could the city resubmit a Type A or Type B sales tax proposition to the voters for voter approval?

If voters do not approve a Type A or Type B sales tax proposition, another election to adopt a Type A or Type B sales tax could not be held for one (1) year.⁸ The Election Code allows a municipality to hold a subsequent election on the corresponding uniform election date that occurs approximately one (1) year later, even if the date falls several days before a full year has elapsed.⁹

⁴ TEX. ELEC. CODE ANN. § 41.001(a) (Vernon Supp. 2008).

⁵ TEX. LOC. GOV'T CODE ANN. § 504.002 (formerly § 4A(a)).

⁶ TEX. LOC. GOV'T CODE ANN. § 505.002 (formerly § 4B(a)(1)).

⁷ TEX. LOC. GOV'T CODE ANN. §§ 504.002(1), 505.002(1), 505.002(3) and (formerly §§ 4A(a)(1), 4B(a)(1)(A) and 4B(a)(1)(C)).

⁸ TEX. LOC. GOV'T CODE ANN. §§ 504.255 and 505.256 (formerly §§ 4A(e) & 4B(f)) and TEX. TAX CODE ANN. § 321.406 (Vernon 2002).

⁹ TEX. ELEC. CODE ANN. § 41.0041(a) (Vernon 2003).

Tax Rate:

8. What is the tax rate for a Type A or Type B sales tax?

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%).¹⁰

9. Can Type A or Type B increase/decrease a tax rate once it is adopted?

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 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.¹¹ There is not statutory authority to increase or decrease the Type B sales tax rate after its initial adoption.

10. Can a city create more than one Type A or Type B corporation?

A city cannot create two Type A or Type B corporations and assess total sales and use tax of one percent (1%). The Development Corporation of 1979 specifically precludes the creation of more than one Type B corporation.¹² Likewise, Type A prohibits the creation of more than one Type A corporation.¹³ Nevertheless, provided the total local sales and use taxes did not exceed two percent (2%), an eligible city could create one Type A corporation and one Type B corporation. Currently, 97 Texas cities have both a Type A and Type B sales tax.

¹⁰ TEX. LOC. GOV'T CODE ANN. §§ 504.252(b) and 505.252(b) (formerly §§ 4A(d) & 4B(e)).

¹¹ TEX. LOC. GOV'T CODE ANN. § 504.258 (formerly § 4A(o)).

¹² TEX. LOC. GOV'T CODE ANN. § 505.003(b) (formerly § 4B(b)) (provides "[a] municipality may not authorize the creation of more than one Type B corporation.").

¹³ TEX. LOC. GOV'T CODE ANN. § 504.003(b) (formerly § 4A(b)(1)) (provides "[a] municipality may not authorize the creation of more than one Type A corporation.").

Permissible Expenditures of Sales Tax Proceeds:

11. What are permissible Type A projects?

Type A Projects Which Must Create or Retain 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.¹⁴ 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:¹⁵
 - (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.

Type A Projects Which Are Not Required to Create or Retain Primary Jobs

The following Type A projects are not required to create or retain primary jobs:

- (1) job training classes;¹⁶
- (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;¹⁷

¹⁴ TEX. LOC. GOV'T CODE ANN. § 501.002(12) (formerly § 2(17)).

¹⁵ TEX. LOC. GOV'T CODE ANN. §§ 501.101(2)(A)-(L) (formerly § 2(11)(A)) and 504.103(a)(1)-(5) (formerly § 4A(i)).

¹⁶ TEX. LOC. GOV'T CODE ANN. §§ 501.102 and 501.162 (formerly §§ 2(11)(B) and 38(b)).

¹⁷ TEX. LOC. GOV'T CODE ANN. § 501.103 (formerly § 2(11)(C)).

- (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;¹⁸
- (4) general aviation business service airport that is an integral part of an industrial park;¹⁹
- (5) port-related facilities to support waterborne commerce;²⁰ and
- (6) development, improvement, expansion, or maintenance of facilities relating to the operation of commuter rail, light rail, or motor buses.²¹

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 expansion of airport facilities;²² and
- (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.²³

¹⁸ TEX. LOC. GOV'T CODE ANN. § 501.105 (formerly § 2(11)(E)).

¹⁹ TEX. LOC. GOV'T CODE ANN. § 504.103(c)(1) (formerly § 4A(i)(1)).

²⁰ TEX. LOC. GOV'T CODE ANN. § 504.103(c)(2) (formerly § 4A(i)(2)).

²¹ TEX. REV. CIV. STAT. ANN. Art. 5190.6, § 38A (as added by Tex. S.B. 1089, 80th Leg., R.S. (2007)).

²² TEX. LOC. GOV'T CODE ANN. §§ 501.106 and 504.103(c)(3) (formerly §§ 2(11)(F) and 4A(i)(3)).

²³ TEX. LOC. GOV'T CODE ANN. § 501.107 (formerly § 2(11)(G)).

12. What are permissible Type B projects?

Type B Projects Which Must Create or Retain 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:²⁴

- (a) manufacturing and industrial facilities;
- (b) research and development facilities;
- (c) military facilities, including closed or realigned military bases;
- (d) transportation facilities, including airports, 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.

(2) 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:²⁵

- (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.

²⁴ TEX. LOC. GOV'T CODE ANN. § 501.101 (formerly § 2(11)(A)).

²⁵ TEX. LOC. GOV'T CODE ANN. § 505.155 (formerly § 4B(a)(2)(B)).

Type B Projects Which Are Not Required to Create or Retain 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;²⁶
- (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;²⁷
- (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;²⁸
- (4) projects consisting of professional and amateur (including children's) sports, athletic, entertainment, tourist, convention, and public park purposes and events;²⁹
- (5) affordable housing projects;³⁰
- (6) water supply facilities projects, with the requisite voter approval;³¹
- (7) water conservation programs, with the requisite voter approval;³²
- (8) development, improvement, expansion, or maintenance of facilities relating to the operation of commuter rail, light rail, or motor buses;³³ and
- (9) development or expansion of airport facilities, including hangars, airport maintenance and repair facilities, air cargo facilities, and related infrastructure located on or adjacent to an airport 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

²⁶ TEX. LOC. GOV'T CODE ANN. §§ 501.102 and 501.162 (formerly §§ 2(11)(B) and 38(b)).

²⁷ TEX. LOC. GOV'T CODE ANN. § 501.103 (formerly § 2(11)(C)).

²⁸ TEX. LOC. GOV'T CODE ANN. § 501.105 (formerly § 2(11)(E)).

²⁹ TEX. LOC. GOV'T CODE ANN. § 505.152 (formerly § 4B(a)(2)(A)).

³⁰ TEX. LOC. GOV'T CODE ANN. § 505.153 (formerly § 4B(a)(2)(C)).

³¹ TEX. LOC. GOV'T CODE ANN. §§ 505.154(1) and 505.304 (formerly §§ 4B(a)(2)(D) and 4B(a-5)).

³² TEX. LOC. GOV'T CODE ANN. §§ 505.154(2) and 505.304 (formerly §§ 4B(a)(2)(E) and 4B(a-5)).

³³ TEX. REV. CIV. STAT. ANN. Art. 5190.6, § 38A (as added by Tex. S.B. 1089, 80th Leg., R.S. (2007)).

possessory interest from the corporation and is authorized to sublease the entity's interest for other authorized projects; and is approved by city council by resolution.³⁴

In addition, 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 expansion of airport facilities;³⁵

(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;³⁶

(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;³⁷

(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;³⁸ and

(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

³⁴ TEX. REV. CIV. STAT. ANN. Art. 5190.6, § 4B(a)(2)(G) (as added by Tex. H.B. 3440, 80th Leg., R.S. (2007)).

³⁵ TEX. LOC. GOV'T CODE ANN. § 501.106 (formerly § 2(11)(F)).

³⁶ TEX. LOC. GOV'T CODE ANN. § 501.107 (formerly § 2(11)(G)).

³⁷ TEX. LOC. GOV'T CODE ANN. § 505.156 (formerly § 4B(a)(2)(F)).

³⁸ TEX. LOC. GOV'T CODE ANN. § 505.158 (formerly § 4B(a)(3)).

expenditures found by the board of directors to be required for the promotion of new or expanded business enterprises within the landlocked community.³⁹

13. What are permissible Type B projects for a Type B corporation which received less than \$50,000 in Type B sales tax revenue?

In 2005, the Texas Legislature authorized certain Type B corporations to use Type B sales tax revenue for 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. This broad use of sales tax revenue is available for Type B corporations which have not for each of the preceding two fiscal years received more than \$50,000 in Type B sales tax revenues, and the governing body of which has authorized the project has adopted a resolution only after giving the resolution at least two separate readings conducted at least one week apart.⁴⁰

14. What are permissible Type B projects for a Type B corporation located in a city with a population of 20,000 or less?

Type B corporations located in a city with a population of 20,000 or less may rely on the various definitions of "project" contained within the statute. Yet, in 2005, the Texas Legislature made a significant revision affecting approximately eighty-eight percent (88%) of all Type B economic development corporations.⁴¹ Eighty-eight percent (88%) of all Type B corporations may look solely to Section 505.158 of the Texas Local Government Code to fund Type B projects. As of 2007, this amounts to 381 of the 435 Type B economic development corporations.

This specific provision authorizes a Type B corporation located in a city with a population of 20,000 or less to assist with land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements. Nonetheless, the board of directors must determine the assistance will promote new or expanded business development. If the assistance will promote new or expanded business development, the Type B corporation is authorized to fund the project. The statute requires the following of certain procedural requirements for expenditures exceeding \$10,000. The Type B corporation may not undertake a project authorized by this section that requires an expenditure of more than \$10,000 until city council adopts a resolution authorizing the project after giving the resolution at least two (2) separate readings.⁴²

³⁹ TEX. LOC. GOV'T CODE ANN. § 505.157 (formerly § 4B(a)(4)).

⁴⁰ TEX. LOC. GOV'T CODE ANN. § 505.156 (formerly § 4B(a)(2)(F)).

⁴¹ TEXAS COMPTROLLER, ECONOMIC DEVELOPMENT CORPORATION REPORT FISCAL 2006-2007, Appendix B at 21-31 (Nov. 2008) (381 of the 435 Type B economic development corporations are from an eligible city with a population of 20,000 or less. This is eighty-eight percent (88%) of all Type B corporations.).

⁴² TEX. LOC. GOV'T CODE ANN. § 505.158 (formerly § 4B(a)(3)).

15. What are permissible Type B projects for a Type B corporation located in a “landlocked community”?

A “landlocked community” may rely on the various definitions of “project” contained in the Act. However, a landlocked community may also look only to a specific provision added recently by the Texas Legislature. In 2005 the Texas Legislature authorized a Type B corporation located in a “landlocked community” to use Type B sales tax revenue towards “expenditures found by the board of directors to be required for the promotion of new or expanded business enterprises within the landlocked community.”⁴³ The term “landlocked community” is defined to mean a city which is located wholly or partly located in a county with a population of 2 million or more 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. Accordingly, this specific provision is limited to Type B corporations located wholly or partly within Harris or Dallas counties.

16. What is a “primary job”?

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.⁴⁴

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.⁴⁵ 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.”

17. Can a Type A corporation fund a Type B project?

Type A sales tax may be used to fund Type B projects with voter approval.⁴⁶ A public hearing must be conducted within the city to inform the residents of the city of the cost and impact of the

⁴³ TEX. LOC. GOV'T CODE ANN. § 505.157 (formerly § 4B(a)(4)(A)&(B)).

⁴⁴ TEX. LOC. GOV'T CODE ANN. § 501.002(12) (formerly § 2(17)).

⁴⁵ *Id.*

⁴⁶ TEX. LOC. GOV'T CODE ANN. § 504.152 (formerly § 4A(s)(1)).

project prior to the election.⁴⁷ Further, the city must publish notice of the hearing in a newspaper with general circulation in the city at least thirty (30) days before the date set for the hearing. The notice must include the date, time, place, and subject of the hearing and should be published on a weekly basis until the date of the hearing.⁴⁸

18. Can Type A or Type B corporations expend sales tax proceeds for promotional purposes?

Both Type A and Type B corporations may spend no more than ten percent (10%) of the corporate revenues for promotional purposes.⁴⁹ Recently, 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.⁵⁰ 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.⁵¹

19. Can Type A or Type B corporations expend sales tax proceeds for 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.⁵²

20. Can Type A or Type B corporations expend sales tax proceeds for 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.⁵³ One of the following three

⁴⁷ TEX. LOC. GOV'T CODE ANN. § 504.153 (formerly § 4A(s)(3)).

⁴⁸ *Id.*

⁴⁹ TEX. LOC. GOV'T CODE ANN. §§ 504.105(a) and 505.103 (formerly §§ 4A(b)(1) and 4B(b)).

⁵⁰ Op. Tex. Att'y Gen. No. GA-0086 (2003).

⁵¹ *Id.*

⁵² TEX. LOC. GOV'T CODE ANN. §§ 501.102 and 501.162 (formerly §§ 2(11)(B) & 38(b)(1)&(2)).

⁵³ TEX. LOC. GOV'T CODE ANN. § 502.101 (formerly § 39).

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.⁵⁴ 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.⁵⁵

21. Can Type A or Type B corporations grant or gift Type A or Type B proceeds to a business entity without a performance agreement?

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.⁵⁶ 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.⁵⁷ Further, the agreement must specify the terms for any repayment should the business fail to meet the performance requirements specified in the agreement.

22. Can Type A and Type B corporations hire an independent third party to conduct business recruitment or development?

Type A and Type B corporations may hire a third party for the purposes of conducting business recruitment or development.⁵⁸ 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. Further, 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.⁵⁹

⁵⁴ TEX. LOC. GOV'T CODE ANN. § 502.101(a)(1) & (2) (formerly § 39(b)(1) & (3)).

⁵⁵ TEX. LOC. GOV'T CODE ANN. § 502.101(d) (formerly § 39(d)).

⁵⁶ TEX. LOC. GOV'T CODE ANN. § 501.158(a) (formerly § 40(a)).

⁵⁷ TEX. LOC. GOV'T CODE ANN. § 501.158(b) (formerly § 40(b)).

⁵⁸ TEX. LOC. GOV'T CODE ANN. § 502.051 (formerly § 41(a)-(d)).

⁵⁹ TEX. LOC. GOV'T CODE ANN. § 502.051(c) (formerly § 41(d)).

23. Can Type A or Type B corporations use sales tax proceeds to cleanup contaminated property?

Should the Texas Governor's office or Texas Commission on Environmental Quality encourage or request a Type A or Type B corporation to use sales tax proceeds to cleanup contaminated property, the corporation may not undertake the project until the use is approved by a majority of the qualified voters of the city voting in an election called and held for that purpose. The ballot proposition is as follows:⁶⁰

"The use of sales and use tax proceeds for the cleanup of contaminated property."

24. Can Type B corporations expend sales tax proceeds for water supply facility projects?

A water supply facility is a permissible Type B project provided the voters approve the project in an election called and held for that purpose.⁶¹ The term "water supply facility" includes dams, transmission lines, well field developments, and other water supply alternatives.⁶² The ballot proposition which must be used to vote for or against the water supply facility is as follows:⁶³

"The use of sales and use tax proceeds for infrastructure relating to _____ (insert water supply facilities or water conservation programs, as appropriate)."

25. Can a Type B corporation expend sales tax proceeds for a water conservation program?

Water conservation programs include incentives to install water-saving plumbing fixtures, educational programs, brush control programs, and programs to replace malfunctioning or leaking water lines and other water facilities.⁶⁴ These programs are permissible Type B projects provided the project is approved by a majority of the qualified voters in an election called held for that purpose. The ballot wording which must be used for such a proposition is as follows:⁶⁵

"The use of sales and use tax proceeds for infrastructure relating to _____ (insert water supply facilities or water conservation programs, as appropriate)."

⁶⁰ TEX. LOC. GOV'T CODE ANN. §§ 504.304 and 505.305 (formerly §§ 4A(t) & 4B(p)).

⁶¹ TEX. LOC. GOV'T CODE ANN. §§ 505.154 and 505.304 (formerly §§ 4B(a)(2)(D) & 4B(a-5)(1)).

⁶² TEX. LOC. GOV'T CODE ANN. § 505.154(1) (formerly § 4B(a)(2)(D)).

⁶³ TEX. LOC. GOV'T CODE ANN. § 505.304(b) (formerly § 4B(a-5)(1)).

⁶⁴ TEX. LOC. GOV'T CODE ANN. § 505.154(2) (formerly § 4B(a)(2)(E)).

⁶⁵ TEX. LOC. GOV'T CODE ANN. § 505.304(b) (formerly § 4B(a-5)(1)).

26. Can Type A or Type B corporations undertake projects which are located outside the city limits of the eligible city?

An economic development corporation may undertake projects outside of the city limits with permission of the governing body that has jurisdiction over the property.⁶⁶ Consequently, should a Type A or Type B corporation decide to undertake a project located completely in the city's extraterritorial jurisdiction or beyond, it should get approval from the county commissioners court.

Type A Ballot Wording:

27. Is there required ballot wording for the adoption of a Type A sales tax?

The Development Corporation Act provides the ballot wording to adopt the Type A sales tax. The proposition must be worded as follows:⁶⁷

“The adoption of a sales and use tax for the promotion and development of new and expanded business enterprises at the rate of _____ of one percent” (one-eighth, one-fourth, three-eighths, or one-half to be inserted as appropriate).

28. Is there required ballot wording to increase or decrease the Type A sales tax rate?

A city may on its own motion or on the petition of at least ten percent (10%) or more of the registered voters of the city call an election to increase or reduce the Type A sales tax rate.⁶⁸ The Type A sales tax rate may be reduced or increased in one or more increments of one-eighth of one percent to a minimum of one-eighth of one percent and a maximum of one-half of one percent. Nevertheless, the Development Corporation Act does not provide the ballot wording for such a proposition. The Act simply provides that “[t]he ballot for an election under this section shall be printed in the same manner as the ballot under Section 504.256.” Section 504.256 of the Texas Local Government Code contains the wording to adopt the Type A sales tax.

⁶⁶ TEX. LOC. GOV'T CODE ANN. § 501.159(a) (formerly § 23(a)(1)).

⁶⁷ TEX. LOC. GOV'T CODE ANN. § 504.256 (formerly § 4A(m)).

⁶⁸ TEX. LOC. GOV'T CODE ANN. § 504.258(b) (formerly § 4A(o)).

29. Is there required ballot wording to abolish a Type A sales tax?

There is required ballot language a city must use for a ballot proposition to abolish a Type A sales tax. The Development Corporation Act provides that the proposition for termination must be worded as follows:⁶⁹

“Termination of the _____ (name of the corporation).”

30. Is there required ballot wording if a city wished to impose a Type A sales tax for a certain time period?

A city is authorized to limit the imposition of a Type A sales tax for a certain time period. If a city decides to impose the sales tax for a limited period, the required ballot wording is as follows:⁷⁰

“The adoption of a sales and use tax for the promotion and development of new and expanded business enterprises at the rate of _____ of one percent (insert one-eighth, one-fourth, three-eighths, or one-half to be inserted as appropriate) to be imposed for _____ years (the number of years to be inserted as appropriate).”

31. Is there required ballot wording should a city decide to limit the use of Type A sales tax proceeds to certain projects?

A city is authorized to limit the use of Type A sales tax to a specific project or projects. Should a city decide to limit the uses of the tax, the ballot proposition is as follows:⁷¹

“The adoption of a sales and use tax for the promotion and development of (insert description of the project) at the rate of _____ of one percent (one-eighth, one-fourth, three-eighths, or one-half to be inserted as appropriate).”

32. Is there required ballot wording should a city which imposes a sales tax for property tax relief decide to reduce the tax to adopt a Type A sales tax?

The Type A sales tax and the sales tax for property tax relief may appear as separate ballot propositions. Cities may also offer a joint ballot proposition on the sales tax for property tax

⁶⁹ TEX. LOC. GOV'T CODE ANN. § 504.352 (formerly § 4A(k)).

⁷⁰ TEX. LOC. GOV'T CODE ANN. §§ 504.256 and 504.257 (formerly § 4A(n)).

⁷¹ TEX. LOC. GOV'T CODE ANN. § 504.260 (formerly § 4A(r)).

relief and Type A sales tax. If a city offers a joint proposition, the ballot proposition is as follows:⁷²

“The adoption of a sales and use tax within the municipality for the promotion and development of new and expanded business enterprises at the rate of _____ of one percent (one-eighth, one-fourth, three-eighths, or one-half to be inserted as appropriate) and the adoption of an additional sales and use tax within the municipality at a rate of _____ of one percent to be used to reduce the property tax rate” (one-eighth, one-fourth, three-eighths, or one-half to be inserted as appropriate).”

33. Is there required ballot language should a Type A corporation choose to reduce or abolish their Type A sales tax to adopt a Type B sales tax?

A city may offer a joint ballot proposition to reduce or abolish an existing Type A sales tax and at the same time adopt a Type B sales tax. However, the Development Corporation Act does not provide statutory ballot wording for such a proposition. Also, a city can still choose to have the voters vote on repealing or reducing a Type A tax and adopting a Type B tax as separate ballot propositions.⁷³ If the city separates the measures into separate ballot propositions, it is possible that one, both, or neither of the items would be approved at the election.

34. Is there required ballot wording should a Type A corporation choose to use sales tax proceeds to cleanup contaminated property?

A Type A corporation may use sales tax proceeds to undertake the cleanup of contaminated property if the use is approved by a majority of the qualified voters of the city voting in an election called and held for that purpose. The ballot wording which must be used is as follows:⁷⁴

“The use of sales and use tax proceeds for the cleanup of contaminated property.”

Type B Ballot Wording:

35. Is there required ballot wording for the adoption of a Type B sales tax?

The Development Corporation Act does not contain mandatory ballot language to adopt a Type B sales tax. The Texas Election Code simply provides that the city has authority to frame the

⁷² TEX. LOC. GOV'T CODE ANN. § 504.261(b) (formerly § 4A(p)).

⁷³ TEX. LOC. GOV'T CODE ANN. § 505.255 (formerly § 4B(e)).

⁷⁴ TEX. LOC. GOV'T CODE ANN. § 504.304(b) (formerly § 4A(t)).

ballot proposition, unless a statute provides the wording.⁷⁵ The ballot proposition must indicate the rate proposed for the Type B sales tax. The voters then vote for or against the proposition.

36. Is there required ballot wording to increase or reduce the Type B sales tax rate?

There is not statutory authorization for the Type B tax rate to be increased or reduced at a subsequent election.

37. Is there required ballot wording to abolish a Type B sales tax?

There is not ballot wording to abolish a Type B corporation created before September 1, 1999. The city, by resolution, could terminate or dissolve the Type B development corporation.⁷⁶ If the city passes such a resolution, the corporation and the tax would continue only for the time period necessary to pay off any outstanding debt.

The Act provides that a city must hold an election on dissolving a Type B corporation created on or after September 1, 1999, if a proper petition is submitted to the city council. The petition must be signed by at least ten percent (10%) of the registered voters of the city.⁷⁷ The ballot proposition to dissolve a Type B corporation created on or after September 1, 1999 is as follows:⁷⁸

“Termination of the _____ (name of the corporation).”

38. Is there required ballot wording if a city wished to impose a Type B sales tax for a certain time period?

There is not specified ballot wording which limits a Type B sales tax for a specified period of time. Nonetheless, the Development Corporation Act provides that an eligible city may allow the voters to vote on a ballot proposition that limits the length of time that a Type B sales and use tax may be imposed.⁷⁹ An eligible city that imposes a tax for a limited time may later extend the period of the tax's imposition or reimpose the tax only if the extension or reimposition is authorized by a majority of the qualified voters of the city voting in an election called and held for that purpose.

⁷⁵ TEX. ELEC. CODE ANN. § 52.072(a) (Vernon 2003).

⁷⁶ TEX. LOC. GOV'T CODE ANN. § 501.401 (formerly § 34).

⁷⁷ TEX. LOC. GOV'T CODE ANN. § 505.352 (formerly § 4B(o)(1)).

⁷⁸ TEX. LOC. GOV'T CODE ANN. § 505.353 (formerly § 4B(o)(2)).

⁷⁹ TEX. REV. CIV. STAT. ANN. Art. 5190.6, § 4B(e-2) (as added by Tex. S.B. 1523, 80th Leg., R.S. (2007)).

39. Is there required ballot wording should a city decide to limit the use of Type B sales tax proceeds to certain projects?

The Development Corporation Act does not specifically address Type B ballot wording for certain projects. Nonetheless, the Development Corporation Act provides that the city may allow the voters to vote on a ballot proposition that limits the use of the Type B sales and use tax to a specific project.⁸⁰ Further, a Type B corporation that has been created to perform a specific project as provided by this subsection may retain its corporate existence and perform other projects as may be approved by the voters of the city under an election called and held for that purpose in the same manner as Section 504.260 of the Texas Local Government Code.⁸¹

40. Is there required ballot wording should a city which imposes a sales tax for property tax relief decide to reduce the sales tax for property tax relief to adopt a Type B sales tax?

In 2005, the Texas Legislature amended chapter 321 of the Texas Tax Code by addressing combined municipal sales and use tax propositions.⁸² The statute provides that a city may by a combined ballot proposition lower or repeal any dedicated or special purpose municipal sales tax, including the additional sales tax for property tax relief, and by the same proposition raise or adopt any other dedicated or special purpose municipal sales tax, including the additional sales tax for property tax relief. In addition, a city can still offer the propositions as separate ballot propositions.

41. Is there required ballot language should a Type A city choose to reduce or abolish their Type A sales tax to adopt a Type B sales tax?

A city is authorized to offer a joint ballot proposition to reduce or abolish an existing Type A sales tax and adopt a Type B sales tax.⁸³ Nonetheless, the Development Corporation Act does not provide ballot wording for a combined proposition. A city may still offer the propositions as separate measures.

42. Is there required ballot wording should a Type B corporation choose to use sales tax proceeds to clean up contaminated property?

A Type B corporation may use sales tax proceeds to undertake the cleanup of contaminated property if the use is approved by a majority of the qualified voters of the city voting in an

⁸⁰ TEX. REV. CIV. STAT. ANN. Art. 5190.6, § 4B(e-2) (as added by Tex. S.B. 1523, 80th Leg., R.S. (2007)).

⁸¹ TEX. REV. CIV. STAT. ANN. Art. 5190.6, § 4B(e-2) (refers to Section 4A(r) which is now Section 504.260 of the Texas Local Government Code).

⁸² TEX. TAX CODE ANN. § 321.409 (Vernon 2008).

⁸³ TEX. LOC. GOV'T CODE ANN. § 505.255 (formerly § 4B(e)).

election called and held for that purpose. The ballot wording which must be used is as follows:⁸⁴

“The use of sales and use tax proceeds for the cleanup of contaminated property.”

43. Can Type B corporations expend sales tax proceeds for water supply facility projects?

A water supply facility is a permissible Type B project provided the voters approve the project in an election called and held for that purpose.⁸⁵ The term “water supply facility” includes dams, transmission lines, well field developments, and other water supply alternatives.⁸⁶ The ballot proposition which must be used to vote for or against the water supply facility is as follows:⁸⁷

“The use of sales and use tax proceeds for infrastructure relating to _____ (insert water supply facilities or water conservation programs, as appropriate).”

44. Can a Type B corporation expend sales tax proceeds for a water conservation program?

Water conservation programs include incentives to install water-saving plumbing fixtures, educational programs, brush control programs, and programs to replace malfunctioning or leaking water lines and other water facilities.⁸⁸ These programs are permissible Type B projects provided the project is approved by a majority of the qualified voters in an election called and held for that purpose. The ballot wording which must be used for such a proposition is as follows:⁸⁹

“The use of sales and use tax proceeds for infrastructure relating to _____ (insert water supply facilities or water conservation programs, as appropriate).”

⁸⁴ TEX. LOC. GOV'T CODE ANN. § 505.305 (formerly § 4B(p)).

⁸⁵ TEX. LOC. GOV'T CODE ANN. §§ 505.154 and 505.304 (formerly §§ 4B(a)(2)(D) & 4B(a-5)(1)).

⁸⁶ TEX. LOC. GOV'T CODE ANN. § 505.154 (formerly § 4B(a)(2)(D)).

⁸⁷ TEX. LOC. GOV'T CODE ANN. § 505.304(b) (formerly § 4B(a-5)(1)).

⁸⁸ TEX. LOC. GOV'T CODE ANN. § 505.154 (formerly § 4B(a)(2)(E)).

⁸⁹ TEX. LOC. GOV'T CODE ANN. § 505.304(b) (formerly § 4B(a-5)(1)).

Administration of Sales Tax:

General:

45. Who administers and oversees a Type A or Type B sales tax?

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, Texas Revised Civil Statutes Article 1396-1.01 et seq., or formed under the Texas Nonprofit Corporation Law, as described by Section 1.008 of the Texas Business Organizations Code.⁹⁰ The corporations determine which projects to fund, with city council retaining approval authority over all expenditures of the corporation.⁹¹

46. If a city has both Type A and Type B sales tax must the city create separate corporations for administration of the Type A and Type B sales tax?

The city must establish separate corporations and boards of directors to administer the Type A and Type B taxes.⁹²

Role of City Council:

47. Does city council have to approve expenditures for permissible Type A and Type B projects?

The development corporation has the power to expend the proceeds of the economic development sales tax for purposes authorized by the Development Corporation Act.⁹³ Nonetheless, city council retains authority to “approve all programs and expenditures of a corporation.”⁹⁴ City council’s oversight includes the authority to approve promotional expenditures as well.⁹⁵

⁹⁰ TEX. LOC. GOV’T CODE ANN. §§ 504.003, 505.003 & 501.054 (formerly §§ 4A(b)(1), 4B(b) & 23(a)).

⁹¹ TEX. LOC. GOV’T CODE ANN. § 501.073(a) (formerly § 21) (“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.”)

⁹² TEX. LOC. GOV’T CODE ANN. §§ 504.003 and 505.003 (formerly §§ 4A(b)(1) and 4B(b)).

⁹³ TEX. LOC. GOV’T CODE ANN. §§ 504.303 and 505.302 (formerly §§ 4A(f) and 4B(g)).

⁹⁴ TEX. LOC. GOV’T CODE ANN. § 501.073(a) (formerly § 21).

⁹⁵ Op. Tex. Att’y Gen. No. GA-0086 (2003) at 3 – 5 (concluding city council may approve or disapprove a particular promotional expenditure).

48. Can city council fund certain Type A or Type B projects on their motion?

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.⁹⁶ The board of directors must also approve the project.

49. Can a quorum of city council attend a Type A or Type B corporation meeting?

A quorum of city council could attend a Type A or Type B meeting. However, attendance by a quorum of city council would require compliance with the Open Meetings Act. Consequently, the city would want to post an agenda of the city council meeting for 72 hours prior to the meeting.⁹⁷ Further, recent amendments to the Open Meetings Act may require the agenda be posted on the city's Internet website.⁹⁸

50. Is city council entitled to the financial records of a Type A or Type B corporation?

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.⁹⁹

51. Does city council appoint the directors of the Type A and Type B corporation?

The board of directors of a Type A corporation consists of at least five (5) directors who are appointed by city council.¹⁰⁰ Similarly, seven (7) directors appointed by city council serve on the Type B board.¹⁰¹

⁹⁶ 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.").

⁹⁷ TEX. GOV'T CODE ANN. §§ 551.041 and 551.043 (Vernon 2004).

⁹⁸ TEX. GOV'T CODE ANN. § 551.056 (b) (Vernon Supp. 2008).

⁹⁹ TEX. LOC. GOV'T CODE ANN. § 501.073 (formerly § 21).

¹⁰⁰ TEX. LOC. GOV'T CODE ANN. § 504.051 (formerly § 4A(c)).

¹⁰¹ TEX. LOC. GOV'T CODE ANN. § 505.051 (formerly § 4B(c)).

52. Could city council discuss the appointment of the directors of the Type A or Type B corporation in executive session?

A city council may only meet in executive session under the personnel exception if the person being discussed is an officer or employee of the city. Neither the appointment of advisory committee members nor the hiring of independent contractors are proper subjects for executive sessions under the personnel exception.¹⁰² Whether a particular position is an officer or employee of the city is a question of fact.

In Texas Attorney General Letter Opinion 94-063 the Attorney General considered whether the Dallas City Council could deliberate in executive session the appointment of board members to the Dallas Area Rapid Transit Authority (DART). Although, the Attorney General noted factual determinations could not be resolved in the opinion process, the opinion concluded city council could discuss in executive session appointees to the Dallas Area Rapid Transit Authority. This conclusion was based on several factors, including: a public officer generally has a fixed term of office and could be removed only in accordance with law; public officers perform governmental functions “largely independent of the control of others;” and city council was authorized by state law to appoint members to the DART board.

53. Can city council remove the directors of a Type A or Type B corporation?

Type A board of directors serve terms not to exceed six (6) years and are subject to removal at any time by city council.¹⁰³ Type B board of directors serve two (2) year terms and are subject to removal at any time by city council.¹⁰⁴

54. Can the city provide services or money to a Type A or Type B corporation?

The Development Corporation Act generally prohibits a city from lending its credit or granting any public money or thing of value to an economic development corporation. The city may not provide any funding or services to a development corporation unless the city is reimbursed for the expenditure.¹⁰⁵

¹⁰² Op. Tex. Att’y Gen. No. DM-149 (1992) (members of advisory committee are not public officers or employees); *Board of Trustees v. Cox Enterprises*, 679 S.W.2d 86, 90 (Tex. App. – Texarkana 1984), *aff’d in part, rev’d in part on other grounds*, 706 S.W.2d 956 (Tex. 1986) (governing body may meet in executive session to discuss officers and employees only; independent contractors are not officers or employees).

¹⁰³ TEX. LOC. GOV’T CODE ANN. § 504.051(b) & (c) (formerly § 4A(c)). *See also*, Op. Tex. Att’y Gen. No. JC-0349 (2001).

¹⁰⁴ TEX. LOC. GOV’T CODE ANN. § 505.051(b) & (c) (formerly § 4B(c)).

¹⁰⁵ TEX. LOC. GOV’T CODE ANN. § 501.007 (formerly § 21) (“(a) Except as provided by Subsection (b), a unit may not lend its credit or grant public money or another thing of value in aid of a corporation. (b) A municipality may grant public money to a corporation under a contract authorized by Section 380.002 [of the Local Government Code]”). *See also*, Op. Tex. Att’y Gen. No. JC-0109 (1999) at 3-5.

In 2001, the Texas Legislature did create an exception to this general rule. A home rule city is now authorized to grant public money to a Type A or Type B corporation under a contract authorized by Section 380.002 of the Texas Local Government Code.¹⁰⁶ The Type A or Type B corporation is required to use the grant of city 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.”¹⁰⁷

55. Who receives the Type A or Type B sales tax proceeds?

Once the Type A or Type B sales tax is effective, the sales tax is remitted to the State Comptroller who then remits the Type A and Type B sales tax proceeds to the city. The city upon receiving its local sales tax allotment from the Comptroller must remit the sales tax to the Type A or Type B corporation.¹⁰⁸

56. Can city council sell land held by a Type A or Type B corporation without the Type A or Type B board’s approval?

In Texas Attorney General Opinion JC-0109 (1999), the Attorney General addressed land sales of a Type B corporation. The opinion noted, “the powers of the corporation are vested in the board of directors, . . . a [Type B] development corporation may not sell land without board approval. The board of directors of a development corporation is subject to the Open Meetings Act and therefore may not take final official action on a land sale except in an open meeting.”¹⁰⁹

Type A and Type B Board of Directors:

57. How many board members serve on a Type A and Type B 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.¹¹⁰ Seven (7) directors serve on the Type B board.¹¹¹

¹⁰⁶ TEX. LOC. GOV’T CODE ANN. § 501.007(b) (formerly § 21).

¹⁰⁷ TEX. LOC. GOV’T CODE ANN. § 380.002(b) (Vernon Supp. 2008).

¹⁰⁸ TEX. LOC. GOV’T CODE ANN. §§ 504.301 & 505.301 (formerly §§ 4A(f) & 4B(g)).

¹⁰⁹ Op. Tex. Att’y Gen. No. JC-0109 (1999) at 2&3.

¹¹⁰ TEX. LOC. GOV’T CODE ANN. § 504.051(a) (formerly § 4A(c)).

¹¹¹ TEX. LOC. GOV’T CODE ANN. § 505.051(a) (formerly § 4B(c)).

58. How long a term do Type A and Type B board of directors serve?

Type A board of directors serve a term not to exceed six (6) years.¹¹² Type B board members serve a two (2) year term.¹¹³

59. Can Type A and Type B board of directors be removed for any reason?

Both Type A and Type B board of directors serve at the pleasure of city council and may be removed by city council at any time without cause.¹¹⁴

60. Can a Type A or Type B director be reappointed to a subsequent term?

The Attorney General concluded a Type A board member could be reappointed to a subsequent term, absent any contrary provision in the certificate of formation (formerly called articles of incorporation) or bylaws, or in a city charter, ordinance or resolution of the city.¹¹⁵

61. Can the board of directors appoint someone to fill a vacancy when a board member resigns in the middle of his or her term?

The Development Corporation Act provides that the board of directors “is appointed by the governing body of the authorizing municipality.”¹¹⁶ Consequently, city council would fill any vacancy on the Type A or Type B board.

62. Who determines which board members serve as President and Secretary of the corporation?

The Type A and Type B board of directors appoint the president, secretary, and the other officers which the city council considers necessary.¹¹⁷

63. Must a Type A board member be a resident of the city?

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.

¹¹² TEX. LOC. GOV'T CODE ANN. § 504.051(c) (formerly § 4A(c)).

¹¹³ TEX. LOC. GOV'T CODE ANN. § 505.051(b) (formerly § 4B(c)).

¹¹⁴ TEX. LOC. GOV'T CODE ANN. §§ 504.051(b) & 505.051(c) (formerly §§ 4A(c) & 4B(c)).

¹¹⁵ Op. Tex. Att'y Gen. No. JC-0349 (2001).

¹¹⁶ TEX. LOC. GOV'T CODE ANN. §§ 504.051(b) & 505.051(b) (formerly §§ 4A(c) & 4B(c)).

¹¹⁷ TEX. LOC. GOV'T CODE ANN. §§ 504.052 & 505.053 (formerly §§ 4A(c) & 4B(c)).

64. Must a Type B board member 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.¹¹⁸ 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.

Moreover, a person may serve on the Type B board if the person was a Type A director at the time the Type A corporation was dissolved, and replaced with a Type B corporation.¹¹⁹ Since the directors of Type A corporations are not required to be residents of the city, a non-resident of the city could serve as a Type B director in this instance.

65. Can city council members serve as directors on the Type A or Type B corporation?

The Development Corporation Act limits the number of city officers or city employees who may serve as Type B directors. The Act provides that three (3) of the seven (7) directors may not be employees, officers, or members of the governing body of the eligible Type B city.¹²⁰

The Development Corporation Act does not address whether council members may serve on the Type A board. Nonetheless, the Texas Attorney General noted service on the board of directors of a Type B board is not a "public officer" for the purposes of the common-law doctrine of incompatibility.¹²¹ Accordingly, such dual service on the Type A board would not violate the common-law doctrine of incompatibility nor the Texas constitutional prohibition on holding two paid offices. However, such service could be prohibited by local ordinance or bylaws of the corporation.

66. Could a mayor or council member serve for a Type A or Type B corporation in a paid capacity such as executive director of a Type A or Type B corporation?

Recently, the Texas Attorney General concluded the mayor of an eligible Type B city could also serve as the paid executive director of the Type B corporation.¹²² Although such dual service

¹¹⁸ TEX. LOC. GOV'T CODE ANN. § 505.052 (formerly § 4B(c)).

¹¹⁹ TEX. LOC. GOV'T CODE ANN. § 505.052(d) (formerly § 4B(e-1)).

¹²⁰ TEX. LOC. GOV'T CODE ANN. § 505.052(c) (formerly § 4B(c)) ("Three directors of a Type B corporation must be persons who are not employees, officers, or members of the governing body of the authorizing municipality.")

¹²¹ Op. Tex. Att'y Gen. No. JC-0547 (2002) at 3. ("As we have noted, an industrial development corporation, by statute, has none of the 'attributes of sovereignty,' and that, as a result, . . . a member of the board does not hold a 'public office.'")

¹²² Op. Tex. Att'y Gen. No. JC-0547 (2002).

may not be prohibited, such dual service may implicate the conflict of interest provisions applicable to local public officials under chapter 171 of the Local Government Code. Accordingly, a mayor or council member with a “substantial interest” in the Type A or Type B corporation would have to file the required affidavit and abstain from voting or discussing matters of the corporation when the action contemplated will have an economic effect on the corporation that is different from its effect on the public.

67. What constitutes a quorum of the Type A or Type B board of directors?

A majority of the board constitutes a quorum. Consequently, three (3) members of a five (5) member Type A board constitute a quorum.¹²³ If a Type A corporation should increase their board membership, a quorum would be a majority of the number of board members. Four (4) members of the seven (7) member Type B board constitute a quorum.¹²⁴

68. Are Type A or Type B board of directors paid?

Type A and Type B board members may not be paid. The directors serve without compensation but must be reimbursed for actual expenses.¹²⁵

69. Would the nepotism statute preclude city council from appointing family members or relatives to the Type A or Type B board of directors?

The nepotism statute, Texas Government Code Chapter 573, prohibits a public official from appointing, confirming the appointment, or voting on the appointment of a “close relative” of certain city officials to paid positions.¹²⁶ Since, neither Type A nor Type B board members are paid, the state nepotism statute would not preclude such appointments.¹²⁷ Nonetheless, a home rule city could enact more restrictive nepotism limitations and preclude such appointments.¹²⁸

¹²³ TEX. LOC. GOV'T CODE ANN. § 504.053 (formerly § 4A(c)).

¹²⁴ TEX. LOC. GOV'T CODE ANN. § 505.054 (formerly § 4B(c)).

¹²⁵ TEX. LOC. GOV'T CODE ANN. § 501.062(d) (formerly § 11(a)).

¹²⁶ TEX. GOV'T CODE ANN. § 573.041 (Vernon 2004).

¹²⁷ Tex. Att'y Gen. LO 96-010 (1996) (concluding because a member of the board of directors of an industrial development corporation, established under the Development Corporation Act of 1979, V.T.C.S. article 5190.6, receives only reimbursement for the member's expenses, the member was not “directly or indirectly compensated from public funds or fees of office.” Thus, section 573.041 of the Government Code, which generally prohibits nepotistic appointments, was inapplicable).

¹²⁸ See, Tex. Att'y Gen. LO 93-30 (1993).

70. Are the board meetings of Type A or Type B board subject to the Open Meetings Act?

Type A and Type B corporations and the board of directors are subject to the Open Meetings Act.¹²⁹ Further, all meetings of the Type A or Type B board must occur within the city limits.¹³⁰

71. Can the board of directors of Type A or Type B corporations take action without a meeting if the board of directors consents in writing?

Section 501.071 of the Texas Local Government Code provides that “[a]n action that may be taken at a meeting of a board of directors, including an action required by this subtitle to be taken at a meeting, may be taken without a meeting if each director signs a written consent providing the action to be taken.” However, in 1983 the Development Corporation Act was amended by providing that the board of directors is subject to the Open Meetings Act.¹³¹ Consequently, in Texas Attorney General Opinion JM-120 (1983), the Attorney General concluded the addition of section 11(b), now Section 501.072 of the Texas Local Government Code, subjecting the board of directors to the Open Meetings Act “impliedly repealed” section 14(c), now Section 501.071(a) of the Texas Local Government Code. As a result, the board of directors of Type A or Type B corporations may not take official action by written agreement without a meeting. All official actions of the Type A or Type B corporation must occur in a posted meeting in full compliance with the Texas Open Meetings Act.

72. Are Type A and Type B corporations subject to the Public Information Act (formerly the Open Records Act)?

Both Type A and Type B corporations are subject to the Public Information Act.¹³²

73. Are the Type A and Type B directors subject to the state conflicts of interest statute?

Generally, directors of non-profit corporations do not constitute a “local public official” subject to the conflicts of interest statute. Consequently, absent a local provision to the contrary directors of a Type A or Type B corporation are not subject to chapter 171 of the Texas Local Government Code.¹³³ However, the Texas Non-Profit Corporation Act may prohibit certain transactions. In Texas Attorney General Opinion JC-338 (2001), the Attorney General noted the

¹²⁹ TEX. LOC. GOV'T CODE ANN. § 501.072 (formerly § 11(b)).

¹³⁰ TEX. LOC. GOV'T CODE ANN. §§ 504.054 and 505.055 (formerly §§ 4A(c) & 4B(c)).

¹³¹ TEX. LOC. GOV'T CODE ANN. § 501.072 (formerly § 11(b)).

¹³² TEX. LOC. GOV'T CODE ANN. § 501.072 (formerly § 14A).

¹³³ Op. Tex. Att'y Gen. No. JC-0338 (2001) at 3 (concluding that a development corporation created under the Act is not a political subdivision nor any other “local governmental entity” subject to chapter 171 of the Local Government Code).

Texas Non-Profit Corporation Act prohibited the board of directors from approving a loan to a director of the Type B corporation.

Corporation Powers and Duties:

74. Once a Type A or Type B corporation is formed must city council approve articles of incorporation now referred to as certificate of formation?

The certificate of formation for all development corporations must be approved by city council.¹³⁴ Further, the certificate of formation of a Type A or Type B corporation must state that the corporation is governed by either Chapter 504 or Chapter 505 of the Texas Local Government Code,¹³⁵ and must be filed in triplicate with the Secretary of State's Office.¹³⁶ Upon the issuance of the certificate of incorporation, the corporate existence begins. Once the certificate of incorporation is issued, the board of directors is required to hold an organizational meeting for the purposes of adopting the corporation's bylaws and to elect officers.¹³⁷

75. Who can amend the certificate of formation?

The Development Corporation Act provides that the certificate of formation may be amended at any time by the board of directors or city council.¹³⁸ The board of directors is required to file with city council a written application requesting city council approve the amendments. The written application must specify the proposed amendments. If city council, by appropriate resolution, determines that it is advisable that the proposed amendments be made, authorizes the same to be made, and approves the form of the proposed amendment, the board of directors shall proceed to amend the certificate of formation.¹³⁹ The certificate of formation may also be amended at any time by city council by resolution.¹⁴⁰ Again, city council would be required to file the certificate of amendment with the Secretary of State.

76. Must city council approve bylaws for the Type A or Type B corporation?

City council must approve the initial bylaws. After the issuance of the certificate of formation, the board of directors is required to hold an organizational meeting to adopt the bylaws and to

¹³⁴ TEX. LOC. GOV'T CODE ANN. § 501.051 (formerly § 4(a)).

¹³⁵ TEX. LOC. GOV'T CODE ANN. §§ 504.004 and 505.004 (formerly § 4A(b)(1) & 4B(b)).

¹³⁶ TEX. LOC. GOV'T CODE ANN. § 501.057(b) (formerly § 7).

¹³⁷ TEX. LOC. GOV'T CODE ANN. § 501.063(a) (formerly § 12).

¹³⁸ TEX. LOC. GOV'T CODE ANN. § 501.301 (formerly § 17(a)).

¹³⁹ *Id.*

¹⁴⁰ TEX. LOC. GOV'T CODE ANN. § 501.302 (formerly § 17(b)).

elect officers.¹⁴¹ The initial bylaws must be adopted by the board of directors and approved by city council by resolution.¹⁴²

77. Can a Type A or Type B corporation amend its bylaws?

A Type A or Type B corporation is authorized to adopt and amend bylaws not inconsistent with its certificate of formation or with state law. In addition, amendments to the bylaws must be approved by resolution of the city council.¹⁴³

78. Are Type A or Type B corporations governed by the Texas Non-Profit Corporation Act?

Type A and Type B corporations are governed by the Development Corporation Act (Article 5190.6), and the Texas Non-Profit Corporation Act (Article 1396-1.01 *et seq.*) or the Texas Nonprofit Corporation Law found in the Texas Business Organizations Code. To the extent the provisions of the Texas Non-Profit Corporation Act or Texas Nonprofit Corporation Law conflict with the provisions of the Development Corporation Act, the Development Corporation Act prevails.¹⁴⁴

79. Can a Type A or Type B corporation assume a debt?

A Type A economic development corporation is prohibited from assuming a debt or making “an expenditure to pay the principal of or interest on a debt that existed before the date” the city authorized the creation of the corporation.”¹⁴⁵ The Development Corporation Act does not address whether a Type B corporation is prohibited from paying principal or interest on a debt if the debt existed before the date the city creates a Type B corporation.

80. When a Type A or Type B corporation sells real property must the corporation comply with certain notice and bidding requirements applicable to cities?

The Texas Attorney General determined an economic development corporation who sells real property unrelated to a project is not required to comply with the notice and bidding procedures applicable to Texas cities, chapter 272 of the Texas Local Government Code.¹⁴⁶ Nonetheless, a

¹⁴¹ TEX. LOC. GOV'T CODE ANN. § 501.063(a) (formerly § 12).

¹⁴² TEX. LOC. GOV'T CODE ANN. § 501.064 (formerly § 13).

¹⁴³ TEX. LOC. GOV'T CODE ANN. § 501.064(c)(2) (formerly § 23(a)(11)).

¹⁴⁴ TEX. LOC. GOV'T CODE ANN. § 501.054(a) (formerly § 23(a)).

¹⁴⁵ TEX. LOC. GOV'T CODE ANN. § 504.104 (formerly § 4A(q)).

¹⁴⁶ Op. Tex. Att'y Gen. No. JC-0109 (1999).

Type A or Type B corporation must obtain fair market value when selling real property unrelated to a project.¹⁴⁷

Role of Citizens:

81. Can citizens initiate Type A or Type B sales tax election?

An election to adopt either the Type A or Type B sales tax may be initiated by citizens. If the city council receives 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 city election, city council would be required to pass an ordinance ordering an election on the imposition of the tax.¹⁴⁸ Additionally, city council on its own initiative may approve an ordinance calling for an election to adopt either the Type A or Type B sales tax.¹⁴⁹

82. Can citizens object to Type A expenditures?

When a Type A corporation pursues a project it is required to obtain city council approval of the project.¹⁵⁰ Generally, there is no additional requirement of notice or hearing for projects undertaken by Type A corporations. Nonetheless, citizen taxpayers through an action in district court could seek declaratory and or injunctive relief to prevent the funding of a particular project.¹⁵¹

83. Can citizens object to Type B expenditures?

Generally, a Type B corporation must hold at least one (1) public hearing on a proposed project.¹⁵² However, in 2007 the Texas Legislature approved legislation applicable to Type B cities with a population of less than 20,000.¹⁵³ 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 authorized

¹⁴⁷ *Id.* at 2.

¹⁴⁸ TEX. LOC. GOV'T CODE ANN. §§ 504.255 and 505.256 (formerly §§ 4A(e) & 4B(f)) (stating Chapter 321 of the Texas Tax Code governs the imposition, computation, administration of the Type A and Type B sales tax) and TEX. TAX CODE ANN. § 321.401(c) (Vernon 2002) (requiring city council to pass an ordinance ordering an election on the Type A or Type B sales tax if a petition is presented).

¹⁴⁹ TEX. TAX CODE ANN. § 321.401(b) (Vernon 2002).

¹⁵⁰ TEX. LOC. GOV'T CODE ANN. § 501.073(a) (formerly § 21) ("The corporation's authorizing unit will approve all programs and expenditures of a corporation...").

¹⁵¹ See, *Gaut v. Amarillo Economic Development Corporation*, 921 S.W.2d 884 (Tex. App. – Austin 1996) (plaintiffs filed a petition seeking declaratory and injunctive relief to prevent Type A corporation's performance of jet service contract with American Airlines for continued jet service for DFW Airport to the Amarillo airport).

¹⁵² TEX. LOC. GOV'T CODE ANN. § 505.159 (formerly § 4B(n)).

¹⁵³ See, Tex. S.B. 1523, 80th Leg., R.S. (2007) (amending Section 4B(n) of the Development Corporation Act of 1979, article 5190.6 of the Texas Revised Civil Statutes).

by Section 2 of the Development Corporation Act of 1979. Any hearing must be held prior to the expenditure of any funds on the project. The Type B corporation may hold one (1) public hearing to consider one project or a group of projects. After the projects have been considered at a public hearing and sixty (60) days have passed since the first published notice of the project, the Type B corporation may make expenditures related to the project.¹⁵⁴

Further, the public has a right to gather a petition to object to a particular expenditure.¹⁵⁵ The petition must be submitted within sixty (60) days following the first published notice of the project or categories of projects. This petition must be signed by ten percent (10%) or more of the registered voters of the city requesting an election be held before the project is undertaken. If the petition is submitted in a timely manner and is signed by the requisite number of voters, an election is required. The corporation may not undertake the project until the voters approve the project at an election on the issue. If the voters disapprove the project at the election, the Type B tax proceeds may not be used for the project. An election is not required to be held after the submission of a petition if the qualified citizens of the city have previously approved the undertaking of a specific project or projects.¹⁵⁶

84. Can the citizens force the funding of a particular Type A or Type B project?

The Development Corporation Act does not address the ability of citizens to force the directors of a Type A or Type B board to fund a particular project.

85. Can citizens seek to abolish a Type A sales tax?

On a petition signed by at least ten percent (10%) or more of the registered voters of the city, the city can be required to order an election on the dissolution of the Type A corporation. If the election for dissolution is approved, the Type A tax would continue to satisfy any remaining obligations that were executed prior to the date of the dissolution election. When the last of the obligations are satisfied, any remaining assets of the corporation shall be transferred to the city, and the corporation is dissolved.¹⁵⁷

86. Can citizens seek to abolish a Type B sales tax?

An eligible Type B city must hold an election on the issue of dissolution of a Type B corporation created on or after September 1, 1999¹⁵⁸ if a proper petition is submitted to the city council.¹⁵⁹

¹⁵⁴ TEX. LOC. GOV'T CODE ANN. § 505.160(a) (formerly § 4B(a-1)).

¹⁵⁵ *Id.*

¹⁵⁶ TEX. LOC. GOV'T CODE ANN. § 505.160(b) (formerly § 4B(a-1)).

¹⁵⁷ TEX. LOC. GOV'T CODE ANN. §§ 504.351 and 504.353 (formerly § 4A(k)). *See also*, Op. Tex. Att'y Gen. No. JC-0553 (2002).

¹⁵⁸ TEX. LOC. GOV'T CODE ANN. § 505.351. (formerly Texas Senate Bill 269, Section 2, 76th Legislature, Regular Session (1999)).

The petition requesting the election on the dissolution of the Type B corporation must be signed by at least ten percent (10%) of the registered voters of the city. At the dissolution election, the ballot shall be printed to permit voting for or against the proposition. The ballot proposition to dissolve a Type B corporation created on or after September 1, 1999 is as follows:¹⁶⁰

“Termination of the _____ (name of the corporation).”

For Type B corporations created prior to September 1, 1999, the city could pass a resolution to dissolve the corporation.¹⁶¹ If the city passed the resolution, the tax would continue to pay off any outstanding obligations.

Procedural Requirements:

Hearing Requirements:

87. Must Type A corporations conduct hearings prior to funding Type A projects?

Generally, when Type A corporations pursue projects they are required to obtain city council approval of the project.¹⁶² 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.¹⁶³

88. If Type A corporations pursue a Type B project must the Type A corporation conduct hearings?

Type A corporations must conduct a public hearing prior to the Type B project.¹⁶⁴ 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

¹⁵⁹ TEX. LOC. GOV'T CODE ANN. § 505.352 (formerly § 4B(o)).

¹⁶⁰ TEX. LOC. GOV'T CODE ANN. § 505.353 (formerly § 4B(o)(2)).

¹⁶¹ TEX. LOC. GOV'T CODE ANN. § 501.401(c) (formerly § 34).

¹⁶² TEX. LOC. GOV'T CODE ANN. § 501.073(a) (formerly § 21) (“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.”)

¹⁶³ TEX. LOC. GOV'T CODE ANN. §§ 504.152 and 504.153 (formerly §§ 4A(s)(1) & (3)).

¹⁶⁴ TEX. LOC. GOV'T CODE ANN. § 504.153 (formerly §§ 4A(s)(3)).

the date, time, place and subject of the hearing. The notice should be published on a weekly basis until the date of the hearing.¹⁶⁵

89. Must Type B corporations conduct a public hearing prior to funding Type B projects?

Generally, a Type B corporation must hold at least one (1) public hearing on a proposed project.¹⁶⁶ In 2007, the Texas Legislature amended the Development Corporation Act of 1979 applicable to Type B cities with a population of less than 20,000.¹⁶⁷ 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 section 2 of the Development Corporation Act of 1979. Additionally, the Type B corporation must obtain city council approval of the expenditure.¹⁶⁸ 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.

90. Can citizens object to Type B expenditures?

The public has a right to gather a petition objecting to a particular Type B project.¹⁶⁹ 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.¹⁷⁰ 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.

91. Must a Type B corporation conduct a hearing to pursue a sports venue project?

Type B corporations must conduct at least one public hearing to consider a sports venue

¹⁶⁵ *Id.*

¹⁶⁶ TEX. LOC. GOV'T CODE ANN. § 505.159 (formerly § 4B(n)).

¹⁶⁷ See, Tex. S.B. 1523, 80th Leg., R.S. (2007) (amending Section 4B(n) of the Development Corporation Act of 1979, article 5190.6 of the Texas Revised Civil Statutes).

¹⁶⁸ TEX. LOC. GOV'T CODE ANN. § 501.073(a) (formerly § 21).

¹⁶⁹ TEX. LOC. GOV'T CODE ANN. § 505.160(a) (formerly § 4B(a-1)).

¹⁷⁰ *Id.*

project.¹⁷¹ Initially, the city would have to call an election on a uniform election date to consider the sports venue project.¹⁷² At the election, the voters of the city would vote on a ballot proposition authorizing the Type B corporation to use the sales and use tax, “including any amount previously authorized and collected, for a specific sports venue project.” The project or category of projects must be clearly described on the ballot proposition so that a voter will be able to discern the limits of the specific project or category of projects authorized by the proposition.¹⁷³ If maintenance and operating costs are to be paid from the sales or use tax, the ballot proposition must clearly state that fact. Again, a public hearing must be held within the city to inform the residents of the city of the cost and impact of the project prior to the election. At least thirty (30) days before the date set for the hearing, a notice of the date, time, place, and subject of the hearing must be published in a newspaper of general circulation within the city. The notice must be published on a weekly basis until the date of the hearing.¹⁷⁴

Publication of Notice:

92. Must Type A corporations publish notice of any hearings on proposed projects?

Generally, there is not a requirement that a Type A corporation conduct 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.¹⁷⁵ 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,¹⁷⁶ and maintenance and operating costs of a project.¹⁷⁷

93. Must a Type A corporation publish notice of their hearing for a sports venue project?

Type A corporations must publish notice of their hearing to consider a sports venue project.¹⁷⁸ Initially, the city would have to call an election on a uniform election date to consider the sports venue project.¹⁷⁹ At the election, the voters of the city would vote on a ballot proposition authorizing the Type A corporation to use the sales and use tax, “including any amount

¹⁷¹ TEX. LOC. GOV'T CODE ANN. § 505.203 (formerly § 4B(a-3)(3)).

¹⁷² TEX. LOC. GOV'T CODE ANN. § 505.202(c)(2) (formerly § 4B(a-3)(1)).

¹⁷³ TEX. LOC. GOV'T CODE ANN. § 505.202(b) (formerly § 4B(a-3)(2)).

¹⁷⁴ TEX. LOC. GOV'T CODE ANN. § 505.203 (formerly § 4B(a-3)(3)).

¹⁷⁵ TEX. LOC. GOV'T CODE ANN. § 501.073(a) (formerly § 21).

¹⁷⁶ TEX. LOC. GOV'T CODE ANN. §§ 504.152 and 504.153 (formerly §§ 4A(s)(1)&(3)).

¹⁷⁷ TEX. LOC. GOV'T CODE ANN. § 504.302 (formerly § 4A(c-1)).

¹⁷⁸ TEX. LOC. GOV'T CODE ANN. § 504.153 (formerly § 4A(s)(3)).

¹⁷⁹ TEX. LOC. GOV'T CODE ANN. § 504.152 (c)(2) (formerly § 4A(s)(1)).

previously authorized and collected, for a specific project or for a specific category of projects, . . . including a sports venue” project.¹⁸⁰ The project or category of projects must be clearly described on the ballot proposition so that a voter will be able to discern the limits of the sports venue project.¹⁸¹ If maintenance and operating costs are to be paid from the sales or use tax, the ballot proposition must clearly state that fact. A public hearing must be held within the city to inform the residents of the city of the cost and impact of the project prior to the election. At least thirty (30) days before the date set for the hearing, a notice of the date, time, place, and subject of the hearing must be published in a newspaper of general circulation within the city. The notice should be published on a weekly basis until the date of the hearing.¹⁸²

94. Must a Type A corporation publish notice to expend sales tax proceeds on maintenance and operating costs of a Type A project?

Type A corporations may use Type A sales tax proceeds on maintenance and operation expenses for a Type A project.¹⁸³ Yet, the voters of the city may petition for an election on the use of Type A proceeds for maintenance and operation costs of a particular project within sixty (60) days of the first published notice of the use of sales tax proceeds to pay maintenance and operating costs. This petition must be signed by at least ten percent (10%) of the registered voters of the city requesting that an election be held prior to tax proceeds being used to pay for the maintenance and operating costs of a project.¹⁸⁴

95. When must a Type B corporation publish notice of a proposed project?

Type B corporations must publish notice of all projects.¹⁸⁵ 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. Further, Type B corporations must conduct at least one (1) public hearing on most projects. Yet, 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 authorized by section 2 of the Development Corporation Act of 1979.¹⁸⁶ Further, 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.¹⁸⁷

¹⁸⁰ TEX. LOC. GOV'T CODE ANN. § 504.152 (a) (formerly § 4A(s)(1)).

¹⁸¹ TEX. LOC. GOV'T CODE ANN. § 504.152(b) (formerly § 4A(s)(2)).

¹⁸² TEX. LOC. GOV'T CODE ANN. § 504.153 (formerly § 4A(s)(3)).

¹⁸³ TEX. LOC. GOV'T CODE ANN. § 504.302(a) (formerly § 4A(c-1)).

¹⁸⁴ TEX. LOC. GOV'T CODE ANN. § 504.302(b) (formerly § 4A(c-1)).

¹⁸⁵ TEX. LOC. GOV'T CODE ANN. § 505.160(a) (formerly § 4B(a-1)).

¹⁸⁶ See, Tex. S.B. 1523, 80th Leg., R.S. (2007) (amending Section 4B(n) of the Development Corporation Act of 1979, article 5190.6 of the Texas Revised Civil Statutes).

¹⁸⁷ TEX. LOC. GOV'T CODE ANN. § 505.160(a) (formerly § 4B(a-1)).

96. When must a Type B corporation publish notice of their hearing on a sports venue project?

Type B corporations must conduct at least one public hearing on a proposed sports venue project.¹⁸⁸ The public hearing is required to be held in the city to inform the residents of the city of the cost and impact of the project or category of projects. "At least 30 days before the date set for the hearing, notice of the date, time, place, and subject of the hearing must be published each week until the date of the hearing in a newspaper with general circulation in the municipality in which the project is located."¹⁸⁹

97. Must a Type B corporation publish notice to expend sales tax proceeds on maintenance and operating costs of a Type B project?

After a public hearing has been held on the proposed project, 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. This includes the maintenance and operating costs of a Type B project. The Development Corporation Act specifically provides that the voters may object to expenditures for maintenance and operating costs of Type B projects by submitting a petition signed by more than ten percent (10%) of the registered voters of the city.¹⁹⁰ The public has sixty (60) days from the date of the first published notice of the project to submit the petition.

¹⁸⁸ TEX. LOC. GOV'T CODE ANN. §§ 505.159 and 505.203 (formerly §§ 4B(n) & 4B(a-3)(3)).

¹⁸⁹ TEX. LOC. GOV'T CODE ANN. § 505.203 (formerly § 4B(a-3)(3)).

¹⁹⁰ TEX. LOC. GOV'T CODE ANN. § 505.160(a) (formerly § 4B(a-1)).

Chapter 380 of the Texas Local Government Code

**Texas City Attorneys Association's
Riley Fletcher Basic Municipal Law Seminar
Austin, Texas
February 13, 2009**

Prepared by:

Jeff Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
(214) 747-6100

1. What are chapter 380 grants?

Chapter 380 is a reference to chapter 380 of the Texas Local Government Code. This chapter of the Texas Local Government Code 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.

2. What type of assistance may a city provide under chapter 380 of the Local Government Code for economic development?

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.¹

3. What constitutes serving a public purpose?

The Texas Constitution requires all expenditures of municipal funds serve a “public purpose.”² 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.”³ Further, any transaction providing public monies must contain sufficient controls “to insure that the public purpose [is] carried out.”⁴

¹ TEX. LOC. GOV'T CODE ANN. § 380.001(a).

² 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.”).

³ 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.”)

⁴ Op. Tex. Att’y Gen. No. JM-1255 (1990) at 8-9.

4. Is there a durational limitation on economic assistance provided under chapter 380 of the Texas Local Government Code?

Unlike tax abatements which are limited to ten (10) years,⁵ chapter 380 of the Local Government Code does not contain a durational limitation. Consequently, some Texas cities have entered into 380 agreements which extend beyond ten (10) years. Whether your particular city has a durational limitation may be controlled by a home-rule city charter or other local provision.

5. Can you abate delinquent taxes under chapter 380 of the Local Government Code?

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 does not authorize a municipality, as part of an economic development program, to agree to abate a taxpayer’s delinquent taxes.”⁶

6. Can a City provide a municipal sales tax rebate as a form of chapter 380 grant?

Many cities may condition the grant or loan of public monies based upon estimated sales tax revenue generated by the business prospect. In a recent Texas Attorney General opinion, the Attorney General considered whether recent legislative changes prevented Texas cities from providing chapter 380 grants in the form of a sales tax rebate.⁷ 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.”⁸ The recent legislative change “does not invalidate existing tax rebate contracts, nor does it prohibit municipalities from executing new ones.”⁹

⁵ TEX. TAX CODE ANN. § 312.204(a).

⁶ Tex. Att’y Gen. LO 95-090 (1995).

⁷ Op. Tex. Att’y Gen. No. GA-0071 (2003).

⁸ Op. Tex. Att’y Gen. No. GA-0137 (2004) at 1.

⁹ *Id.* at 4.

7. Can a city 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].¹⁰ 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.”¹¹

¹⁰ TEX. LOC. GOV'T CODE ANN. § 380.002(b).

¹¹ *Id.*

Chapter 380 of the Texas Local Government Code

§ 380.001. ECONOMIC DEVELOPMENT PROGRAMS.

(a) The governing body of a municipality may establish and 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, to promote state or local economic development and to stimulate business and commercial activity in the municipality. For purposes of this subsection, a municipality includes an area that:

- (1) has been annexed by the municipality for limited purposes; or
- (2) is in the extraterritorial jurisdiction of the municipality.

(b) The governing body may:

- (1) administer a program by the use of municipal personnel;
- (2) contract with the federal government, the state, a political subdivision of the state, a nonprofit organization, or any other entity for the administration of a program; and
- (3) accept contributions, gifts, or other resources to develop and administer a program.

(c) Any city along the Texas-Mexico border with a population of more than 500,000 may establish not-for-profit corporations and cooperative associations for the purpose of creating and developing an intermodal transportation hub to stimulate economic development. Such intermodal hub may also function as an international intermodal transportation center and may be collocated with or near local, state, or federal facilities and facilities of Mexico in order to fulfill its purpose.

Added by Acts 1989, 71st Leg., ch. 555, § 1, eff. June 14, 1989. Amended by Acts 1999, 76th Leg., ch. 593, § 1, eff. Sept. 1, 1999.

✳ Section 380.002(b) of the Local Government Code as amended by Texas House Bill 2278, 80th Legislature, Regular Session (2007) (effective date April 1, 2009).

§ 380.002. ECONOMIC DEVELOPMENT GRANTS BY CERTAIN MUNICIPALITIES.

(a) A home-rule municipality with a population of more than 100,000 may create programs for the grant of public money to any organization exempt from taxation under Section 501(a) of the Internal Revenue Code of 1986 as an organization described in Section 501(c)(3) of that code for the public purposes of development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development or expansion of commerce in the state. The grants must be in furtherance of those public purposes and shall be used by the recipient as determined by the recipient's governing board for programs found by the municipality to be in furtherance of this section and under conditions prescribed by the municipality.

(b) A home-rule municipality may, under a contract with a development corporation created by the municipality under the Development Corporation Act (Subtitle C1, Title 12) [~~of 1979 (Article 5190.6, Vernon's Texas Civil Statutes)~~], grant public money to the corporation. The development corporation shall 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.

(c) The funds granted by the municipality under this section shall be derived from any source lawfully available to the municipality under its charter or other law, other than from the proceeds of bonds or other obligations of the municipality payable from ad valorem taxes.

Added by Acts 1991, 72nd Leg., ch. 16, § 13.06(a), eff. Aug. 26, 1991. Amended by Acts 1991, 72nd Leg., 1st C.S., ch. 4, § 25.02, eff. Aug. 22, 1991; Acts 2001, 77th Leg., ch. 56, § 1, eff. Sept. 1, 2001.

§ 380.003. APPLICATION FOR MATCHING FUNDS FROM FEDERAL GOVERNMENT.

A municipality may, as an agency of the state, provide matching funds for a federal program that requires local matching funds from a state agency to the extent state agencies that are eligible decline to participate or do not fully participate in the program.

Added by Acts 1995, 74th Leg., ch. 1051, § 1, eff. June 17, 1995.

Article III, Section 52-a of the Texas Constitution

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

Local Hotel Occupancy Tax

**Texas City Attorneys Association's
Riley Fletcher Basic Municipal Law Seminar
Austin, Texas
February 13, 2009**

Prepared by:

Jeff Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
(214) 747-6100

General:

1. What is the municipal hotel occupancy tax?

The municipal hotel occupancy tax is a tax which may be imposed on the price paid for a hotel room.¹ The revenue generated by hotels within the city generally may be expended on endeavors which promote tourism and the convention and hotel industry and is associated with one of seven (7) possible categories of expenditures.² The revenue generally may be expended for the following: (1) construction, improvement, enlarging, equipping, repairing, operation, and maintenance of convention centers or visitor information centers; (2) furnishing of facilities, personnel, and materials for the registration of convention delegates; (3) advertising and conducting solicitations and promotional programs to attract tourists and convention delegates; (4) encouragement and promotion of the arts; and (5) historical restoration and preservation projects.

In 2005, the Texas Legislature amended the statute concerning a sixth (6th) expenditure, and authorized a seventh expenditure. The sixth (6th) permissible use of hotel occupancy tax revenue authorizes expenditures by cities located within a county of less than 1,000,000 in population, towards sporting events in which the majority of participants are tourists.³ Accordingly, only cities located in Harris, Dallas, Tarrant, and Bexar counties are excluded from this permissible use of hotel occupancy tax revenue.

The seventh (7th) permissible expenditure added in 2005 authorizes certain cities to use hotel occupancy tax revenue to upgrade certain existing sports facilities. Existing sports facilities or fields for baseball, softball, soccer, or flag football may be upgraded with hotel occupancy tax revenue if the facility or field is: (1) owned by the city; and (2) the sports facility or field has been used, in the preceding calendar year, a combined total of more than ten (10) times for district, state, regional, or national sports tournaments. The cities which are authorized to use hotel occupancy tax revenue for this seventh (7th) expenditure are: (1) cities which have a population of 80,000 or more, and are located within a county which has a county population of 350,000 or less; (2) cities which have a population between 65,000 to 70,000 and are located within a county which has a county population of 155,000 or less; and (3) cities which have a population between 34,000 and 36,000, and are located in a county with a population of 90,000 or less.⁴

¹ TEX. TAX CODE ANN. § 351.003(a) (Vernon 2008).

² TEX. TAX CODE ANN. § 351.101(a)(1)-(7).

³ TEX. TAX CODE ANN. § 351.101(a)(6).

⁴ TEX. TAX CODE ANN. § 351.101(a)(7).

2. How is the hotel occupancy tax imposed?

Unlike certain sales taxes which are imposed by a sales tax election, a city may impose the hotel occupancy tax by simply passing an ordinance at an open meeting. The ordinance would authorize the imposition of the hotel occupancy tax on a person who, under a lease, contract, or agreement pays for the use of a room that is in a hotel which costs \$2 or more each day.⁵

Tax Rate:

3. What is the municipal hotel occupancy tax rate?

Generally, the hotel occupancy tax rate cities may charge is seven percent (7%).⁶ Nonetheless, certain cities are authorized to charge different rates ranging as high as nine percent (9%). For example, the cities of Fort Worth and San Antonio meet the definition of “eligible central municipality.” Consequently, both of these cities may assess a municipal hotel occupancy tax at the rate of nine percent (9%).⁷ Additionally, the City of Corpus Christi may impose a municipal hotel occupancy tax at the rate of nine percent (9%).⁸

4. Can the State of Texas assess a state hotel occupancy tax?

The state does assess a hotel occupancy tax. The state rate imposed is six percent (6%) on the price paid for a hotel room.⁹

5. Can a county assess a county hotel occupancy tax?

Certain counties are authorized to assess a county hotel occupancy tax. The county hotel occupancy tax is contained in Chapter 352 of the Tax Code. The counties authorized to assess the tax are found in section 352.002 of the Tax Code. Some of the Texas counties authorized to impose a county hotel occupancy tax include: Harris, El Paso, Webb, Sabine, Somervell, Camp, Rains, Young, Stephens, Palo Pinto, Hidalgo, Cameron, Wood, Val Verde, Brewster, Uvalde, Chambers, Jefferson, Galveston, Brazoria, Matagorda, Calhoun, Aransas, San Patricio, Nueces, Kleberg, Kenedy, Young, and Blanco.¹⁰

⁵ TEX. TAX CODE ANN. § 351.002(a).

⁶ TEX. TAX CODE ANN. § 351.003(a).

⁷ TEX. TAX CODE ANN. §§ 351.001(7) and 351.003(b).

⁸ TEX. TAX CODE ANN. § 351.003(c).

⁹ TEX. TAX CODE ANN. § 156.052.

¹⁰ TEX. TAX CODE ANN. § 352.002(a)(1)-(25).

6. If a county is authorized to assess a county hotel occupancy tax, do hotels have to pay both a county and municipal hotel occupancy tax?

Not necessarily. In certain counties the county hotel occupancy tax does not apply to hotels located within a city which imposes a municipal hotel occupancy tax. Consequently, for certain counties the county hotel occupancy tax may not be imposed within the city limits.¹¹

7. How much can a county charge as the county hotel occupancy tax rate?

Eligible Texas counties may assess a county hotel occupancy tax rate as allowed by section 352.003 of the Texas Tax Code. The Texas Tax Code authorizes a county hotel occupancy tax rate ranging from one percent (1%) to seven percent (7%).¹²

8. Can a city or county impose a sports venue tax?

Chapters 334 and 335 of the Local Government Code authorize the imposition of venue taxes for authorized venue projects. The permissible venue taxes include; a sales and use tax, short-term motor vehicle rental tax, admissions tax, parking tax, facility use tax, and hotel occupancy tax. The sports venue taxes would have to be approved by the voters at an election called and held for that purpose. A city or county, with voter approval, could authorize a hotel occupancy tax rate not to exceed two percent (2%).¹³ Dallas County was recently authorized to impose a hotel occupancy tax rate authorized by the sports venue provisions at a rate not to exceed three percent (3%) with the requisite voter approval.¹⁴ The ballot proposition must specify the maximum rate of the hotel occupancy tax rate to be adopted.¹⁵

9. What are permissible expenditures of the hotel occupancy tax generated by the sports venue provisions?

Revenue generated by the sports venue provisions including the hotel occupancy tax may be expended for authorized venue projects. Permissible venue projects include an arena, coliseum, stadium, or other similar facility; a convention center facility or related improvements; and a tourist development area along an island waterway.¹⁶ Hotel occupancy

¹¹ TEX. TAX CODE ANN. § 352.002(d).

¹² TEX. TAX CODE ANN. § 352.003(a) – (h).

¹³ TEX. LOC. GOV'T CODE ANN. § 334.254(a).

¹⁴ TEX. LOC. GOV'T CODE ANN. § 334.254(c).

¹⁵ TEX. LOC. GOV'T CODE ANN. § 334.254(b).

¹⁶ TEX. LOC. GOV'T CODE ANN. § 334.001(4)(A), (B), and (C).

tax revenue generated for sports venue projects may not be expended for an area or facility that is part of a municipal parks and recreation system.¹⁷ Neither, may the revenue be expended for permissible Type A or Type B project [formerly referred to as section 4A or 4B projects] other than an arena, coliseum, stadium, or other sports facility.¹⁸ Additionally, the revenue may not be expended for a watershed protection and preservation program.¹⁹

Permissible Expenditures

10. What are permissible expenditures of the municipal hotel occupancy tax?

The Texas Tax Code provides a two-part test for all expenditures of the tax. The revenue must promote tourism and the convention and hotel industry, and be tied to one of seven (7) possible expenditures.²⁰ The municipal hotel occupancy tax may be expended on items which promote tourism and the convention and hotel industry and are tied to the following: convention center facilities and visitor information centers; furnishing of facilities, personnel and materials for the registration of convention delegates; advertising and promotional activities which attract tourists and convention delegates; promotion of the arts; historical restoration and preservation projects; and expenses directly related to a sporting event in which a majority of the participants are tourists, for cities located in a county with a population of 1,000,000 or less; and expenditures by certain cities to upgrade certain existing sports facilities. The cities which are authorized to use hotel occupancy tax revenue for this seventh (7th) expenditure are: (1) cities which have a population of 80,000 or more and are located within a county which has a county population of 350,000 or less; (2) cities which have a population between 65,000 to 70,000 and are located within a county which has a county population of 155,000 or less; and (3) cities which have a population between 34,000 and 36,000, and are located in a county with a population of 90,000 or less.²¹

In 2007, the Texas Legislature also authorized the use of hotel occupancy tax revenue for a transportation system to transport tourists from hotels in and near the municipality to: (1) the commercial center of the municipality; (2) a convention center in the municipality; (3) other hotels in or near the municipality; and (4) tourist attractions in or near the municipality. The transportation system that transports tourists may be: (1) owned and operated by the municipality; or (2) privately owned and operated but partially financed by the

¹⁷ TEX. LOC. GOV'T CODE ANN. § 334.2515(1).

¹⁸ TEX. LOC. GOV'T CODE ANN. § 334.2515(2).

¹⁹ TEX. LOC. GOV'T CODE ANN. § 334.2517.

²⁰ TEX. TAX CODE ANN. § 351.101(a)(1)-(7).

²¹ TEX. TAX CODE ANN. § 351.101(a)(7).

municipality.²²

11. Can the municipal hotel occupancy tax be expended for general revenue purposes?

The municipal hotel occupancy tax can only be used to promote tourism and the convention and hotel industry and are tied to one of the above seven (7) permissible expenditures. The revenue may not be used for general revenue purposes or general governmental operations of a municipality.²³

12. Can the municipal hotel occupancy tax finance the construction or improvement of a visitor information center?

The municipal hotel occupancy tax can fund the construction of or improvements to a visitor information center.²⁴

13. Can the municipal hotel occupancy tax finance general landscaping and sidewalk improvements?

The hotel occupancy tax may only be used to promote tourism and the convention and hotel industry. Expenditures for general landscaping and sidewalk improvements generally do not promote tourism and the convention and hotel industry.²⁵

14. Can the municipal hotel occupancy tax finance advertisement and promotional programs that promote tourism?

The municipal hotel occupancy tax may be expended for advertisement and promotional programs that attract tourists and convention delegates or registrants to the city and its vicinity.²⁶

15. Can the municipal hotel occupancy tax finance and promote the arts?

The municipal hotel occupancy tax may be expended for the promotion of the arts, provided

²² TEX. TAX CODE ANN. § 351.110.

²³ TEX. TAX CODE ANN. § 351.101(b).

²⁴ TEX. TAX CODE ANN. § 351.101(a)(1), and Tex. Att’y Gen. LO 92-51 (1992).

²⁵ See, Tex. Att’y Gen. LO 92-16 (1992).

²⁶ TEX. TAX CODE ANN. § 351.101(a)(3).

the revenue is used in the promotion of tourism and the convention and hotel industry.²⁷ The term arts includes, “instrumental and vocal music, dance, drama, folk art, creative writing, architecture, design and allied fields, painting, sculpture, photography, graphic and craft arts, motion pictures, radio, television, tape and sound recording, and other arts related to the presentation, performance, execution, and exhibition of these major art forms.”²⁸

16. Can the municipal hotel occupancy tax finance historical restoration and preservation projects?

The municipal hotel occupancy tax may be expended for historical restoration and preservation projects.²⁹ Further, the revenue may be expended for activities or advertising, solicitations and promotional programs that encourage tourists and convention delegates to visit certain preserved historic sites or museums.

17. Can the municipal hotel occupancy tax finance certain sporting events?

Cities located in counties with a county population of less than 1,000,000 may make expenditures towards certain sporting events. The expenditures, including promotion expenses, may be expended for sporting events in which the “majority of participants are tourists who substantially increase economic activity at hotels and motels within the municipality or its vicinity.”³⁰ According to 2000 census figures the following four (4) counties have a population exceeding 1,000,000: Harris, Dallas, Tarrant, and Bexar County. Accordingly, cities located within these four (4) counties are excluded from funding certain sporting events.

Miscellaneous:

18. Can cities charge the hotel occupancy tax within the city’s extraterritorial jurisdiction (or ETJ)?

Cities with a population of less than 35,000 may, by ordinance, impose the city hotel occupancy tax within the city’s ETJ. However, some cities may not impose the tax if the combined rate for state, county, and city hotel occupancy taxes in the ETJ exceeds fifteen percent (15%) for the price paid for a hotel room.³¹ Further, the city may continue to impose

²⁷ TEX. TAX CODE ANN. § 351.101(a).

²⁸ TEX. TAX CODE ANN. § 351.101(a)(4).

²⁹ TEX. TAX CODE ANN. § 351.101(a)(5).

³⁰ TEX. TAX CODE ANN. § 351.101(a)(6).

³¹ TEX. TAX CODE ANN. § 351.0025(b).

the tax for hotels located within the ETJ should the county subsequently adopt a county hotel occupancy tax.³²

19. What remedies may a city seek to collect delinquent hotel occupancy taxes?

The city attorney may bring suit against a person who is required to collect the tax and has failed to pay the tax due. Additionally, suit may be brought for failure to file the required tax report.³³ The city may enjoin a person from operating a hotel in the city until the tax is paid or the report is filed, as provided by court order.³⁴ The hotel can be liable for reasonable attorney's fees, and the cost of an audit. Further, a fifteen percent (15%) penalty may be assessed on the total amount of tax owed. The city, by ordinance, may also authorize misdemeanor punishment for a hotel occupancy tax violation.³⁵

20. Can the city allow the hotels to retain a portion of the hotel occupancy tax as reimbursement?

Cities, by ordinance, may allow hotel operators to retain up to one percent (1%) of the amount of hotel occupancy taxes collected as reimbursement to hotels for the costs of collecting the tax.³⁶

21. Can hotel occupancy tax revenue be used for day-to-day administrative costs?

The Texas Tax Code authorizes the expenditure of hotel occupancy tax proceeds for the following administrative costs: day-to-day operations, supplies, salaries, office rental, travel expenses, and "other administrative costs only if" costs are incurred directly in the promotion and servicing of expenditures authorized under section 351.101(a) of the Texas Tax Code.³⁷

³² Op. Tex. Att'y Gen. No. GA-0408 (2006) (Section 351.0025(b) of the Tax Code prohibits a municipality with a population of fewer than 35,000 from adopting and imposing a hotel occupancy tax in its extraterritorial jurisdiction when the combined rate of state, county, and municipal taxes would exceed 15 percent. The section does not, however, prohibit a municipality from imposing its tax if the combined rate did not exceed 15 percent when the municipality adopted its tax but exceeds that rate after the county adopts a county tax).

³³ TEX. TAX CODE ANN. § 351.004(a).

³⁴ *Id.*

³⁵ TEX. TAX CODE ANN. § 351.004(c).

³⁶ TEX. TAX CODE ANN. § 351.005.

³⁷ TEX. TAX CODE ANN. § 351.101(f) & (g).

Tax Abatement Agreements

**Texas City Attorneys Association's
Riley Fletcher Basic Municipal Law Seminar
Austin, Texas
February 13, 2009**

Prepared by:

Jeff Moore
Brown & Hofmeister, L.L.P.
740 East Campbell Road, Suite 800
Richardson, Texas 75081
(214) 747-6100

In General:

1. What is a tax abatement agreement?

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.¹ Only property located within a reinvestment zone is eligible for a tax abatement agreement. Accordingly, 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 ten (10) years in length.²

2. Who may enter into a tax abatement agreement?

Those entities which levy ad valorem taxes, excluding school districts,³ are authorized to execute tax abatement agreements. Nonetheless, only a city can initiate the process to enter into a tax abatement agreement within the city limits of the city.⁴ The county or the city may initiate the process for tax abatement agreements within the extraterritorial jurisdiction ("ETJ") of a city.⁵ Further, only the county may initiate the tax abatement process outside the city limits or ETJ of a city.⁶

3. Can a school district enter into a tax abatement agreement?

A school district is no longer authorized to enter into tax abatement agreements.⁷ Their authority to limit appraised values is found in the recently adopted Texas Economic Development Act located in chapter 313 of the Texas Tax Code.

¹ TEX. TAX CODE ANN. § 312.204(a).

² *Id.*

³ TEX. TAX CODE ANN. § 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).

⁴ TEX. TAX CODE ANN. § 312.204.

⁵ TEX. TAX CODE ANN. § 312.206.

⁶ TEX. TAX CODE ANN. § 312.401.

⁷ TEX. TAX CODE ANN. § 312.002(f).

4. How long does a tax abatement agreement last?

A tax abatement agreement cannot exceed ten (10) years in length.⁸ 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.”⁹ 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.”¹⁰ 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.¹¹

5. What are the required steps to establish a tax abatement agreement?

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.”¹²
- (2) The taxing unit must establish guidelines and criteria governing tax abatement agreements.¹³
- (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 (7th) day before the date of the public hearing.¹⁴
- (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 (7th) day before the

⁸ TEX. TAX CODE ANN. §§ 312.204(a) & 312.208(a) (any modification of an agreement cannot extend beyond ten (10) years from the date of the original agreement).

⁹ Op. Tex. Att’y Gen. No. JC-0133 (1999) at 6.

¹⁰ Op. Tex. Att’y Gen. No. GA-0304 (2005) at 7.

¹¹ TEX. TAX CODE ANN. § 312.204(a).

¹² TEX. TAX CODE ANN. § 312.002(a).

¹³ *Id.*

¹⁴ TEX. TAX CODE ANN. § 312.201(d).

- date of the public hearing.¹⁵
- (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.¹⁶
 - (6) At least seven (7) days before the date on which a city enters into a tax abatement agreement, the city 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 intends to enter into a tax abatement agreement.¹⁷ The notice must include a copy of the proposed agreement. Nonetheless, failure to deliver the notice does not affect the validity of any agreement.¹⁸
 - (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.¹⁹

6. What portion of the appraised property value can the City abate?

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 is executed.²⁰ 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.

7. Can the City abate 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

¹⁵ TEX. TAX CODE ANN. § 312.201(d).

¹⁶ TEX. TAX CODE ANN. § 312.201(a).

¹⁷ TEX. TAX CODE ANN. § 312.2041(a).

¹⁸ TEX. TAX CODE ANN. § 312.2041(c).

¹⁹ TEX. TAX CODE ANN. § 312.207(a).

²⁰ TEX. TAX CODE ANN. § 312.204(a).

agreement cannot abate delinquent taxes.²¹

8. Can a tax abatement agreement be granted for newly added business personal property if there was an earlier ten (10) year tax abatement at the site on previously existing personal property?

The Texas Attorney recently 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.²²

Guidelines and Criteria:

9. Can a taxing unit enter into a tax abatement agreement without the owner of the property meeting certain 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.²³

10. Can a taxing unit establish a reinvestment zone without having established criteria and guidelines governing tax abatement agreements?

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.²⁴

11. Must the guidelines and criteria provide for the abatement of both new facilities and structures and for the expansion or modernization of existing facilities and structures?

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.²⁵

²¹ Tex. Att'y Gen. LO 95-090 (1995).

²² Op. Tex. Att'y Gen. No. GA-0304 (2005).

²³ TEX. TAX CODE ANN. § 312.002(b).

²⁴ TEX. TAX CODE ANN. § 312.002(a).

²⁵ TEX. TAX CODE ANN. § 312.002(a).

12. How long are guidelines and criteria effective?

Guidelines and criteria are effective for two (2) years from the date of adoption.²⁶

13. Can guidelines and criteria be amended or repealed?

Guidelines and criteria can be amended or repealed. During the two (2) year period, guidelines and criteria may be amended or repealed by a 3/4th vote of the members of the governing body.²⁷ Accordingly, this would require an affirmative vote of four (4) of the five (5) council members, for cities with five (5) city council members.

14. If a property owner meets the taxing city's guidelines and criteria, must the city enter into a tax abatement agreement with the owner?

The city still has discretion on whether to enter into a tax abatement agreement. Although, a property owner met certain guidelines and criteria, city council could still decide not to enter into a tax abatement agreement with a particular owner. Adoption of guidelines and criteria by the city council does not limit the discretion of the governing body as to whether to enter into a specific tax abatement agreement.²⁸ 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.²⁹

15. Can a city receive technical assistance regarding the adoption of tax abatement guidelines?

Yes, the Governor's Office of Texas Economic Development and Tourism, and State Comptroller's office are authorized to 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.³⁰

²⁶ TEX. TAX CODE ANN. § 312.002(c).

²⁷ TEX. TAX CODE ANN. § 312.002(c).

²⁸ TEX. TAX CODE ANN. § 312.002(d)(1).

²⁹ TEX. TAX CODE ANN. § 312.002(d)(3).

³⁰ TEX. TAX CODE ANN. § 312.005(b) (Although the Tax Code provision still references the Texas Department of Commerce, this department is now part of the Governor's office).

Designation of Reinvestment Zones:

16. Can a city designate a reinvestment zone by ordinance or resolution?

City council must designate a reinvestment zone by ordinance.³¹ The ordinance must describe the boundaries of the zone and the eligibility of the zone for residential tax abatement or commercial-industrial tax abatement.³² Further, an area located within 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.³³ 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.³⁴

17. Must the city reinvestment zone be located within the city limits?

City council may designate a reinvestment zone within the city's limits or within the extraterritorial jurisdiction of the city.³⁵

18. Must an area meet certain criteria to be designated a reinvestment zone?

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:³⁶

(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;

³¹ TEX. TAX CODE ANN. § 312.201(a).

³² TEX. TAX CODE ANN. § 312.201(b).

³³ TEX. TAX CODE ANN. § 312.2011.

³⁴ TEX. GOV'T CODE ANN. § 2303.101(3) (Vernon 2008).

³⁵ TEX. TAX CODE ANN. § 312.201(a).

³⁶ TEX. TAX CODE ANN. § 312.202(a).

- (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.

Tax Abatement Agreements:

19. Must tax abatement agreements made with the owners of property within a single reinvestment zone contain identical terms?

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.³⁷ Yet, agreements made with several owners

³⁷ TEX. TAX CODE ANN. § 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

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.³⁸

20. If the city enters into a tax abatement agreement must the remaining taxing entities enter into tax abatement 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.³⁹

21. If the city enters into a tax abatement agreement and the other taxing entities enter into a tax abatement agreement with the owner, must the city, county and special districts enter into identical agreements?

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.⁴⁰

Public Information:

22. If a business provides proprietary information in connection with an application or request for tax abatement, is the proprietary information considered public information?

Certain information provided to a taxing unit in connection with a tax abatement

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.”)

³⁸ TEX. TAX CODE ANN. § 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.”)

³⁹ TEX. TAX CODE ANN. § 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).

⁴⁰ TEX. TAX CODE ANN. § 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 . . .”)

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.⁴¹

State Administration of Tax Abatement Agreements:

23. Is a taxing unit required to file a report with the State if a reinvestment zone is created or a tax abatement agreement is executed?

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 before July 1 of the year following the year in which the zone is designated or the agreement is executed a report. Further, the comptroller is required to maintain a central registry of reinvestment zones designated and of tax abatement agreements executed.⁴²

24. What information is required in the tax abatement report filed with the 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 and 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.⁴³

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.⁴⁴

25. Is there a state agency which can provide assistance concerning tax abatements?

Yes. 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

⁴¹ TEX. TAX CODE ANN. § 312.003.

⁴² TEX. TAX CODE ANN. § 312.005(a).

⁴³ TEX. TAX CODE ANN. § 312.005(a)(1)-(3).

⁴⁴ TEX. TAX CODE ANN. § 312.005(a)(2)&(a)(3).

*Tax Abatement Agreements
Austin, Texas
February 13, 2009*

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.⁴⁵

⁴⁵ TEX. TAX CODE ANN. § 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).