



ECONOMIC DEVELOPMENT HANDBOOK 2008



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT



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Dear City and County Officials:

Fostering a vibrant, thriving economy is critical to the future of our great state. All across Texas, cities and counties are working to nurture small business, encourage entrepreneurship, advance commerce, and create jobs.

Fortunately, Texas law offers many options for local leaders seeking to generate economic development and opportunity. This compilation of state economic development laws is published to help Texas municipalities and counties realize the wide-range of legal tools that are available to them.

The Economic Development Handbook is compiled annually by the Office of the Attorney General's Municipal and County Affairs sections. Hopefully these legal experts' efforts will prove helpful to local leaders around the State of Texas.

Thank you for your interest in economic development and the laws that help foster growth and opportunity. Together, state and local offices can ensure our great state is ripe with economic opportunity for all Texans.

Sincerely,

Greg Abbott
Attorney General of Texas

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For additional information on any of the topics covered, please call the OAG's Municipal Affairs Section at (512) 475-4683 or OAG's County Affairs Section at (512) 463-2060.

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I. The Sales Tax for Economic Development

Using Sales Tax to Promote Economic Development

The sales tax for economic development has been one of the most popular and effective tools used by cities to promote economic development. Although authorization for the local option tax has only been in effect since 1989, more than 558 cities have levied an economic development sales tax. The cities that have adopted this tax have cumulatively raised in excess of \$376 million annually in additional sales tax revenue dedicated to the promotion of local economic development. Of these cities, 115 have adopted a Section 4A economic development sales tax, 339 cities have adopted a Section 4B economic development sales tax, and 104 cities have adopted both a Section 4A and a Section 4B sales tax.

History of the Economic Development Sales Tax

Although legislators have always understood the need to promote economic development, prior to 1979 there were few statutory vehicles that facilitated such efforts. Business leaders expressed this concern to the Texas Legislature and asked for authorization to create an entity that could encourage the development of new local commerce.

In response, the Texas Legislature passed the Development Corporation Act of 1979 (Texas Revised Civil Statutes Article 5190.6). The Development Corporation Act of 1979 (the “Act”) allows municipalities to create nonprofit development corporations that promote the creation of new and expanded industry and manufacturing activity within the municipality and its vicinity. The development corporations operate separately from the municipalities, with boards of directors that oversee their efforts. These corporations, in conjunction with industrial foundations and other private entities, work to promote local business development. However, prior to 1987, the efforts of these entities were dependent on funding from private sources, which often was difficult to obtain. At that time, development corporations could not legally receive funding from the state or local governments because of a Texas constitutional prohibition against the expenditure of public funds to promote private business activity.¹

In November 1987, the voters of Texas approved an amendment to the Texas Constitution providing that expenditures for economic development serve a public purpose and were therefore permitted under Texas law.² This amendment states in pertinent part:

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 . . . for the public purposes of development and diversification of the economy of the state

¹ Tex. Const. art. III, § 52.

² Tex. Const. art. III, § 52-a.

After this constitutional amendment, the Texas Legislature passed laws that would allow state and local government funds to be used to promote economic development.³ In fact, the 1989 and subsequent legislative sessions produced many new laws granting economic development authority to municipalities.

Most notably, in 1989, the Texas Legislature amended the Act by adding Section 4A, which allowed the creation of a new type of development corporation. The legislation provided that a Section 4A development corporation could be funded by the imposition of a local sales and use tax dedicated to economic development. The tax could be levied only after its approval by the voters of the city at an election on the issue.

The proceeds of the Section 4A sales tax were dedicated by statute to economic development projects to primarily promote new and expanded industrial and manufacturing activities. This authority became popularly referred to as the Section 4A economic development sales tax. The Section 4A tax was generally available to cities that were located within a county of fewer than 500,000 and had room within the local sales tax cap to adopt an additional one-half cent sales tax.

In 1991, the Texas Legislature made a number of changes to the Section 4A sales tax authorization. It allowed the tax to be adopted at any rate between one-eighth and one-half of one percent (in one-eighth percent increments). It additionally allowed cities to offer a joint proposition to be voted on that would authorize both a Section 4A economic development sales tax and a sales tax for property tax relief.

Also in the 1991 Legislative Session, the Legislature authorized a new type of sales tax, a Section 4B sales tax. This legislation authorized a one-half cent sales tax to be used by certain cities to promote a wide range of civic and commercial projects. The legislation authorized 73 Texas cities to propose a Section 4B sales tax. Between 1991 and 1993, 19 cities adopted the new Section 4B sales tax.

The popularity of the Section 4B sales tax led the Texas Legislature in 1993 to broaden its availability to any city that was eligible to adopt a Section 4A sales tax. In other words, most cities in a county of less than 500,000 could adopt either the Section 4A or the Section 4B sales tax if they had room in their local sales tax. Until recently, only cities within El Paso County and Travis County were ineligible by statute to adopt either the Section 4A or the Section 4B tax. Now, cities located within El Paso County and Travis County are authorized to adopt a Section

³ Currently, there do not appear to be any Attorney General opinions or court rulings that clarify whether the post-1987 amendments to the Development Corporation Act are intended to implement Article III, Section 52-a of the Texas Constitution. *See* Op. Tex. Att’y Gen. Nos. LO 94-037 (1994) at n.1 (expressly declining to address this issue) and JM-1227 (1990) (Legislation was not considered enabling legislation for Article III, Section 52-a where the legislation did not mention lending of credit or Article III, Section 52-a, the legislation significantly predated Article III, Section 52-a, and the legislation was not associated with any legislative history indicating that it anticipated Article III, Section 52-a).

4B tax.⁴ As of this publication, at least 558 cities have either a Section 4A or a Section 4B sales tax for economic development.

The Act has historically been codified at Texas Revised Civil Statutes Article 5190.6, and the identification of “4A” and “4B” sales tax structures are in fact references to sections 4A and 4B of the Act. In 2007, the 80th Legislature authorized the recodification of several civil statute provisions by topic, including those pertaining to planning and development. Under H.B. 2278 (80th Leg., R.S.), the Act will be codified in the Local Government Code, effective April 1, 2009 (the “Effective Date.”) As of the Effective date, economic development corporations adopting what was formally known as a “4A” or “4B” sales tax will be known simply as “Type A” or “Type B” corporations.

Differences Between the Section 4A and the Section 4B Sales Tax

There are a number of important differences between Section 4A and the Section 4B sales taxes for economic development.⁵ In broad terms, Section 4A and Section 4B taxes can be distinguished on the following grounds: 1) the authorized uses of the tax proceeds; 2) the oversight procedures regarding project expenditures; and 3) the means for adopting and altering the tax by election. These general differences are outlined below. Further distinctions are covered in the individual chapters on each tax in this handbook.

Differences in the Authorized Uses of the Tax Proceeds

The Section 4A tax is generally considered the more restrictive of the two taxes in terms of authorized types of expenditures. The types of projects permitted under Section 4A include the more traditional types of economic development initiatives that facilitate manufacturing and industrial activity. For example, the Section 4A tax can be used to fund the provision of land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements that are for the creation or retention of primary jobs for projects such as manufacturing and industrial facilities, research and development facilities, military facilities, including closed or realigned military bases, recycling facilities, distribution centers, small warehouse facilities, primary job training facilities for use by institutions of higher education, and regional or national corporate headquarters facilities.⁶ The Section 4A sales tax may also fund business-related airports, port-

⁴ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(a)(1)(A) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.002 (Vernon Supp. 2008), effective April 1, 2009).

⁵ *But see id.* §§ 4A(b)(1) and 4B(b) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 504.101 and 505.101 (Vernon Supp. 2008), effective April 1, 2009). Section 4B(b) states that a Section 4B corporation “has the powers granted by this section and by other sections of this Act and is subject to the limitations of a corporation created under other provisions of this Act. To the extent of a conflict between this section and another provision of this Act, this section prevails.” Section 4A(b)(1) contains similar language that applies to Section 4A corporations. It does not appear that the intent of these sections was to make the provisions of Section 4A applicable to Section 4B corporations or vice versa. Rather, these provisions seem to be intended to clarify that both Section 4A and Section 4B corporations are subject to the general provisions of the Development Corporation Act.

⁶ *Id.* § 2(11) (as amended by Tex. H.B. 3440, 80th Leg., R.S. (2007)) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.101 (Vernon Supp. 2008), effective April 1, 2009).

related facilities, and certain airport-related facilities 25 miles from an international border,⁷ as well as eligible job training classes, certain career centers and certain infrastructural improvements which promote or develop new or expanded business enterprises.⁸

The Section 4B tax also can be used to fund the provision of land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements that are for the creation or retention of primary jobs for projects such as manufacturing and industrial facilities, research and development facilities, military facilities, including closed or realigned military bases, transportation facilities, sewage or solid waste disposal facilities, recycling facilities, air or water pollution control facilities, distribution centers, small warehouse facilities, primary job training facilities for use by institutions of higher education, regional or national corporate headquarters facilities,⁹ eligible job training classes, certain career centers and certain infrastructural improvements that promote or develop new or expanded business enterprises.¹⁰ However, the Section 4B tax can additionally fund projects that are typically considered to be community development initiatives. For example, authorized categories under Section 4B include, among other items, land, buildings, equipment, facilities, expenditures, and improvements for professional and amateur sports facilities, park facilities and events, entertainment and tourist facilities, and affordable housing.¹¹ Also, the Section 4B tax may be expended for the development of water supply facilities or water conservation programs. However, in order to undertake a water supply facility or water conservation program, the facility or program has to be approved by a majority of the qualified voters of the city voting in an election called and held for that purpose.¹² As of September 1, 2005, certain Section 4B development corporations are allowed to do projects that promote new and expanded business development, which could include retail projects.¹³

Differences in the Oversight Procedures

Section 4A and Section 4B tax monies differ in the types of oversight required for each. Both Section 4A and Section 4B monies are overseen by the development corporation's board of directors and by the city council. The Section 4A board has at least five members with no statutory criteria for their selection.¹⁴ A section 4B board consists of seven members. No more than four of the seven Section 4B directors may also be city officers or employees. Section 4B board members must all be city residents. However, two very limited exceptions are provided to

⁷ *Id.* § 4A(i) (to be codified at Tex. Loc. Gov't Code Ann. § 504.103 (Vernon Supp. 2008), effective April 1, 2009).

⁸ *Id.* §§ 2(11)(B), (C), and (D) and 38(b) (as amended by Tex. H.B. 3440, 80th Leg., R.S. (2007)) (to be codified at Tex. Loc. Gov't Code Ann. §§ 501.102, 501.103, 501.104 and 501.162 (Vernon Supp. 2008), effective April 1, 2009).

⁹ *Id.* § 2(11).

¹⁰ *Id.* §§ 2(11)(B), (C), and (D) and 38(b).

¹¹ *Id.* § 4B(a)(2)(A) and (C) (to be codified at Tex. Loc. Gov't Code Ann. §§ 505.152 and 505.153 (Vernon Supp. 2008), effective April 1, 2009).

¹² *Id.* §§ 4B(a)(2)(D) and (E) and 4B (a-5) (to be codified at Tex. Loc. Gov't Code Ann. §§ 505.154 and 505.304 (Vernon Supp. 2008), effective April 1, 2009).

¹³ *Id.* § 4B(a)(2)(F),(3), and (4) (to be codified at Tex. Loc. Gov't Code Ann. §§ 505.156, 505.157, and 505.158 (Vernon Supp. 2008), effective April 1, 2009).

¹⁴ *Id.* § 4A(c) (to be codified at Tex. Loc. Gov't Code Ann. § 504.051(a) (Vernon Supp. 2008), effective April 1, 2009).

allow Section 4B corporation boards to place certain individuals who are not city residents onto Section 4B boards.¹⁵

First, in a city of fewer than 20,000 in population, a Section 4B director may either be a resident of the city, a resident of the county in which the major part of the area of the city is located, or reside in a place that is within 10 miles of the city's boundaries and is in a county bordering the county in which a major portion of the city is located.¹⁶ Second, the Act provides that a person may serve on a Section 4B board if that person was a Section 4A director at the time that a Section 4A corporation was dissolved, and the 4A corporation was replaced with a Section 4B corporation.¹⁷ Since the directors of a Section 4A corporation are not required to be residents of the city, this change in the law would allow a non-resident to serve as a Section 4B director in this limited circumstance.

When a Section 4A or Section 4B board pursues a project, it is required to obtain city council approval of the project. There is no requirement for additional public notice or a public hearing on individual projects undertaken by the 4A corporation, but Section 4B corporations are subject to certain additional procedural requirements. They must provide public notice and hold a public hearing prior to pursuing a project, and the public has 60 days to petition for an election to be called on whether to pursue the project.

Differences in the Means for Adopting and Altering the Tax

Finally, there are differences in how Section 4A and Section 4B taxes may be created or altered by election. A Section 4A tax is authorized by an election that has mandatory statutory wording for the ballot proposition. There is also authority for a Section 4A tax to be adopted in conjunction with a sales tax for property tax relief under one combined proposition at the same election. Once adopted, the Section 4A tax continues in existence until repealed by action of the voters. The Section 4A tax can be increased, reduced, or repealed at subsequent elections within the statutory range provided for the tax.

Conversely, the Section 4B tax has no required statutory wording for the ballot proposition. It can be adopted by a general ballot proposal for the adoption of a Section 4B sales tax for economic development. In most cases, however, cities place a long list of the authorized categories for expenditure in the ballot wording that adopts the Section 4B tax. Before the 79th Legislative Session, there was no authorization for a Section 4B tax to be combined onto one ballot proposition with a sales tax for property tax relief. If the voters wanted both taxes, they would have to approve the items as separate ballot propositions. As of September 1, 2005, Section 4B tax can be combined into one ballot proposition with a sales tax for property relief or any other special purpose municipal sales tax.¹⁸

¹⁵ *Id.* § 4B(c) (to be codified at Tex. Loc. Gov't Code Ann. § 505.052 (Vernon Supp. 2008), effective April 1, 2009).

¹⁶ *Id.*

¹⁷ *Id.* § 4B(e-1) (to be codified at Tex. Loc. Gov't Code Ann. § 505.052(d) (Vernon Supp. 2008), effective April 1, 2009).

¹⁸ Tex. Tax Code Ann. § 321.409 (Vernon Supp. 2008).

However, there is no authorization for a Section 4B tax rate to be increased or reduced at subsequent elections. In fact, for Section 4B corporations created prior to September 1, 1999, the Section 4B tax arguably only ends once the bonds and any other debt obligations have been paid in full for all of the projects undertaken by the Section 4B corporation. For corporations created on or after September 1, 1999, the Section 4B corporation may also be dissolved by petition of the voters and an election on the issue.¹⁹ In either case, the Section 4B tax would continue until the prior debt obligations of the Section 4B corporation have been paid in full.

Section 4A Economic Development Sales Tax

Eligibility to Adopt a Section 4A Tax

A city is eligible to adopt the Section 4A tax, with voter approval, if the new combined local sales tax rate would not exceed two percent and:²⁰

- the city is located in a county with a population of fewer than 500,000; or
- the city has a population of fewer than 50,000 and is located within two or more counties, one of which is Bexar, Dallas, El Paso, Harris, Hidalgo, Tarrant, or Travis; or
- the city has a population of less than 50,000 and is within the San Antonio or Dallas Rapid Transit Authority territorial limits but has not elected to become part of the transit authority.

It should be noted that participation in a rapid transit authority does not invalidate a city's ability to adopt a Section 4A tax if adoption of the tax would not place the area within the city above its statutory cap for the local sales tax rate.²¹ If a city is not certain whether it fits into one of the above categories, the city can call the Local Assistance Section of the State Comptroller's Office at (800) 531-5441, ext. 3-4679, for a confirmation of its eligibility.

If a city is eligible to adopt a Section 4A tax, it may propose a sales tax rate equal to one-eighth, one-fourth, three-eighths, or one-half of one percent.²² The city may not adopt a sales tax rate that would result in a combined rate of all local sales taxes that would exceed two percent.²³

¹⁹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(e) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.255 (Vernon Supp. 2008), effective April 1, 2009).

²⁰ *Id.* § 4A(a) (to be codified at Tex. Loc. Gov't Code Ann. § 504.002 (Vernon Supp. 2008), effective April 1, 2009).

²¹ *See also id.* § 4A(o-1) (to be codified at Tex. Loc. Gov't Code Ann. § 504.259 (Vernon Supp. 2008), effective April 1, 2009) (allowing a city located in a county in which a chapter 452 regional transportation authority has territory to call an election to be added to the transit authority provided a majority of the votes cast in the election favor the proposition. If the proposition is approved the Section 4A sales tax can be reduced "to the highest rate that will not impair the imposition of the [regional transportation] authority's sales and use tax.")

²² *Id.* § 4A(d) (to be codified at Tex. Loc. Gov't Code Ann. § 504.252(b) (Vernon Supp. 2008), effective April 1, 2009).

²³ *Id.*

Cities That Have Adopted a Section 4A Tax (115 Cities)

<i>Abilene</i>	<i>Crowell</i>	<i>Hitchcock</i>	<i>Munday</i>	<i>Rotan</i>
<i>Amarillo</i>	<i>Decatur</i>	<i>Hooks</i>	<i>Nash</i>	<i>Rusk</i>
<i>Andrews</i>	<i>DeKalb</i>	<i>Hutto</i>	<i>New Boston</i>	<i>Seguin</i>
<i>Baird</i>	<i>DeLeon</i>	<i>Jasper</i>	<i>Odessa</i>	<i>Shamrock</i>
<i>Bellmead</i>	<i>Denison</i>	<i>Kaufman</i>	<i>Olney</i>	<i>Sherman</i>
<i>Belton</i>	<i>Denver City</i>	<i>Kilgore</i>	<i>Ore City</i>	<i>Silsbee</i>
<i>Big Spring</i>	<i>Early</i>	<i>Kountze</i>	<i>Overton</i>	<i>Slaton</i>
<i>Booker</i>	<i>Eastland</i>	<i>Lamesa</i>	<i>Palacios</i>	<i>Snyder</i>
<i>Borger</i>	<i>Edgewood</i>	<i>La Marque</i>	<i>Palmview</i>	<i>Sour Lake</i>
<i>Brady</i>	<i>Edinburg</i>	<i>Levelland</i>	<i>Panhandle</i>	<i>S. Padre Island</i>
<i>Bridgeport</i>	<i>El Campo</i>	<i>Lindale</i>	<i>Paris</i>	<i>Stamford</i>
<i>Brownfield</i>	<i>Fairfield</i>	<i>Littlefield</i>	<i>Penitas</i>	<i>Sulphur Springs</i>
<i>Brownwood</i>	<i>Gilmer</i>	<i>Longview</i>	<i>Perryton</i>	<i>Sweetwater</i>
<i>Burnet</i>	<i>Gladewater</i>	<i>Lubbock</i>	<i>Pharr</i>	<i>Tatum</i>
<i>Canadian</i>	<i>Graham</i>	<i>Marshall</i>	<i>Plains</i>	<i>Taylor</i>
<i>Childress</i>	<i>Greenville</i>	<i>Maud</i>	<i>Port Arthur</i>	<i>Terrell</i>
<i>Clarksville</i>	<i>Hale Center</i>	<i>Meadows Place</i>	<i>Primera</i>	<i>Texas City</i>
<i>Coleman</i>	<i>Hamlin</i>	<i>Memphis</i>	<i>Princeton</i>	<i>Tolar</i>
<i>Comanche</i>	<i>Haskell</i>	<i>Menard</i>	<i>Prosper</i>	<i>Vernon</i>
<i>Commerce</i>	<i>Henderson</i>	<i>Mercedes</i>	<i>Quanah</i>	<i>Waller</i>
<i>Copperas Cove</i>	<i>Hereford</i>	<i>Monahans</i>	<i>Ranger</i>	<i>Wellington</i>
<i>Corpus Christi</i>	<i>Hidalgo</i>	<i>Mt. Pleasant</i>	<i>Raymondville</i>	<i>Weslaco</i>
<i>Crockett</i>	<i>Hillsboro</i>	<i>Muleshoe</i>	<i>Rockwall</i>	<i>Wills Point</i>

Section 4A Projects

Section 4A tax proceeds may be used to fund any of 15 types of projects under the Development Corporation Act. Some of these projects require the creation or retention of primary jobs. Others require that the Section 4A corporation meet the requisite revenue amounts, population, and other requirements specified by the Act without having to create or retain primary jobs. A few projects do not require either the creation or retention of primary jobs or to meet a certain criteria.

Section 4A Expenditure Which Must Create or Retain Primary Jobs

In 2003, the Texas Legislature amended the definition of project in Section 2(11) to require certain projects result in the “creation or retention of primary jobs”.²⁴ Accordingly, most Section 4A projects must now create or retain primary jobs. Yet, not all projects contain this requirement. “Primary job” is defined to mean 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 meet any one of a certain enumerated sector numbers of the North American Industry Classification System (NAICS).²⁵

²⁴ See Tex. H.B. 2912, 78th Leg., R.S. (2003).

²⁵ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 2(17) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.002(12) (Vernon Supp. 2008), effective April 1, 2009).

I. The Sales Tax for Economic Development

The enumerated sector numbers are:

111	Crop Production
112	Animal Production
113	Forestry and Logging
11411	Commercial Fishing
115	Support Activities for Agriculture and Forestry
211 to 213	Mining
221	Utilities
311 to 339	Manufacturing
42	Wholesale Trade
48 and 49	Transportation and Warehousing
51 (excluding 51213 and 512132)	Information (excluding movie theaters and drive-in theaters)
523-525	Securities, Commodity Contracts, and Other Financial Investments and Related Activities; Insurance Carriers and Related Activities; Funds, Trusts, and Other Financial Vehicles
5413, 5415, 5416, 5417, and 5419	Scientific Research and Development Services
551	Management of Companies and Enterprises
56142	Telephone Call Centers
922140	Correctional Institutions; or a job that is included in North American Industry Classification System (NAICS) sector number 928110, National Security, for corresponding index entries for Armed Forces, Army, navy, Air Force, Marine Corps, and Military Bases.

For more information on the North American Industry Classification System, please visit: <http://www.census.gov/epcd/naics02/naicod02.htm>

Section 2(11) of the Act specifically allows funding for the 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 of the Section 4A corporation to be required or suitable for the development, retention, or expansion of the following 8 types of projects:

Manufacturing and industrial facilities. A primary purpose of the Section 4A sales tax for economic development is to promote the expansion and development of manufacturing and industrial facilities which create or retain primary jobs.

Research and development facilities. Economic development corporations can help provide research and development facilities which create or retain primary jobs.

Military facilities. Economic development corporations can help promote or support an active military base, attract new military missions to a military base in active use; or redevelop a military base that has been closed or realigned.²⁶

Recycling facilities. With the recent federal and state statutory encouragement of recycling enterprises, a growing number of businesses are emerging to meet these needs, and cities will be competing to attract these businesses. Recycling facilities which create or retain primary jobs are permissible projects.

Distribution centers. In cities with access to major airports or ports, and in areas that have passed the Freeport exemption, the environment is often favorable for the location of distribution centers. Funding distribution centers which create or retain primary jobs is allowable under the Act.

Small warehouse facilities. Again, in cities with access to major airports or ports, and in areas that have passed the Freeport exemption, the environment is often favorable for the location of warehouse facilities capable of serving as decentralized storage and distribution centers. Small warehouse facilities projects which create or retain primary jobs are permissible Section 4A projects.

Primary job training facilities for use by institutions of higher education. The term “institution of higher education” is defined under Section 61.003 of the Texas Education Code to include any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined under Section 61.003. The Development Corporation Act of 1979 allows the funding for “primary job training facilities for use by institutions of higher education.”

Regional or national corporate headquarters facilities. House Bill 2912 added certain corporate headquarter facilities to the definition of “project.” “Corporate headquarters facilities” is defined to mean “buildings proposed for construction or occupancy as the principal office for a business enterprise's administrative and management services.”²⁷ Accordingly, Section 4A corporations may fund corporate headquarter facilities, provided the facilities create or retain primary jobs.

Section 4A Projects Which Are Not Required to Create Primary Jobs

Additionally, the following three categories are also authorized Section 4A projects pursuant to Section 2(11) of the Act. Job training classes, certain infrastructure improvements and career centers need not be conditioned upon the creation or retention of primary jobs.

²⁶ *Id.* § 2(11) (as amended by Tex. H.B. 3440, 80th Leg., R.S. (2007)) (to be codified at Tex. Loc. Gov't Code Ann. § 501.101 (Vernon Supp. 2008), effective April 1, 2009).

²⁷ *Id.* § 2(18) (to be codified at Tex. Loc. Gov't Code Ann. § 501.101(2)(L) (Vernon Supp. 2008), effective April 1, 2009).

Job training classes. Certain job training required or suitable for the promotion of development and expansion of business enterprises can be a permissible project. Section 4A corporations may spend tax revenue for job training classes offered through a business enterprise only if the business enterprise agrees in writing to certain conditions. The business enterprise must agree to create new jobs that pay wages that are at least equal to the prevailing wage for the applicable occupation in the local labor market area; or it must agree to increase its payroll to pay wages that are at least equal to the prevailing wage for the applicable occupation in the local labor market area.²⁸ The creation or retention of primary jobs is not a mandatory requirement for funding permissible job training classes.

Certain infrastructural improvements which promote or develop new or expanded business enterprises. “Project” also includes expenditures found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises. Yet the infrastructure improvements are limited to streets and roads, rail spurs, water and sewer utilities, electric utilities, gas utilities, drainage, site improvement, and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico.²⁹ Accordingly, Section 4A corporations may assist with limited infrastructural improvements that the board finds will promote or develop new or expanded business development. The funding of these infrastructural improvements do not have to be conditioned upon the creation or retention of primary jobs.

Career Centers. Certain career centers can also be provided land, buildings, equipment, facilities, improvements and expenditures found by the board of directors to be required or suitable for use if the area to be benefited by the career center is not located in the taxing jurisdiction of a junior college district.³⁰

Commuter Rail, Light Rail or Motor Buses. A Section 4A corporation, as authorized by the corporation’s board of directors, may spend tax revenue received under the Act for the development, improvement, expansion or maintenance of facilities relating to the operation of commuter rail, light rail, or motor buses.³¹

Section 4A(i) specifically allows industrial development corporations to undertake two categories of projects without the requirement of creating or retaining primary jobs. The primary purpose of these projects is to provide:

Business airports (general aviation business service airports that are an integral part of an industrial park); and

²⁸ *Id.* § 38(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.162 (Vernon Supp. 2008), effective April 1, 2009).

²⁹ *Id.* § 2(11)(C) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.103 (Vernon Supp. 2008), effective April 1, 2009).

³⁰ *Id.* § 2(11)(D) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.104 (Vernon Supp. 2008), effective April 1, 2009).

³¹ *Id.* art. 5190.6, § 38A (as added by Tex. S.B. 1089, 80th Leg., R.S. (2007)).

Port-related facilities (port-related facilities to support water-borne commerce).

In addition, there are three categories that are not required to create or retain primary jobs, but for which there are revenue amount, population and other requirements specified in the Act:

Airport Facilities. Section 4A corporations located within twenty-five (25) miles of an international border, in a city with 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.³²

Airport and Port Facilities. Section 4A corporations located in a city wholly or partly in a county that is bordered by the Rio Grande, with a population of at least 500,000, and having wholly or partly within its boundaries at least four cities that each have a population of at least 25,000 (Hidalgo County), may provide certain assistance with infrastructure necessary to promote or develop new or expanded business enterprises, including airports and ports facilities, provided section 4A sales tax revenues do not support the project.³³

Undertaking Projects Located Outside of the City

Section 23(a)(1) of the Development Corporation Act provides that an economic development corporation may undertake projects outside of the city limits with permission of the governing body that has jurisdiction over the property. In other words, if the corporation wants to undertake a project that is located completely in the city's extraterritorial jurisdiction or beyond, it should get approval from the governing body of the county, the county commissioners court. The language of the Act, however, does not seem to require this approval if the project is located at least partially within the boundaries of the city. If the project is located completely within the jurisdiction of another municipality, the corporation would need approval of the city council for that municipality.

Use of a Section 4A Tax for Infrastructural Improvements

Section 4A tax proceeds are not intended to fund the general infrastructural needs of a city. For example, Section 4A(i) of the Act states that Section 4A tax proceeds cannot be used to undertake a project the primary purpose of which is to provide transportation facilities, solid waste disposal facilities or air or water pollution control facilities. Section 4A(i) further states that Section 4A tax proceeds may be used for these types of facilities only if the expenditure would "benefit property acquired for a project having another primary purpose." Further, in

³² *Id.* §§ 2(11)(D) and 4A(i)(3) (to be codified at Tex. Loc. Gov't Code Ann. §§ 501.104 and 504.103(c) (Vernon Supp. 2008), effective April 1, 2009).

³³ *Id.* § 2(11)(E) (to be codified at Tex. Loc. Gov't Code Ann. § 501.105 (Vernon Supp. 2008), effective April 1, 2009). This provision includes also sewer and solid waste disposal facilities. But 4A(i) prohibits 4A corporations from using its tax proceeds for such projects.

1999, the definition of the term “project” in Section 2(11) of the Act was amended to clarify that project expenditures could include “targeted infrastructure.” The Act does not define what constitutes “targeted infrastructure;” however, it appears to limit the expenditure of Section 4A tax proceeds to infrastructure tied to a project which will create or retain primary jobs.

In Texas Attorney General Opinion 95-072 (1995), the Attorney General’s Office concluded that the construction of sewer facilities in a residential subdivision would be unlikely to promote or develop new or expanded business enterprises, as is required by the Act. However, the Act appears to authorize the use of Section 4A funds for specific infrastructural improvements that may be necessary for a particular manufacturer or business to locate at a site.³⁴ For instance, an industry could ask the development corporation to fund improvements to a road that runs from the industrial facility to the main thoroughfare. In these situations, the expenditures are not made for general city infrastructural purposes, but are made to “benefit property acquired for a project having another primary purpose.”

In 2003, the Texas Legislature amended the Act to allow Section 4A corporations to expend sales tax proceeds for specific infrastructural improvements necessary to promote or develop new or expanded business enterprises. This is a rather broad provision in that the board of directors must determine that the project will promote new or expanded business development. Further, the expenditures under this provision are not required to create or retain primary jobs. Yet the corporation is limited in the type of infrastructural improvements that can be funded. This provision authorizes and limits expenditures for streets and roads, rail spurs, water and sewer utilities, electric utilities, gas utilities, drainage, site improvements and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico.³⁵

Prior to 1993, Section 4A of the Act contained specific authorization for Section 4A tax proceeds to be used to fund facilities for furnishing water to the general public. The Texas Legislature removed this authority from Section 4A in 2003. Although the definition of the term “project” in Section 2(11) still includes a reference to facilities for furnishing water to the general public, it is clear that the Legislature did not intend that general water facilities be funded by the use of Section 4A tax proceeds. In 2003, the Texas Legislature prohibited the use of Section 4A proceeds for furnishing water to the general public in Section 4A(i) of the Act.³⁶

Use of Section 4A Tax for Section 4B Projects

In 1997, the Texas Legislature amended the Development Corporation Act to allow the voters of an area to approve at an election the use of Section 4A economic development sales tax monies for a purpose authorized under Section 4B.³⁷ This alternative was authorized to allow cities with

³⁴ *Id.* § 2(11)(C) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.103 (Vernon Supp. 2008), effective April 1, 2009).

³⁵ *Id.*

³⁶ *Id.* § 4A(i) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.103 (Vernon Supp. 2008), effective April 1, 2009).

³⁷ *Id.* § 4A(s)(1) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.152 (Vernon Supp. 2008), effective April 1, 2009).

a Section 4A tax to propose Section 4B projects to the voters without having to repeal or reduce the Section 4A tax and adopt a Section 4B tax.

As noted, any use of Section 4A monies for a Section 4B project must be approved by the city's voters at an election held on the issue and a public hearing must be conducted before the city holds the election. If the city already has a Section 4A tax, it only needs to have the voters approve at the election the use of Section 4A tax proceeds for a particular Section 4B project or a category of Section 4B projects. The city would need to list each project or category of projects on a separate ballot proposition for the voters' approval. For example, if the city wanted to have the voters approve the use of Section 4A funds for park facilities and public safety facilities, there would need to be two separate ballot propositions. The voters would either approve or deny each proposition on its own merits. Unfortunately, state law does not define what constitutes a separate category of projects. A city should consult with its local legal counsel before it drafts its ballot wording for such an election.

If the city chooses to propose the use of Section 4A funds for Section 4B purposes, it must hold a public hearing prior to the election. At the public hearing, the city's residents must be informed of the estimated cost and impact of the proposed project or category of projects. It appears that the hearing may be conducted at any time before the election takes place. The city must publish notice of the hearing in a newspaper of general circulation in the city at least 30 days before the date set for the hearing. The notice must include the time, date, place and subject of the hearing and must be published on a weekly basis until the date of the hearing.

In an election to approve the use of Section 4A sales tax monies for a Section 4B purpose, the law requires that a specific Section 4B project or category of projects be clearly described on the ballot. The ballot proposition must be clear enough for the voters to discern the limits of the specific project or category of projects to be authorized. State law does not indicate what type of limits must be identified. At a minimum, the proposition should clearly identify what types of project are anticipated. Additionally, if Section 4A monies are to be used to pay maintenance and operating costs (and not just initial construction cost, etc.) of a Section 4B project, then the ballot proposition must state that fact.

A city may ask the voters to consider the use of Section 4A funds for a Section 4B purpose at the same election in which the voters are considering the creation of the Section 4A tax itself. However, there does not appear to be any authority for combining these two issues into one ballot proposition. The city would use one ballot proposition for the adoption of the Section 4A tax and a separate ballot proposition to approve the use of Section 4A monies for a Section 4B purpose. A city may also have the voters consider authorizing the use of Section 4A funds for several different Section 4B projects or categories of projects at the same election. As noted earlier, each project or category of projects would need to be placed on a separate ballot proposition for the voters' approval. There does not seem to be any authorization for a city to have the voters consider the use of Section 4A funds for several different Section 4B projects or categories of projects within one ballot proposition, unless the city proposes a combined ballot proposition to repeal or reduce the Section 4A tax and in the same proposition adopt a Section 4B tax. If an election on a Section 4B project or category of projects fails to win voter approval,

the city must wait at least one year before holding another election on that particular project or category.

Additionally, even when undertaking a properly authorized Section 4B project, a Section 4A corporation is governed by all the normal rules applicable to 4A corporations. For instance, if the ballot proposition originally authorizing the Section 4A tax contained an expiration date for the tax, voter authorization of the use of Section 4A funds for a Section 4B purpose would not eliminate the expiration date of the tax.

Use of Section 4A Tax for “Sports Venue” Facilities

The 1997 legislative change that allows Section 4A corporations to do Section 4B projects with approval of the voters would also allow cities to propose the use of Section 4A proceeds for a sports venue facility.³⁸ In other words, sports venue facilities would be another type of Section 4B project that the city could ask the voters to approve as a separate ballot proposition at a special election. Of course, the city would need to comply with all the normal statutory requirements for special elections and hold the necessary public hearing prior to the election. A project qualifies as a “sports venue” if it is an arena, coliseum, stadium, or other type of area or facility that meets both of the following criteria:³⁹

- The primary use or primary planned use is for one or more professional or amateur sports or athletics events; and
- A fee for admission to the sports or athletics events is charged or is planned to be charged, except that a fee need not be charged for occasional civic, charitable or promotional events.

Texas law specifies that any money authorized by the voters to be spent on a “sports venue and related infrastructure” may be spent on any on-site or off-site improvements that relate to a sports venue and that enhance the use, value, or appeal of the sports venue, including areas adjacent to it. Eligible expenditures would include any costs that are reasonably necessary to construct, improve, renovate, or expand the sports venue. The law specifically lists the following uses as examples of permissible “related infrastructure”: stores, restaurants, concessions, on-site hotels, parking facilities, area transportation facilities, roads, water or sewer facilities, parks, and environmental remediation. Each of these facilities, however, must relate to and enhance the sports venue.

Specific Costs of a Section 4A Project That May be Funded

Cities need to know what types of specific expenditures are contemplated within each category available for expenditure of Section 4A tax proceeds. For assistance in understanding what is

³⁸ *Id.* § 4A(s)(2) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.152(a) (Vernon Supp. 2008), effective April 1, 2009).

³⁹ *Id.* § 4A(s)(5)(B) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.151(2) (Vernon Supp. 2008), effective April 1, 2009).

permitted under the Act, cities should review the definition of the term “cost” under Section 2(4) of the Act. Section 2(4) defines what costs may be applied to a project under the Act. It states, in pertinent part, that costs for a project may include:

Land and facility improvements: the cost of acquisition, construction, improvement and expansion of land and buildings.

Machinery and supplies: the cost of machinery, equipment, inventory, raw materials and supplies.

Financial transaction costs: the cost of financing charges, interest prior to and during construction, and necessary reserve funds.

Planning costs: the cost of research and development, legal services, development of plans and specifications, surveys, and cost estimates; and other expenses necessary or incident to determining the feasibility and practicability of undertaking the project.

Brownfield Clean-up costs: Should the Texas Governor’s office or Texas Commission on Environmental Quality encourage or request a section 4A corporation to use sales tax proceeds to clean-up 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:⁴⁰

“The use of sales and use tax proceeds for the clean-up of contaminated property.”

An argument can be made that any expenditure by a Section 4A corporation, other than job training classes, must be related to the acquisition or physical improvement of real property, the acquisition of equipment, or the administrative costs associated with such an improvement or acquisition. Cities should consult with local legal counsel when considering whether such expenditures fit within this definition.

Use of Section 4A Tax Proceeds for Training Seminars

Certain Section 4A economic development and city officials are required to complete a training seminar.⁴¹ The officials must complete a seminar once every 24 months.⁴² At least one person from each of the following are required to attend a seminar each 24-month period:

- the city attorney, the city administrator or city clerk; and

⁴⁰ *Id.* § 4A(t) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.304 (Vernon Supp. 2008), effective April 1, 2009).

⁴¹ *Id.* § 39 (to be codified at Tex. Loc. Gov’t Code Ann. § 502.101 (Vernon Supp. 2008), effective April 1, 2009).

⁴² *Id.* § 39(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.101(a) (Vernon Supp. 2008), effective April 1, 2009).

- the executive director or other person who is responsible for the daily administration of the corporation.⁴³

The corporation is authorized to use Section 4A sales tax proceeds to pay for the costs of attending a seminar.⁴⁴ The certificates of completion are issued by the person, entity, or organization providing the training seminars, on a form approved by the Comptroller's office.⁴⁵ The Comptroller's Office may impose an administrative penalty in an amount not to exceed \$1,000 for the failure to attend the seminar.⁴⁶

Administrative Expenses of a Section 4A Project Maintenance and Operating Expenses

Section 2(4) of the Act also states that the cost of a project may include the administrative expenses and other expenses that are incident to placing a project into operation. The law states that these expenses could include "the administrative expenses for the acquisition, construction, improvement, and financing of any project." It is this authority that may be cited for the hiring of administrative staff to implement the work of the development corporation with regard to its projects. Cities that perform some of the administrative functions for the corporation could also cite this authority for reimbursement from Section 4A funds for administrative costs of projects that the city staff oversee.⁴⁷ Additionally, Section 4A(b)(1) specifically permits a Section 4A corporation to contract with other private corporations to carry out industrial development programs. Effective June 20, 2003, should a Section 4A corporation contract with a broker, agent or other third party for business recruitment, a written contract approved by the board of directors is required for any payment of a commission, fee, or other thing of value to the third party.⁴⁸ Failure to enter into a written contract could result in a civil penalty not to exceed \$10,000.

It should be noted that there is a difference between "administrative expenses that are necessary to put a project into operation" and the "maintenance and operating expenses" of an ongoing project. Section 4A corporations have statutory authority to expend Section 4A tax proceeds on administrative expenses to put a project into operation. Until September 1, 1999, however, there was no specific authority for Section 4A proceeds to be expended on maintenance and operating expenses of a Section 4A project.

⁴³ *Id.* §§ 39(b)(1) and (b)(3) (to be codified at Tex. Loc. Gov't Code Ann. § 502.101(a)(1) and (2) (Vernon Supp. 2008), effective April 1, 2009).

⁴⁴ *Id.* § 39(d) (to be codified at Tex. Loc. Gov't Code Ann. § 502.101(d) (Vernon Supp. 2008), effective April 1, 2009).

⁴⁵ *Id.* § 39(h) (to be codified at Tex. Loc. Gov't Code Ann. § 502.103 (Vernon Supp. 2008), effective April 1, 2009).

⁴⁶ *Id.* § 39(c) (to be codified at Tex. Loc. Gov't Code Ann. § 502.103(b) (Vernon Supp. 2008), effective April 1, 2009).

⁴⁷ *See* Op. Tex. Att'y Gen. No. JC-0109 (1999) at 3-5.

⁴⁸ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 41 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 502.051 (Vernon Supp. 2008), effective April 1, 2009).

As of September 1, 1999, Section 4A corporations have statutory authority to spend Section 4A sales tax money on maintenance and operation expenses for a Section 4A project.⁴⁹ However, as with a Section 4B corporation, voters will be able to petition for an election on the issue of whether to prohibit the Section 4A corporation from expending Section 4A money for the maintenance and operation costs of a particular project. Such a petition must be signed by 10 percent of the registered voters of the city. The petition must be presented within 60 days after the city first publishes notice that the tax proceeds are going to be used for maintenance and operations of a specific project.

Promotional Expenses and Prior Debts

Section 4A(b)(1) limits Section 4A corporations to spending no more than 10 percent of the corporate revenues (Section 4A tax proceeds) for promotional purposes.⁵⁰ The Act does not define the term “promotional purposes.” Yet the attorney general has concluded that a promotional expenditure “must advertise or publicize the city for the purpose of developing new and expanded business enterprises.”⁵¹ Further, a corporation is limited to spending not more than 10 percent of its current annual revenues for promotional purposes in any given year. Nonetheless, unexpended revenues specifically set aside for promotional purposes in past years may be expended along with 10 percent of current revenues without violating the cap.⁵² Additionally, city council may disapprove a promotional expenditure.⁵³ If there is some question as to whether a particular expenditure should be considered a promotional expense, the development corporation should consult with its local legal counsel.

A Section 4A development corporation is prohibited from assuming a debt or paying the principal or interest on a debt if the debt existed before the date when the city created the development corporation. This prohibition is contained in Section 4A(q) of the Act.⁵⁴ This limitation does not prevent a development corporation from undertaking or making future expenditures toward a project that is already in operation. It simply means that the corporation could not reimburse that project for its prior debts.

⁴⁹ *Id.* § 4A(c-1) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.302 (Vernon Supp. 2008), effective April 1, 2009).

⁵⁰ Op. Tex. Att’y Gen. No. LO-94-037 (1994) (concluding the Development Corporation of Abilene, which operated under section 4A of the Development Corporation Act, could spend proceeds of the sales and use tax imposed under section 4A for “promotional purposes,” subject to the proviso of subsection (b)(1) that no more than 10 percent of corporation revenue could be spent for such purposes, and so long as the expenditures were otherwise consistent with the provisions of the act and state law generally).

⁵¹ Op. Tex. Att’y Gen. No. GA-0086 (2003) at 2.

⁵² *Id.* at 6.

⁵³ *Id.* at 3-5.

⁵⁴ *But see* Op. Tex. Att’y Gen. No. DM-299 (1994). (That opinion indicates that Tex. Rev. Civ. Stat. art. 5190.6, § 4A(q) is not retroactive. A 4A corporation can, therefore, continue to make payments on any obligation that the corporation entered into before the enactment date of 4A(q) (in 1993). This would be true even if the obligation entered into before the enactment of 4A(q) was one that existed before the creation of the 4A corporation.)

Issuance of Bonds for a Section 4A Project

A Section 4A development corporation may issue bonds, notes and other contractual obligations to fund its projects.⁵⁵ The sales tax proceeds received by the corporation may be used to pay the principal and interest on the bonds and any other costs related to the bonds.⁵⁶ For example, the Attorney General concluded in Letter Opinion 92-86 that a Section 4A development corporation may finance bonds for the start-up costs of a technical college if the funds are used solely for vocational training purposes. Any bond or debt instrument of the corporation remains an obligation of the corporation and is not an obligation of the city. Nor is it backed by the city ad valorem tax rate.⁵⁷ The city and the development corporation staff will want to visit with local bond counsel prior to the imposition of any debt obligation or debt instrument. All such bonds would need to receive approval by the Public Finance Division of the Office of the Attorney General.⁵⁸

Initiating an Election to Adopt a Section 4A Sales Tax

An election to adopt a Section 4A economic development sales tax may be initiated by either:

- city council approval of an ordinance calling for an election on the imposition of the tax⁵⁹; or
- a petition signed by a number of qualified voters that equals at least 20 percent of the voters who voted in the most recent regular city election. If the city council receives such a petition, it is required to pass an ordinance to call an election on the imposition of the tax.⁶⁰

Most cities simply pass the ordinance calling for a Section 4A sales tax election on their own motion and do not wait for the election to be initiated by a petition of the voters. If a city orders an election on the sales tax for economic development, it must follow all applicable requirements for special elections contained in the Texas Election Code, the Municipal Sales and Use Tax Act

⁵⁵ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(a) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.214 (Vernon Supp. 2008), effective April 1, 2009).

⁵⁶ *Id.* § 4A(f) (to be codified at Tex. Loc. Gov't Code Ann. § 504.303 (Vernon Supp. 2008), effective April 1, 2009).

⁵⁷ *Id.* § 22 (to be codified at Tex. Loc. Gov't Code Ann. § 501.207 (Vernon Supp. 2008), effective April 1, 2009).

⁵⁸ *Id.* § 25(d) (to be codified at Tex. Loc. Gov't Code Ann. § 501.212 (Vernon Supp. 2008), effective April 1, 2009) (states that a development corporation may issue bonds without the approval of any state agency "except as otherwise provided herein." However, Tex. Gov't Code Ann. § 1202.003, which was enacted after Section 25(d) of the Development Corporation Act, requires approval of development corporation bonds by the Office of the Attorney General).

⁵⁹ *Id.* § 4A(e) (to be codified at Tex. Loc. Gov't Code Ann. § 504.255 (Vernon Supp. 2008), effective April 1, 2009) (stating that ch. 321 of the Tex. Tax Code governs the imposition of a 4A tax), and Tex. Tax Code Ann. § 321.401(a) (Vernon 2002) (an election may be called by the adoption of a city ordinance by city council).

⁶⁰ *See id.* (stating that ch. 321 of the Tex. Tax Code governs the imposition of a 4A tax) and Tex. Tax Code Ann. § 321.401(c) (Vernon 2002) (requiring that the city council pass an ordinance calling for a sales tax election if a petition is presented). See ch. 277 of the Tex. Elec. Code for requirements for petition signatures.

(Chapter 321 of the Texas Tax Code), and other Texas statutes relating to elections.⁶¹ Notably, the following requirements must be met:

Potential Election Dates. The election must be held on a uniform election date as provided by Chapter 41 of the Election Code. In the 2005 Legislative Session, the Texas Legislature changed the May election date and reduced the number of uniform election dates from 4 to 2. The current uniform election dates are:

- the second Saturday in May; and
- the first Tuesday after the first Monday in November.⁶²

Time Frame for Ordering the Election. The city should order the election at least 62 days prior to the date of the election, unless the election is the general election for state and county officers.⁶³ If the election is the general election for state and county officers, then the city should order the election at least 70 days prior to the date of the election.⁶⁴ The Tax Code requires only that the city order the election at least 30 days before the date of the election.⁶⁵ Nonetheless, it is advisable to provide at least 62 or 70 days' notice, since this is the requirement applicable to most other special elections in Texas, and it allows time to comply with other Election Code requirements, such as early voting. The special election must also be submitted for "pre-clearance" to the U.S. Department of Justice. Additionally, the Legislature added a provision noting the Election Code provision "supersedes a law outside this code to the extent of any conflict."⁶⁶

Notice to be Provided of Election. The city must publish notice of the election at least once in a newspaper of general circulation in the city.⁶⁷ The notice must be published not more than 30 days and not less than 10 days before the date of the election. The notice must state the nature and date of the election, the location of each polling place, hours that the polls will be open, and any other early voting and election-related information required by law. The notice must also include the wording of all the ballot propositions. The entire notice must generally be provided in both English and Spanish.⁶⁸

Prohibition on Electioneering. The city is prohibited from expending public funds or public resources to influence the results of an election, commonly referred to as "electioneering." A city may publish fact sheets to inform the public of the applicable statistics and proposed plans for the use of the tax; however, city stationery, city funds

⁶¹ See *id.* (stating that ch. 321 of the Tex. Tax Code governs elections under Section 4A) and Tex. Tax Code Ann. § 321.403 (Vernon 2002) (stating that an election held under ch. 321 of the Tax Code must be held on the next available uniform election date).

⁶² Tex. Elec. Code Ann. § 41.001(a) (Vernon Supp. 2008).

⁶³ *Id.* § 3.005.

⁶⁴ *Id.* § 3.005(c).

⁶⁵ Tex. Tax Code Ann. § 321.403 (Vernon 2002).

⁶⁶ Tex. Elec. Code Ann. § 3.005(b) (Vernon Supp. 2008).

⁶⁷ See *id.* ch. 4 (Vernon 2003 & Supp. 2008) (general requirements for providing notice of an election).

⁶⁸ See *id.* ch. 272.

and city staff (during the work day) may not be used to urge the public to vote one way or the other.⁶⁹

Additionally, in certain cases a court may find that a city has “made a contract” with the voters to use money for a specific purpose if the city has indicated in voter information sheets or through other means that the money would be used for that purpose.⁷⁰ Therefore, a city will want to be careful not to represent that money from the economic development sales tax will be used for a particular project unless the city intends to be legally limited by that representation.

Other Procedural Requirements. The city must follow all other procedural requirements under the Election Code for special elections. For further information about the requirements contained in the Election Code, contact the Secretary of State’s Office, Elections Division, at (800) 252-8683. For further information about the prohibition against expenditure of public funds to influence the results of an election, contact the Texas Ethics Commission at (800) 325-8506.

Required Ballot Wording for Section 4A Ballot. There is statutorily required wording for a Section 4A sales tax proposition ballot. The wording that must be used is as follows:⁷¹

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

The actual wording used on the ballot must indicate what rate is proposed for the Section 4A sales tax. The voters then vote for or against the proposition.

Setting a Limited Time Period for a Section 4A Tax

A Section 4A tax that is approved without a time limit is effective until repealed by election.⁷² However, a city may include in the wording of the ballot proposition a limitation on the length of time in years that a Section 4A tax may be imposed. For example, a city could limit to four years the time period during which a Section 4A tax is imposed. Once such a limit is approved by the voters, the tax may only be extended beyond this time limit or re-imposed if the city has an

⁶⁹ *Id.* § 255.003 (Vernon 2003).

⁷⁰ *See San Saba County v. McCraw*, 108 S.W. 2d 200 (Tex. 1937); *Black v. Strength*, 246 S.W. 79 (Tex. 1922); *Devorsky v. La Vega I.S.D.*, 635 S.W.2d 904 (Tex. App. -- Waco 1982, no writ); *Wright v. Allen*, 257 S.W. 980 (Tex. Civ. App.-- Dallas 1923, writ ref’d). *But see also San Antonio I.S.D. v. Hudson*, 92 S.W.2d 527 (Tex. Civ. App. -- San Antonio 1936), *affirmed*, 95 S.W.2d 673 (Tex. 1936). *See also* Op. Tex. Att’y Gen. No. JC-400 (2001) at 4-5.

⁷¹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(m) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.256 (Vernon Supp. 2008), effective April 1, 2009).

⁷² *Id.* § 4A(n) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.257 (Vernon Supp. 2008), effective April 1, 2009).

election at which the voters authorize the extension or re-imposition of the tax. If a city decides to include such a time limitation, the required ballot wording is as follows:

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

The actual wording used on the ballot must indicate what rate is proposed for the Section 4A sales tax and the number of years that the tax would be in effect. The voters then vote for or against the proposition.

Limiting the Types of Projects for a Section 4A Tax

On a ballot to adopt the Section 4A tax or on a ballot to increase or reduce a Section 4A tax, a city may also limit the use of the tax to a specific project.⁷³ For example, a city could limit the use of the Section 4A tax to a project for a specific manufacturing entity or to a specific type of project such as expenditures for an industrial park. If such a limit is approved by the voters, the city may not broaden the purposes for which the Section 4A tax may be used unless it holds another election. Any desired change would have to go back to the voters for approval at an election on the issue. Once the obligations for the specific project have been satisfied, the corporation is required to notify the State Comptroller to cease collecting the Section 4A tax. To date, no city has limited the use of a section 4A tax to a specific project. If a city decides to include such a limitation, the required wording of the ballot is as follows:⁷⁴

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

The actual wording used on the ballot must indicate what rate is proposed for the Section 4A sales tax and must include a description of the project. The voters then vote for or against the proposition.

Joint Proposition for a Section 4A Tax and a Sales Tax for Property Tax Relief

A city may include the Section 4A sales tax and the sales tax for property tax relief as separate ballot propositions at the same election. In 1991, the Texas Legislature additionally allowed cities to offer the voters a joint ballot proposition on a sales tax for property tax relief and a

⁷³ *Id.* § 4A(r) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.260 (Vernon Supp. 2008), effective April 1, 2009).

⁷⁴ *Id.* §§ 4A(r) & 4A(m) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 504.260 and 504.256 (Vernon Supp. 2008), effective April 1, 2009).

Section 4A sales tax for economic development.⁷⁵ In this scenario, the voters would vote for or against one ballot proposition that covers the adoption of both taxes.

This joint ballot proposition has been very popular, because it joins the popular incentive of a sales tax to reduce the property tax with the sometimes less popular sales tax for economic development. Under this joint ballot proposition, the voters are not able to pass the property tax relief sales tax without also passing the Section 4A sales tax for economic development. Either both taxes pass or both taxes fail. Some communities believe the wording of the joint ballot proposition was instrumental in their ability to pass a Section 4A sales tax for economic development. If a city decides to use such a joint proposition, the required wording on the ballot is as follows:⁷⁶

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

The actual wording used on the ballot must indicate what rate is proposed for the Section 4A sales tax and what rate is proposed for the sales tax for property tax relief. The voters then vote for or against the proposition. If the total local sales tax has reached the legal maximum of two percent, a city may attempt to simultaneously reduce the sales tax for property tax relief and impose the 4A economic development sales tax in one ballot proposition. The city would still use the above noted ballot wording.⁷⁷

There is nothing that stops a city from using separate ballot items for the passage of a sales tax for property tax relief and a Section 4A sales tax for economic development. In this case, the voters would vote for or against the adoption of each of the two taxes and the passage of one would not influence the passage of the other. Cities, however, have historically preferred the incentive value of joining the two items onto one ballot proposition. If a city uses separate ballot propositions, it should be noted that it is not possible to make one ballot proposition dependent on the passage of a separate ballot proposition. In other words, the city could choose to offer one proposition proposing a reduction of the sales tax for property tax and a separate proposition for the adoption of a sales tax for economic development. It is not possible in this scenario to make the adoption of one of the propositions dependent on the passage of the other. Such dependency can only be accomplished where the Legislature has authorized a joint proposition as described earlier.

⁷⁵ *Id.* § 4A(p) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.261 (Vernon Supp. 2008), effective April 1, 2009).

⁷⁶ *Id.*

⁷⁷ Op. Tex. Att’y Gen. No. LO 93-104 (1993) (notes that a city would use the same combined proposition ballot wording that is used to adopt a sales tax for property tax relief and a sales tax for economic development as it would for a combined ballot proposition to reduce or repeal a sales tax for property tax relief and increase a 4A sales tax for economic development).

Proposition to Increase or Reduce a Section 4A Tax

A city that has imposed a Section 4A tax may on its own motion call for an election to approve an increase or a reduction of the Section 4A tax rate.⁷⁸ The election would be administered by the same procedure that was used to originally adopt the tax. The Section 4A tax rate would be reduced or increased if the proposition were approved by a majority of the qualified voters who voted at an election held on the issue. The rate may be reduced or increased in one or more increments of one-eighth of one percent with a minimum rate of one-eighth of one percent and a maximum rate of one-half of one percent. On petition of at least 10 percent of the registered voters of the city, the city may be compelled to order an election on a proposed increase or decrease of the Section 4A tax rate.

It should be noted that the Attorney General has concluded in Attorney General Opinion DM-137 (1992) that if there is an election to reduce the Section 4A sales tax or to limit the length of time of its collection, the reduction or limitation may not be applied to any bonds issued prior to the date of the election.

It is not clear what ballot wording would be required for a proposition to increase or reduce a Section 4A tax rate. Section 4A(o) states that “the ballot shall be printed in the same manner as the ballot under Subsection (m) of this section.” Subsection (m) contains the regular wording on the ballot to adopt a Section 4A sales tax. The ballot wording to adopt the Section 4A sales tax is as follows: “The adoption of a sales and use tax for the promotion and development of new and expanded business enterprises at the rate of (insert one-eighth, one-fourth, three-eighths, or one-half, as appropriate) of one percent.” A city should consult with its local legal counsel, in conjunction with the Local Assistance Section of the Comptroller’s Office, if it decides to ask the voters to reduce or increase an existing Section 4A tax. Prior to the election, the city should also check with the Elections Division of the Texas Secretary of State’s Office to determine whether this type of special election would require pre-clearance from the U.S. Department of Justice. The Elections Division can be reached by phone at (512) 463-5650 or at (800) 252-8683.

Proposition to Abolish the Section 4A Tax

On petition of 10 percent or more of the registered voters of the city, the city can be required to order an election on the dissolution of the Section 4A corporation.⁷⁹ If the corporation is dissolved, the Section 4A tax may not be collected except to pay off any remaining obligations that were executed before the date of the dissolution election.

⁷⁸ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(o) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.258 (Vernon Supp. 2008), effective April 1, 2009).

⁷⁹ *Id.* § 4A(k) (to be codified at Tex. Loc. Gov’t Code Ann. § 504.351(a) (Vernon Supp. 2008), effective April 1, 2009).

The governing body of the city is required to order an election within 62 days after such a petition is filed. The ballot for the election shall be printed to provide for voting for or against the proposition:⁸⁰

“Dissolution of the _____ (insert name of the corporation).”

The election must be held on a uniform election date and the election is subject to all requirements under law for special elections. Prior to the election, the city should check with the Elections Division of the Texas Secretary of State’s Office to determine whether this type of election would require pre-clearance from the U.S. Department of Justice. The Elections Division can be reached by phone at (512) 463-5650 or at (800) 252-8683.

If a majority of the voters voting on the issue approve the dissolution, the corporation continues its operations only long enough to pay off any bonds that were issued before the date of the election and to the extent necessary to dispose of its assets. The Attorney General concluded that a corporation that is dissolving is required to submit its dissolution plan to city council for its review and approval. Yet city council may not use its approval power to prevent the corporation from performing its statutory duty to, “to the extent practicable, . . . dispose of its assets and apply the proceeds to satisfy” the corporation’s obligations.⁸¹ The assets are used to pay off any liabilities; any remaining assets are transferred to the city. The corporation is required to notify the State Comptroller to cease collection of the tax once the corporation has satisfied all of its obligations.

Combined Proposition to Reduce a Section 4A Tax and Adopt a Section 4B Tax

A city may offer a combined ballot proposition that would reduce or abolish an existing Section 4A tax and at the same time approve the creation of a Section 4B tax.⁸² That is, the city can have the voters approve or reject both items together by one “yes” or “no” vote. However, a city is not required to combine these two issues into one ballot proposition. It is not clear under the Development Corporation Act what statutory wording would be used in the ballot proposition for this type of combined proposition. A city that pursues such a combined proposition should consult with its local legal counsel and with the Texas State Comptroller’s Office on this issue. Further, a city can still choose to have the voters vote on repealing or reducing a Section 4A tax and adopting a Section 4B tax as separate ballot propositions.⁸³ If the city places the items on separate ballot propositions, it is possible that one, both or neither of the items would be approved at such an election. A city that chooses to provide these options to the voters would use

⁸⁰ *Id.* (provides for 45 days). *But see* Tex. Loc. Gov’t Code Ann. § 504.351(b) (Vernon Supp. 2008) (as codified effective April 1, 2009) (recodified text provides that the municipality shall hold the election on the next uniform election date as required by Section 3.005 of the Texas Election Code.).

⁸¹ Op. Tex. Att’y Gen. No. JC-0553 (2002) at 6 (quoting Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(k)).

⁸² Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(e) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.255 (Vernon Supp. 2008), effective April 1, 2009).

⁸³ *Id.*

the ballot wording suggested earlier for each of these items. In no case may a city offer ballot propositions that, if passed, would cause the city to exceed its two percent local sales tax cap.⁸⁴

Combined Proposition of a Section 4A Tax and Other Municipal Sales Tax

The 79th Legislature passed House Bill 3195, which now allows cities to have combined ballots propositions to lower, repeal, raise or adopt various municipal sales taxes.⁸⁵ This would include the Section 4A tax. If a city wants to lower the Section 4A tax and create a street maintenance tax, the city could combine the ballot propositions instead of having separate ballot propositions. If the combined ballot proposition does not pass, then there will be no effect on those sales taxes.

Reporting Election Results of a Section 4A Tax

The Election Code requires that, no earlier than the eighth day and no later than the eleventh day⁸⁶ after the election, the governing body of the city must canvass the ballots and enter the resolution or ordinance declaring the results of the election into the minutes of a meeting. The resolution or ordinance must include the following:⁸⁷

- The date of the election;
- The proposition for which the vote was held;
- The total number of votes cast for and against the proposition; and
- The number of votes by which the proposition was approved.

If the proposed change in the tax rate is approved by a majority of the qualified voters of the city voting at an election on the issue, the city may levy the approved tax. The city secretary must, by certified or registered mail, send the State Comptroller a certified copy of the resolution or ordinance and must include a map of the city clearly showing the city's boundaries. After receiving the documents, the Comptroller has 30 days to notify the city secretary that the Comptroller's Office will administer the tax.

If the election fails, the city must wait one full year before bringing the issue to the voters again.⁸⁸ However, the Election Code allows the city to hold a subsequent election on the

⁸⁴ See *id.* § 4B(f) (to be codified at Tex. Loc. Gov't Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009), and Tex. Tax Code Ann. § 321.101(f) (Vernon Supp. 2008). However, there may be a limited exception to this principle for certain taxes to support a sports venue. See Tex. Loc. Gov't Code Ann. chs. 334 and 335 (Vernon 2005 & Supp. 2007) and consult with local legal counsel if it appears that this exception may be applicable.

⁸⁵ See Tex. Tax Code Ann. § 321.409 (Vernon Supp. 2008).

⁸⁶ Tex. Elec. Code Ann. § 67.003(a) (Vernon Supp. 2008). *But see* Tex. Tax Code Ann. § 321.405 (Vernon 2002) (which gives the city 10 days to canvass an election on the proposed adoption of a Section 4A sales tax. It is not clear whether the Election Code provision or the Tax Code provision is controlling on this issue. Therefore, it is recommended that cities follow the stricter provisions of the Election Code and canvass the election between 8 and 11 days after it has taken place. Also, the Election Code allows the city to canvass the May election results as early as three days after the election, but only if there are no outstanding mail or provisional ballots).

⁸⁷ Tex. Tax Code Ann. § 321.405 (Vernon 2002).

⁸⁸ *Id.* § 321.406. (However, it can be argued that the language in Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(k) overcomes the requirements of Tex. Tax Code Ann. § 321.406. Section 4A(k) requires that a city council schedule an election on the issue of dissolution on the next available uniform election date after receiving a proper petition.

corresponding uniform election date that occurs approximately one year later, even if the date falls several days before a full year has elapsed.⁸⁹

Effective Date of Section 4A Tax

The change in the sales tax rate becomes effective one full calendar quarter after notice of the election has been provided to the State Comptroller. The new tax rate applies to purchases on or after the first day of that calendar quarter as provided under Section 321.102(a) of the Tax Code.

May Election: Send notice to the Comptroller no later than the last week in June. On October 1, the new tax rate will take effect. The city will receive its first payment in December.

November Election: Send notice to the Comptroller no later than the last week in December. On April 1, the new tax rate will take effect. The city will receive its first payment in June.

If the city passes an election for a Section 4A sales tax and, at the same election, adopts a sales tax for property tax relief, the city has two options with regard to the effective date of the tax. The city may opt to have the taxes take effect at the same time (the following October 1 if a full calendar quarter has passed since the election).⁹⁰ Or, alternatively, the city may choose to have the Section 4A tax take effect as soon as one calendar quarter has passed after the election, and have the sales tax for property tax relief take effect the following October 1 (after which a full calendar quarter has passed since the election). In this scenario, the Section 4A tax would generally take effect before the sales tax for property tax relief. Some cities choose this option to maximize revenues from the tax; other cities choose to make it easier on retailers and allow both taxes to take effect at the same time in October.

Allocation of the Sales Tax Proceeds by the Comptroller

Once the sales tax is effective, the Comptroller remits the sales tax proceeds from the increase in the rate to the municipality with its other local sales tax proceeds. The Municipal Sales and Use Tax Act (Chapter 321 of the Tax Code) governs the imposition, computation, administration, abolition, and use of the tax except where it is inconsistent with the statutory provisions within the Development Corporation Act.⁹¹

Additionally, Section 4A(e) states that Chapter 321 of the Tax Code governs an election related to a 4A sales tax, *except to the extent that Chapter 321 is inconsistent with Section 4A*. Thus, a petition for dissolution of a 4A corporation may not be subject to the one-year waiting period requirement. To a lesser extent, the same argument may be made for a petition under Section 4A(o) of Article 5190.6 (petition to increase or reduce an extant 4A tax). To date, this issue appears to be unresolved.)

⁸⁹ Tex. Elec. Code Ann. § 41.0041(a) (Vernon 2003).

⁹⁰ While the option to have both taxes take effect on October 1 is not expressly set out in state statute, it has been the interpretation of the Comptroller's office that such an option is allowed. Thus, it is currently Comptroller policy to give cities a choice with regard to the date of implementation for a 4A sales tax as outlined in this section.

⁹¹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(e) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 504.255 (Vernon Supp. 2008), effective April 1, 2009).

The city, upon receiving its local sales tax allotment from the Comptroller, must remit the sales tax for economic development to the industrial development corporation responsible for administering the tax.⁹² The proceeds of a sales tax for property tax relief would remain with the city.

Creating a Section 4A Industrial Development Corporation

A Section 4A development corporation may be initiated either by the city or by a group of citizens.⁹³ In either case, the development corporation must be created by a group of at least three persons who are at least 18 years old and qualified voters of the city. The group must file a written application with the city requesting approval of an industrial development corporation. The city may not charge a fee for consideration of the application. If the city determines that the corporation should be created, the city must approve the corporation's articles of incorporation by ordinance or resolution. The ordinance or resolution must indicate what purposes the corporation can further on the city's behalf. The purposes shall be limited to the promotion and development of industrial and manufacturing enterprises to encourage employment and the public welfare. The articles of incorporation must state that the corporation is to be governed by Section 4A of the Act.

If a city collects a sales and use tax under both Section 4A and Section 4B, the city must create separate corporations and boards of directors for the Section 4A and Section 4B taxes. However, the members of the board of directors of one corporation may serve on the board of directors of the other corporation. A city may not create more than one corporation to oversee the Section 4A tax or more than one corporation to oversee the Section 4B tax.⁹⁴

A corporation established under a section of the Act other than Section 4A may choose to transfer all of its assets to a Section 4A corporation and dissolve, as provided under the Act.⁹⁵ The dissolution must be approved by the city council and by the board of directors of the corporation. It should be noted, however, that a new Section 4A corporation is prohibited from expending Section 4A tax proceeds on pre-existing debt (debt that was created prior to the creation of the Section 4A development corporation).⁹⁶

The articles of incorporation for all development corporations must contain the items required under Section 6 of the Act, and must be approved by the municipality's governing body.⁹⁷ The city may amend the articles of incorporation at its sole discretion at any time.⁹⁸

⁹² *Id.* § 4A(f) (to be codified at Tex. Loc. Gov't Code Ann. § 504.301 (Vernon Supp. 2008), effective April 1, 2009).

⁹³ *Id.* §§ 4(a) and 4A(b)(1) (to be codified at Tex. Loc. Gov't Code Ann. §§ 501.051 and 504.003(a) (Vernon Supp. 2008), effective April 1, 2009).

⁹⁴ *Id.* §§ 4A(b)(1) and 4B(b) (to be codified at Tex. Loc. Gov't Code Ann. §§ 504.003(b) and 505.003(b) (Vernon Supp. 2008), effective April 1, 2009).

⁹⁵ *Id.* § 4A(l) (to be codified at Tex. Loc. Gov't Code Ann. § 501.407 (Vernon Supp. 2008), effective April 1, 2009).

⁹⁶ *Id.* § 4A(q) (to be codified at Tex. Loc. Gov't Code Ann. § 504.104 (Vernon Supp. 2008), effective April 1, 2009).

⁹⁷ *Id.* § 4(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.051(b) (Vernon Supp. 2008), effective April 1, 2009).

The articles of incorporation must be filed in triplicate with the Secretary of State's Office pursuant to Section 7 of the Act. Upon the issuance of the certificate of incorporation, the corporate existence begins. After the issuance of the certificate of incorporation, the board of directors must hold an organizational meeting to adopt the bylaws of the corporation and to elect officers. The initial bylaws must also be approved by resolution of the governing body of the city. The first meeting of the board of directors of the corporation should be held pursuant to the requirements under Section 12 of the Act.

For copies of sample articles of incorporation or bylaws, a city may want to contact one of the cities noted in this handbook as having already adopted the Section 4A tax.

Directors of a Section 4A Development Corporation

A Section 4A corporation is governed by at least a five-member board of directors.⁹⁹ The directors are appointed by a majority vote of the city council at an open meeting. The Act does not specify any qualifying criteria for a person who serves as a director on the Section 4A Board. A Section 4A director is not required to be a city resident or a property owner. The directors serve without compensation, but must be reimbursed for actual expenses.¹⁰⁰ The directors are appointed to a term not to exceed six years. Further, should the articles of incorporation or the bylaws not address a term of office, then the 4A directors have a six-year term of office.¹⁰¹ However, in actuality, the directors serve at the pleasure of the city council and may be removed by the city council at any time without cause.¹⁰²

In JC-349, the Attorney General concluded that a Section 4A director may be appointed to a subsequent term. Neither Article 5190.6 nor the Texas Non-Profit Corporation Act, article 1396 of the Revised Civil Statutes, bars such reappointment. Accordingly, a city council may reappoint a director to a subsequent term, provided there is not a contrary provision in the articles of incorporation, bylaws, city charter, city ordinance or resolution.

A majority of the board constitutes a quorum.¹⁰³ The board of directors is subject to both the Open Meetings Act¹⁰⁴ and the Public Information Act.¹⁰⁵ Additionally, the Act requires the board

⁹⁸ *Id.* § 17(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.302 (Vernon Supp. 2008), effective April 1, 2009).

⁹⁹ *Id.* § 4A(c) (to be codified at Tex. Loc. Gov't Code Ann. § 504.051(a) (Vernon Supp. 2008), effective April 1, 2009).

¹⁰⁰ *Id.* § 11(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.062(d) (Vernon Supp. 2008), effective April 1, 2009).

¹⁰¹ Op. Tex. Att'y Gen. No. JC-0349 (2001) at 3.

¹⁰² Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(c) (Vernon Supp. 2008) (referring to the removal of directors) (to be codified at Tex. Loc. Gov't Code Ann. §§ 504.051(b) and 501.062(c) (Vernon Supp. 2008), effective April 1, 2009).

¹⁰³ *Id.* § 4A(c) (referring to quorum) (to be codified at Tex. Loc. Gov't Code Ann. § 504.053 (Vernon Supp. 2008), effective April 1, 2009).

¹⁰⁴ *Id.* § 11(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.072 (Vernon Supp. 2008), effective April 1, 2009).

¹⁰⁵ *Id.* § 14A (to be codified at Tex. Loc. Gov't Code Ann. § 501.072 (Vernon Supp. 2008), effective April 1, 2009).

to conduct all of its meetings within the city limits.¹⁰⁶ It is worth mentioning that the Open Meetings Act generally applies when a quorum of a governmental body is present and discusses public business.¹⁰⁷ However, it does not apply to purely social gatherings or to the attendance of public officials at conferences or training if no formal actions are taken and if the discussion of public business is only incidental to the social function, convention, workshop, ceremonial event or press conference.¹⁰⁸ At one of its first meetings, the board is required to elect a president, a secretary and any other officers that the governing body of the city considers necessary. The corporation's registered agent must be a resident of Texas and the corporation's registered office must be within the boundaries of the city.¹⁰⁹

General Powers and Duties of Section 4A Development Corporations

Section 4A industrial development corporations have the following general powers and duties:

- **Power to Expend Tax Proceeds.** The development corporation has the power to expend the proceeds of the economic development sales tax for purposes authorized by the Development Corporation Act. All actions of the development corporation are pursuant to a majority vote of the governing body of the board and subject to oversight by the city.¹¹⁰ In Texas Attorney General Opinion JC-0488 (2002), the Attorney General noted that the city's spending of sales tax proceeds was "contrary to the Act."¹¹¹ Rather, it is for the corporation to expend the Section 4A tax proceeds for the purposes authorized by the Act subject to city council approval.
- **Powers of a Nonprofit Corporation.** The corporation shall have and exercise all powers and rights of a nonprofit corporation under the Texas Nonprofit Corporation Act (Article 1396-1.01), except to the extent such powers would be in conflict or inconsistent with the Development Corporation Act.¹¹²
- **Legal and Financial Transaction Powers.** The corporation shall have the power to sell, lease,¹¹³ and make secured and unsecured loans,¹¹⁴ and to sue and be sued.¹¹⁵

¹⁰⁶ *Id.* § 4A(c) (to be codified at Tex. Loc. Gov't Code Ann. § 504.054 (Vernon Supp. 2007), effective April 1, 2009).

¹⁰⁷ Tex. Gov't Code Ann. § 551.001(4) (Vernon Supp. 2008).

¹⁰⁸ *Id.* § 551.001(4)(B)(iv).

¹⁰⁹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(c) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 504.055 (Vernon Supp. 2008), effective April 1, 2009).

¹¹⁰ *Id.* § 23(a)(13) (to be codified at Tex. Loc. Gov't Code Ann. § 501.054 (Vernon Supp. 2008), effective April 1, 2009).

¹¹¹ Op. Tex Att'y Gen. No. JC-0488 (2002) at 3.

¹¹² Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(a) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.054(a) (Vernon Supp. 2008), effective April 1, 2009).

¹¹³ *Id.* §§ 23(a)(1)-(5) (to be codified at Tex. Loc. Gov't Code Ann. §§ 501.153, 501.154, and 501.159 (Vernon Supp. 2008), effective April 1, 2009).

¹¹⁴ *Id.* § 23(a)(6) (to be codified at Tex. Loc. Gov't Code Ann. § 501.155(a) (Vernon Supp. 2008), effective April 1, 2009).

¹¹⁵ *Id.* § 23(a)(9) (to be codified at Tex. Loc. Gov't Code Ann. § 501.060 (Vernon Supp. 2008), effective April 1, 2009).

Further, in Texas Attorney General Opinion JC-109 (1999), it was noted that when an economic development corporation sells real property, the corporation is not required to comply with the notice and bidding requirements contained in chapter 272 of the Local Government Code. Nonetheless, the Section 4A corporation must obtain fair market value when selling real property.¹¹⁶

- **Status as Non-stock Corporation.** The corporation is a nonprofit, nonmember, non-stock corporation.¹¹⁷
- **Limited Exemption from Federal, State and Local Taxation.** In terms of state taxation, Section 32 of Article 5190.6 provides that Section 4A corporations are considered public charities within the tax exemption of Article VIII, Section 2, of the Texas Constitution. Whether the corporation is exempt from various state and local taxes depends on the statutory provisions applicable to that tax. For example, the Texas State Comptroller's Office has treated Section 4A development corporations as exempt from state and local sales taxes and the state franchise tax.¹¹⁸ In order to claim these exemptions, corporations submit a copy of the corporation's articles of incorporation to the Exempt Organizations Section of the Office of the State Comptroller. If a development corporation has qualified for federal tax exempt status prior to applying for state exemptions, a copy of the determination letter from the Internal Revenue Service should be sent to the State Comptroller's Office at the time the corporation applies for exemption from the state sales tax and franchise tax. It should be noted that development corporations are exempt from state and local sales and state franchise taxes regardless of their tax exempt status with the Internal Revenue Service. The articles of incorporation, and any IRS determination letter, should be submitted with a cover letter containing the development corporation's daytime phone number, charter number and tax identification number. The Comptroller's address is: Texas State Comptroller, Exempt Organizations Section, P.O. Box 13528, Austin, TX 78711-3528.

It is currently unclear whether the property owned by Section 4A economic development corporations is exempt from local property taxation. There is a strong argument that the language of Section 32 of Article 5190.6 exempts such corporations from all taxation under state law, including property taxation. However, the State Comptroller's Office has not taken a position on whether Section 4A corporations are exempt from local property taxation. Additionally, there does not appear to be any clear statutory guidance on this issue within Section 4A of the Act, and there are no Attorney General Opinions or court rulings on the subject. To determine whether property taxes or other state or local taxes are applicable, a development corporation may wish to visit with its local legal counsel and work with its local appraisal district.

¹¹⁶ Op. Tex. Att'y Gen. No. JC-109 (1999) at 2.

¹¹⁷ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 5 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.052 (Vernon Supp. 2008), effective April 1, 2009).

¹¹⁸ Tex. Tax Code Ann. §§ 151.341 and 171.074 (Vernon 2002 & Supp. 2008).

For more information about tax exemptions, contact the Texas Comptroller's Office Tax Assistance at (800) 252-5555.

- **Duty to Comply with Open Meetings Act and Public Information Act.** The corporation and its board of directors are subject to the Open Meetings Act and the Public Information Act.¹¹⁹
- **Limited Eminent Domain Power.** The corporation may not exercise the power of eminent domain except by action of the city council.¹²⁰
- **Limited Tort Claims Act Protection.** The corporation and its directors and employees are not liable for damages arising out of the performance of governmental functions of the corporation.¹²¹ The corporation is considered a governmental entity for purposes of the Texas Tort Claims Act.
- **Limited Power to Own or Operate Project.** Generally, the corporation does not have the power to own or operate any project as a business entity other than as a lessor, seller, or lender. However, the corporation does have all the powers necessary to own and operate a project as a business if the project is part of a military installation or military facility that has been closed or realigned, including a military installation or facility closed or realigned under the Defense Base Closure and Realignment Act of 1990 (10 United States Code Section 2687).¹²²
- **Ability of a Home Rule City to Provide an Economic Grant of Money to the Development Corporation.** The Act generally prohibits a city from lending its credit or granting any public money or thing of value to an economic development corporation. In other words, a city may not provide any funding or services to a development corporation unless the city is fully reimbursed for the value of the expenditure. If a city and an economic development corporation enter into a contract for the provision of city services, such as accounting services, the economic development corporation must provide consideration in exchange for city services.¹²³

In 2001, the Texas Legislature did create an exception to this general rule.¹²⁴ A home rule city is now authorized to grant public money to a Section 4A or Section 4B corporation under a contract authorized by Section 380.002 of the Texas Local Government Code. The Section 4A or Section 4B corporation is required to use the

¹¹⁹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 11(b) and 14A (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.072 (Vernon Supp. 2008), effective April 1, 2009).

¹²⁰ *Id.* § 4A(g) (to be codified at Tex. Loc. Gov't Code Ann. § 504.106 (Vernon Supp. 2008), effective April 1, 2009).

¹²¹ *Id.* § 4A(j) (to be codified at Tex. Loc. Gov't Code Ann. § 504.107 (Vernon Supp. 2008), effective April 1, 2009).

¹²² *Id.* § 23(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.160 (Vernon Supp. 2008), effective April 1, 2009).

¹²³ Op. Tex. Att'y Gen. No. JC-109 (1999) at 3-5.

¹²⁴ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 21 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.007 (Vernon Supp. 2008), effective April 1, 2009).

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.”¹²⁵

- **Ability of City to Provide City Insurance Coverage and Retirement Benefits to Development Corporation Staff/Officers.** An economic development corporation may participate in the following types of insurance coverage from the city:¹²⁶ health benefits coverage, liability coverage, workers’ compensation coverage, and property coverage. These coverages can be obtained under the city’s insurance policies, the city’s self-funded coverage, or the coverage provided under an Interlocal Agreement with other political subdivisions. Health benefits coverage may be extended to the economic development corporation’s directors and employees and their dependents. Workers’ compensation benefits may be extended to the corporation’s directors, employees and volunteers. Liability coverage may be extended to protect the corporation and its directors and employees. The new law also allows economic development corporations to obtain retirement benefits under the city’s retirement program and extend those benefits to the corporation’s employees. An economic development corporation may not obtain any of these insurance coverages or retirements benefits unless the city consents. The law does not specifically address whether a development corporation must reimburse the city for any insurance or retirement benefits that are provided. However, a strong argument can be made that the development corporation must reimburse the city for any costs for such coverage due to the above noted limitation on the city from providing anything of value to the development corporation. If a city chooses to extend such benefits to the development corporation board or staff, it should consult with its local legal counsel.
- **Reverse Auction Procedures for Purchasing.** Reverse Auction Procedures is a method of purchasing where suppliers of services or goods, anonymous to each other, submit bids to provide their services or goods. The bidding is a real-time process usually lasting either one hour or two weeks. The bidding takes place at a previously scheduled time period and at a previously scheduled Internet location.¹²⁷ Economic development corporations are now authorized to use reverse auction procedures, as defined by Section 2155.062 (d), Government Code, for the purchase of goods or services.¹²⁸

Performance Agreements

Section 4A corporations cannot simply provide gifts of sales tax proceeds. The Texas Attorney General has noted that expenditures of sales tax proceeds must be made pursuant to a contract or

¹²⁵ Tex. Loc. Gov’t Code Ann. § 380.002(b) (Vernon Supp. 2008).

¹²⁶ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 23(c) and (d) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.067 (Vernon Supp. 2008), effective April 1, 2009).

¹²⁷ Tex. Gov’t Code Ann. § 2155.062(d) (Vernon Supp. 2008).

¹²⁸ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(e) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.074 (Vernon Supp. 2008), effective April 1, 2009).

other arrangement sufficient to ensure that the funds are used for the intended and authorized purposes.¹²⁹ In 2003, legislation was passed requiring certain written performance agreements. The Texas Legislature now require a Section 4A corporation to enter into a written performance agreement with a business enterprise when the corporation provides funding or makes expenditures on behalf of the business enterprise in furtherance of a permissible Section 4A project.¹³⁰ This performance agreement between the corporation and the business enterprise at a minimum must contain the following: (1) a schedule of additional payroll or jobs to be created or retained; (2) the capital investment to be made by the business enterprise; and (3) the terms under which repayment must be made by the business enterprise to the Section 4A corporation should the business fail to meet the performance requirements specified in the agreement.¹³¹

In 2007, the Texas Legislature passed House Bill 1196, which requires that both governmental entities and economic development corporations put certain language in any written agreement involving public subsidies to businesses, which would include those given by 4A corporations. The language must specify that the business does not and will not knowingly employ an undocumented worker (which statement must also be any application for the subsidy). The language also must require repayment of the subsidy with specified rate and terms of interest if the business is convicted of federal immigration violations under 8 U.S. Code Section 1324a(f), not later than the 120th day after receiving notice of the violation from the public entity or economic development corporation.¹³²

Requirement for Third-Party Contracts for Business Recruitment

Additionally, Section 4A and 4B corporations are required to enter into written contracts approved by the board of directors when the corporation uses a third party for certain business recruitment efforts. The written contract requirement does not apply to the payment of an employee of the Section 4A or 4B corporation.¹³³ Nonetheless, should the corporation pay a commission, fee, or other thing of value to a broker, agent, or other third party for business recruitment or development, a written contract is required.¹³⁴ Failure to enter into a written contract with a third party recruiter could result in a civil penalty up to \$10,000.¹³⁵ The Texas Legislature authorized the Office of the Attorney General to commence an action to recover the

¹²⁹ Op. Tex. Att’y Gen. Nos. JC-118 (1999) at 9 (“Expenditures for even project costs must be pursuant to a contractual or other arrangement sufficient to ensure that the funds are used for the purposes authorized.”); LO 97-061 (1997) at 4-5; LO 94-037 (1994) at 3.

¹³⁰ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 40(a) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.158 (Vernon Supp. 2008), effective April 1, 2009).

¹³¹ *Id.* § 40(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.158 (Vernon Supp. 2008), effective April 1, 2009).

¹³² Tex. Gov’t Code Ann. (2 section signs) 2264.001--101 (Vernon Supp. 2008) (as added by Tex. H. B. 1196, 80th Leg., R.S. (2007)).

¹³³ *Id.* § 41(a) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051 (Vernon Supp. 2008), effective April 1, 2009).

¹³⁴ *Id.* § 41(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051 (Vernon Supp. 2008), effective April 1, 2009).

¹³⁵ *Id.* § 41(c) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051(b) (Vernon Supp. 2008), effective April 1, 2009).

penalty in Travis County district court or in the county district court where the violation occurred.¹³⁶

Incentives to Purchasing Companies

In 2003, the Texas Legislature addressed purchasing companies and their ability to receive an incentive from a Section 4A or 4B corporation.¹³⁷ Section 4A and 4B corporations may not offer to provide economic incentives to businesses whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80 percent of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.¹³⁸

Oversight of a Section 4A Development Corporation

Section 21 of the Act provides that the city shall approve all programs and expenditures of the development corporation and shall annually review any financial statements of the corporation. It further provides that at all times the city will have access to the books and records of the development corporation. Additionally, Section 23(a)(13) of the Act states that the powers of the corporation shall be subject at all times to the control of the city's governing body. Finally, the city council retains a certain degree of control over the corporation by virtue of its power to at any time replace any or all of the members of the board of directors of the development corporation.¹³⁹

Section 4A Development Corporation is Not Considered a Political Subdivision

State law typically imposes certain requirements or conditions upon political subdivisions such as cities. A frequent concern is whether state law requirements imposed upon cities also applies to Section 4A or Section 4B economic development corporations. Section 22 of the Act states, in part, that an economic development corporation "is not intended to be and shall not be a political subdivision or political corporation within the meaning of the constitution and the laws of the state." Accordingly, a statute's use of the term "political subdivision" does not include a Section 4A or Section 4B economic development corporation.

The Texas Attorney General has considered whether certain statutes apply to economic development corporations. The Attorney General has concluded that the Texas conflicts of interest statute, chapter 171 of the Local Government Code, does not apply to an economic

¹³⁶ *Id.* § 41(d) (to be codified at Tex. Loc. Gov't Code Ann. § 502.051(c) (Vernon Supp. 2008), effective April 1, 2009).

¹³⁷ *Id.* § 42 (to be codified at Tex. Loc. Gov't Code Ann. § 501.161 (Vernon Supp. 2008), effective April 1, 2009).

¹³⁸ *Id.* § 42(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.161(a) (Vernon Supp. 2008), effective April 1, 2009).

¹³⁹ *Id.* §§ 4A(c), 11(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.062(c) (Vernon Supp. 2007), effective April 1, 2009).

development corporation.¹⁴⁰ Chapter 272 of the Local Government Code, governing the city sale of real property, is not applicable to economic development corporations.¹⁴¹ Nor is the prevailing wage law contained in Chapter 2258 of the Government Code applicable to a worker employed by or on behalf of an economic development corporation.¹⁴² Section 4A corporations should consult their local legal counsel when considering the application of a particular statute.

Annual Reporting Requirement for Section 4A Corporations

Section 4C of the Development Corporation Act, added during the 1997 Legislative Session, requires both Section 4A and Section 4B economic development corporations to submit an annual, one-page report to the State Comptroller's Office. The report must be submitted by February 1 of each year and must be in the form required by the Comptroller.

The report must include the following:

- A statement of the corporation's primary economic development objectives.
- A statement of the corporation's total revenues for the preceding fiscal year.
- A statement of the corporation's total expenditures for the preceding fiscal year.
- A statement of the corporation's total expenditures during the preceding fiscal year in each of the following categories:
 - administration
 - personnel
 - marketing or promotion
 - direct business incentives
 - job training
 - debt service
 - capital costs
 - affordable housing
 - payments to taxing units, including school districts.
- A list of the corporation's capital assets, including land and buildings (for example, industrial parks, recreation and sports facilities, etc).
- Any other information required by the Comptroller.

If a corporation fails to file the required report or to include all the required information, the Comptroller may impose an administrative penalty against the corporation of \$200. However, before imposing such a penalty, the Comptroller must provide written notice to the corporation of its error or omission in filing the report. That notice must include information on how to correct the error. Once it has received notice, the corporation has 30 days to correct its reporting error before the Comptroller may impose the \$200 penalty. The form may be submitted to the Comptroller's Office by mail or by fax at fax number (512) 475-0664.

¹⁴⁰ Op. Tex. Att'y Gen. No. JC-338 (2001) at 2.

¹⁴¹ Op. Tex. Att'y Gen. No. JC-109 (1999).

¹⁴² Op. Tex. Att'y Gen. No. JC-032 (1999).

For more information on filing the required form, contact the Texas Comptroller's Office at (800) 531-5441, extension 3-4679.

Federal Taxation of Section 4A and Section 4B Development Corporations¹⁴³

A development corporation created under Section 4A or Section 4B of the Act may qualify for exemption from federal income tax under at least three different Internal Revenue Code (the Code) sections. The following is a summary of these Code sections, their purposes and some of their advantages and disadvantages. A development corporation will want to consult with its accountants and legal counsel to determine which, if any, of these exemptions apply to their operations.

Federal Tax Code Section 115

Federal Tax Code Section 115 exempts income that an entity receives from the exercise of an essential governmental function that accrues to a political subdivision. Organizations similar to Section 4A and Section 4B development corporations have been determined to be exempt under this section. Additionally, the Internal Revenue Service (the IRS) has informally indicated that it would grant an exemption for income of a development corporation that involves the performance of a governmental function (e.g., funding public infrastructural improvements). If a development corporation otherwise qualifies under this federal tax code provision, it does not have to apply to the IRS to be exempt under this section. A Federal Tax Code Section 115 exemption is usually relied upon when a qualifying entity does not desire a written determination letter from the IRS. Development corporations with this type of exemption may issue tax-exempt bonds for governmental purposes as specifically provided by Texas statute. Most bond counsel will not require an IRS determination for the issuance of tax-exempt bonds. Most entities described in this section also do not have to file an annual federal income tax return. Contributions to Section 115 entities are generally tax deductible. If a development corporation wants a formal written determination from the IRS that it is exempt under this Section, such a determination can be obtained by filing a private letter ruling request with the Washington Office of the IRS.

Federal Tax Code Section 501 (c) (3)

Federal Tax Code Section 501 (c) (3) exempts the income of corporations organized and operated exclusively for charitable purposes. Charitable purposes have in the past been found to include efforts by entities to lessen the burdens of government by performing duties previously undertaken by the government. To be exempt under this provision, the development corporation must file a Form 1023 with the IRS requesting this exemption. This process is much less expensive than obtaining a written determination under Section 115 (discussed earlier). Most development corporations that qualify under Section 501 (c) (3) are not required to file an annual

¹⁴³ This material on federal taxation of development corporations was written by James P. Plummer and Jeffrey Kuhn with the law firm of Fulbright and Jaworski in San Antonio, Texas.

federal income tax return, but they should obtain a determination to that effect when they file their Form 1023 with the IRS. If the development corporation has unrelated business income, it will have to file a federal tax return and may have to pay tax on that income. An entity can obtain a Section 501 (c) (3) determination even though it also considers itself exempt under Section 115. The Section 501 (c) (3) exemption is usually relied upon when a written determination from the IRS is desired by the development corporation. Some bond counsel may insist that if this type of entity issues bonds, it would only be eligible to issue Section 501 (c) (3) bonds, which are more expensive to issue than governmental bonds. Contributions to this type of entity are generally tax deductible.

Federal Tax Code Section 501 (c) (4) and 501 (c) (6)

Federal Tax Code Section 501 (c) (4) and 501 (c) (6) exempts the income of corporations organized and operated as community development organizations and business leagues. To obtain a written determination that an organization is exempt under this provision, a Form 1024 must be filed with the IRS. This type of exemption is not difficult to qualify for, but does not have as many advantages as the other IRS code sections discussed earlier. The only major benefit of a Federal Tax Code Section 501 (c) (4) and 501 (c) (6) designation is that it generally allows the exemption of the income of the development corporation from federal taxation. Development corporations qualifying under these sections should not have to file an annual federal income tax return (unless they have unrelated business income) if they receive a determination to this effect from the IRS when they file their Form 1024. Contributions to this type of organization are not considered deductible as charitable contributions. These organizations also cannot issue tax exempt bonds unless they also qualify under Federal Section 115.

Section 4B Economic Development Sales Tax

Eligibility to Adopt a Section 4B Tax

A city may impose the Section 4B tax, with voter approval, if the new combined local sales tax rate would not exceed 2 percent and if the city fits into one of the following categories:¹⁴⁴

- the city would be eligible to adopt a Section 4A sales tax (see earlier Section on Eligibility to Adopt a Section 4A Tax);
- the city is located in a county with a population of 500,000 or more and the current combined sales tax rate does not exceed 8.25 percent at the time the Section 4B tax is proposed;¹⁴⁵ or
- the city has a population of 400,000 or more and is located in more than one county, and the combined state and local sales tax rate does not exceed 8.25 percent.

¹⁴⁴ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(a)(1) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.002 (Vernon Supp. 2008), effective April 1, 2009).

¹⁴⁵ *Id.* (to be codified at Tex. Loc. Gov't Code Ann. § 505.002(1)(B) (Vernon Supp. 2008), effective April 1, 2009).

An eligible Section 4B city includes a city “that is located in a county with a population of 500,000 or more,” and the Act also provides that an eligible city includes a city “located in a county with a population of 500,000 or fewer.” Consequently, every Texas city appears to be eligible to adopt a Section 4B sales tax provided the city’s combined local sales tax rate does not exceed two percent.¹⁴⁶ Further, it should be noted that participation in a rapid transit authority does not invalidate a city’s ability to adopt a Section 4B tax if adoption of the tax would not place the city above its statutory cap for the local sales tax rate.¹⁴⁷ If the city is not certain whether it fits into one of the above categories, the city can call the Local Assistance Section of the State Comptroller’s Office at (800) 531-5441, ext. 3-4679 for a confirmation of its eligibility.

If the city is eligible to adopt a Section 4B tax, it may propose a tax rate equal to one-eighth, one-fourth, three-eighths or one-half of one percent.¹⁴⁸ The city may not adopt a sales tax rate that would result in a combined rate exceeding two percent.¹⁴⁹

¹⁴⁶ *Id.* §§ 4B(a)(1)(A), 4A(a)(1) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 504.002 and 505.002 (Vernon Supp. 2008), effective April 1, 2009).

¹⁴⁷ *See also id.* § 4B(n-1) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.257 (Vernon Supp. 2008), effective April 1, 2009).

¹⁴⁸ *Id.* § 4B(e) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.252(b) (Vernon Supp. 2008), effective April 1, 2009).

¹⁴⁹ Tex. Tax Code Ann. § 321.101(f) (Vernon 2002), Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(f) (Vernon Supp. 2008) (making Chapter 321 of the Tax Code applicable to a 4B tax) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009).

Cities that have Passed a Section 4B Tax (339 Cities)

<i>Alamo</i>	<i>Corinth</i>	<i>Hart</i>	<i>Lorena</i>	<i>Point</i>	<i>Southlake</i>
<i>Alba</i>	<i>Corral City</i>	<i>Hawkins</i>	<i>Los Fresnos</i>	<i>Ponder</i>	<i>Spearman</i>
<i>Alvarado</i>	<i>Cotulla</i>	<i>Hawley</i>	<i>Lott</i>	<i>Port Aransas</i>	<i>Spur</i>
<i>Alvord</i>	<i>Crandall</i>	<i>Helotes</i>	<i>Lufki</i>	<i>Port Isabel</i>	<i>Stafford</i>
<i>Angleton</i>	<i>Crawford</i>	<i>Henrietta</i>	<i>Luling</i>	<i>Port Neches</i>	<i>Stanton</i>
<i>Archer City</i>	<i>Cross Plains</i>	<i>Hickory Creek</i>	<i>Lumberton</i>	<i>Portland</i>	<i>Sterling City</i>
<i>Arcola</i>	<i>Crowley</i>	<i>Hico</i>	<i>Mabank</i>	<i>Post</i>	<i>Stinnett</i>
<i>Argyle</i>	<i>Cuero</i>	<i>Highland Village</i>	<i>Malone</i>	<i>Poth</i>	<i>Stockdale</i>
<i>Athens</i>	<i>Cuney</i>	<i>Hill Country Village</i>	<i>Manvel</i>	<i>Prarie View</i>	<i>Stratford</i>
<i>Aubrey</i>	<i>Dalworthington-Gardens</i>	<i>Hollywood Park</i>	<i>Marble Falls</i>	<i>Presidio</i>	<i>Strawn</i>
<i>Avinger</i>	<i>Dalhart</i>	<i>Hondo</i>	<i>Marfa</i>	<i>Princeton</i>	<i>Sudan</i>
<i>Balmorhea</i>	<i>Dayton</i>	<i>Howe</i>	<i>Mathis</i>	<i>Queen City</i>	<i>Sullivan City</i>
<i>Bandera</i>	<i>Dickinson</i>	<i>Hubbard</i>	<i>Maypearl</i>	<i>Quinlan</i>	<i>Sundown</i>
<i>Bangs</i>	<i>Domino</i>	<i>Hudson</i>	<i>McAllen</i>	<i>Quitaque</i>	<i>Sweeny</i>
<i>Bartonville</i>	<i>Douglassville</i>	<i>Hughes Springs</i>	<i>McCamey</i>	<i>Quitman</i>	<i>Taft</i>
<i>Bastrop</i>	<i>Driscoll</i>	<i>Huntington</i>	<i>McGregor</i>	<i>Rankin</i>	<i>Teague</i>
<i>Bay City</i>	<i>Dublin</i>	<i>Hurst</i>	<i>McLean</i>	<i>Redwater</i>	<i>Thorndale</i>
<i>Bedford</i>	<i>Dumas</i>	<i>Hutchins</i>	<i>Meridian</i>	<i>Refugio</i>	<i>Throckmorton</i>
<i>Bee Cave</i>	<i>Duncanville</i>	<i>Iraan</i>	<i>Merkel</i>	<i>Richland Hills</i>	<i>Tomball</i>
<i>Beeville</i>	<i>E. Tawakoni</i>	<i>Industry</i>	<i>Mesquite</i>	<i>Richmond</i>	<i>Trenton</i>
<i>Bellville</i>	<i>Eden</i>	<i>Ingleside</i>	<i>Mexia</i>	<i>Rio Grande City</i>	<i>Trinidad</i>
<i>Benbrook</i>	<i>Electra</i>	<i>Italy</i>	<i>Miles</i>	<i>Rio Vista</i>	<i>Trinity</i>
<i>Benjamin</i>	<i>Elgin</i>	<i>Itasca</i>	<i>Mineola</i>	<i>Rising Star</i>	<i>Troup</i>
<i>Bertram</i>	<i>Emory</i>	<i>Jacksboro</i>	<i>Mission</i>	<i>River Oaks</i>	<i>Turkey</i>
<i>Big Lake</i>	<i>Encinal</i>	<i>Jacksonville</i>	<i>Montgomery</i>	<i>Robstown</i>	<i>Tyler</i>
<i>Big Sandy</i>	<i>Ennis</i>	<i>Jefferson</i>	<i>Morgan's Point</i>	<i>Rocksprings</i>	<i>Universal City</i>
<i>Bishop</i>	<i>Eules</i>	<i>Jewett</i>	<i>Morton</i>	<i>Rollingwood</i>	<i>Van</i>
<i>Bonham</i>	<i>Everman</i>	<i>Junction</i>	<i>Mount Enterprise</i>	<i>Roma Los Saenz</i>	<i>Van Horn</i>
<i>Bovina</i>	<i>Fate</i>	<i>Kames City</i>	<i>Mount Vernon</i>	<i>Ropesville</i>	<i>Venus</i>
<i>Breckenridge</i>	<i>Flower Mound</i>	<i>Keller</i>	<i>Muenster</i>	<i>Rosenberg</i>	<i>Victoria</i>
<i>Brenham</i>	<i>Floydada</i>	<i>Kemah</i>	<i>Nassau Bay</i>	<i>Rosebud</i>	<i>Wake Village</i>
<i>Brookshire</i>	<i>Forest Hill</i>	<i>Kemp</i>	<i>Navasota</i>	<i>Round Rock</i>	<i>Wallis</i>
<i>Brownsboro</i>	<i>Forney</i>	<i>Kenedy</i>	<i>Nederland</i>	<i>Round Top</i>	<i>Watauga</i>
<i>Buda</i>	<i>Frankston</i>	<i>Kennedale</i>	<i>Needville</i>	<i>Royse City</i>	<i>Waxahachie</i>
<i>Buffalo</i>	<i>Freeport</i>	<i>Kerens</i>	<i>Nevada</i>	<i>Runaway Bay</i>	<i>Webberville</i>
<i>Buffalo Gap</i>	<i>Fritch</i>	<i>Kerrville</i>	<i>New Braunfels</i>	<i>Sachse</i>	<i>Webster</i>
<i>Bullard</i>	<i>Friona</i>	<i>Krum</i>	<i>New Deal</i>	<i>San Angelo</i>	<i>Weimar</i>
<i>Burkburnett</i>	<i>Gainesville</i>	<i>La Grange</i>	<i>N. Richland Hills</i>	<i>San Benito</i>	<i>W. Columbia</i>
<i>Caddo Mills</i>	<i>Galveston</i>	<i>La Joya</i>	<i>Oak Leaf</i>	<i>San Juan</i>	<i>W. Tawakoni</i>
<i>Cameron</i>	<i>Giddings</i>	<i>La Porte</i>	<i>Oak Ridge</i>	<i>San Saba</i>	<i>Westworth Village</i>
<i>Canton</i>	<i>Glen Rose</i>	<i>Laguna Vista</i>	<i>Oak Ridge North</i>	<i>Sansom Park</i>	<i>Wharton</i>
<i>Canyon</i>	<i>Goldthwaite</i>	<i>Lake Jackson</i>	<i>Odem</i>	<i>Santa Anna</i>	<i>Wheeler</i>
<i>Carmine</i>	<i>Goliad</i>	<i>Lake Worth</i>	<i>Olton</i>	<i>Santa Fe</i>	<i>White Deer</i>
<i>Centerville</i>	<i>Gonzales</i>	<i>Lampasas</i>	<i>Orange</i>	<i>Savoy</i>	<i>White Oak</i>
<i>Chandler</i>	<i>Gordon</i>	<i>Lavon</i>	<i>Ovilla</i>	<i>Schertz</i>	<i>White Settlement</i>
<i>Chico</i>	<i>Grand Saline</i>	<i>League City</i>	<i>Oyster Creek</i>	<i>Schulenburg</i>	<i>Whiteface</i>
<i>Cibolo</i>	<i>Grapevine</i>	<i>Leonard</i>	<i>Palestine</i>	<i>Seabrook</i>	<i>Windcrest</i>
<i>Clarendon</i>	<i>Grapeland</i>	<i>Lewisville</i>	<i>Palmer</i>	<i>Seagoville</i>	<i>Windthorst</i>
<i>Cleburne</i>	<i>Groesbeck</i>	<i>Lexington</i>	<i>Pampa</i>	<i>Sealy</i>	<i>Winnsboro</i>
<i>Clifton</i>	<i>Groom</i>	<i>Liberty</i>	<i>Pantego</i>	<i>Seminole</i>	<i>Winona</i>
<i>Clute</i>	<i>Groves</i>	<i>Liberty Hill</i>	<i>Paradise</i>	<i>Seven Points</i>	<i>Wolfforth</i>
<i>Clyde</i>	<i>Gruver</i>	<i>Lincoln Park</i>	<i>Pasadena</i>	<i>Shenandoah</i>	<i>Yantis</i>
<i>Colleyville</i>	<i>Gun Barrel City</i>	<i>Little Elm</i>	<i>Pearland</i>	<i>Shepherd</i>	<i>Yoakum</i>
<i>Columbus</i>	<i>Gunter</i>	<i>Live Oak</i>	<i>Pecos</i>	<i>Silverton</i>	<i>Yorktown</i>
<i>Conroe</i>	<i>Gustine</i>	<i>Llano</i>	<i>Pflugerville</i>	<i>Snook</i>	
<i>Converse</i>	<i>Haltom City</i>	<i>Lockhart</i>	<i>Pilot Point</i>	<i>Sonora</i>	
<i>Coppell</i>	<i>Hamilton</i>	<i>Lockney</i>	<i>Pittsburg</i>	<i>South Houston</i>	

Cities that have passed both a Section 4A and a Section 4B Tax (104 Cities)

<i>Albany</i>	<i>Cedar Hill</i>	<i>Frisco</i>	<i>Justin</i>	<i>Newton</i>	<i>Sugar Land</i>
<i>Allen</i>	<i>Cedar Park</i>	<i>Fulshear</i>	<i>Keene</i>	<i>Nocona</i>	<i>Sunnyvale</i>
<i>Alton</i>	<i>Celina</i>	<i>Georgetown</i>	<i>Knox City</i>	<i>Northlake</i>	<i>The Colony</i>
<i>Anna</i>	<i>Center</i>	<i>Godley</i>	<i>Krugerville</i>	<i>Orchard</i>	<i>Tioga</i>
<i>Anson</i>	<i>Cisco</i>	<i>Gorman</i>	<i>La Feria</i>	<i>Paducah</i>	<i>Trophy Club</i>
<i>Aspermont</i>	<i>Collinsville</i>	<i>Grandfalls</i>	<i>Lake Dallas</i>	<i>Pottsboro</i>	<i>Tye</i>
<i>Atlanta</i>	<i>Crystal City</i>	<i>Grandview</i>	<i>Lancaster</i>	<i>Progreso</i>	<i>Van Alstyne</i>
<i>Balch Springs</i>	<i>DeSoto</i>	<i>Groveton</i>	<i>Linden</i>	<i>Red Oak</i>	<i>Westlake</i>
<i>Beasley</i>	<i>Donna</i>	<i>Hallettsville</i>	<i>Little Elm</i>	<i>Rio Hondo</i>	<i>Whitesboro</i>
<i>Bells</i>	<i>Edcouch</i>	<i>Harlingen</i>	<i>Magnolia</i>	<i>Roanoke</i>	<i>Whitewright</i>
<i>Blue Ridge</i>	<i>Elsa</i>	<i>Haslet</i>	<i>Mansfield</i>	<i>Roaring Springs</i>	<i>Wichita Falls</i>
<i>Bowie</i>	<i>Escobares</i>	<i>Hearne</i>	<i>Matador</i>	<i>Robert Lee</i>	<i>Willis</i>
<i>Bremond</i>	<i>Fairview</i>	<i>Heath</i>	<i>McKinney</i>	<i>Roscoe</i>	<i>Wortham</i>
<i>Bronte</i>	<i>Farmersville</i>	<i>Hempstead</i>	<i>Melissa</i>	<i>Saint Jo</i>	<i>Wylie</i>
<i>Brownsville</i>	<i>Ferris</i>	<i>Iowa Park</i>	<i>Miami</i>	<i>Sanger</i>	
<i>Burleson</i>	<i>Floresville</i>	<i>Jarrell</i>	<i>Midland</i>	<i>Seagraves</i>	
<i>Calvert</i>	<i>Fort Stockton</i>	<i>Joaquin</i>	<i>Midlothian</i>	<i>Sinton</i>	
<i>Carthage</i>	<i>Franklin</i>	<i>Joshua</i>	<i>Murphy</i>	<i>Somerset</i>	

Section 4B Projects

The Development Corporation Act provides a wide variety of purposes for which Section 4B tax proceeds may be expended. Section 4B tax proceeds may be spent on land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements for items that fit the definition of “project” under Sections 2(11) and 4B(a) of the Act. It is important to emphasize that any activities of a development corporation must always be in furtherance of and attributable to a “project.”¹⁵⁰ Further, the definition of “project” was significantly amended by House Bill 2912 in the 2003 Legislative Session.¹⁵¹ Changes made by the bill apply only to a project that is undertaken or approved after the effective date of the bill, June 20, 2003. Any projects undertaken or approved before the effective date of House Bill 2912 are governed by the law that was in effect on the date the project was undertaken or approved.¹⁵²

The 2005 Legislative Session also made some amendments to the definition of “project.” House Bill 2928 loosened some of the restrictions that were imposed by the 78th Legislature for certain 4B corporations. There are some projects that a section 4B corporation can do that do not require them to create or retain primary jobs.¹⁵³

Section 4B Projects Which Must Create or Retain Primary Jobs

In 2003, the Texas Legislature amended the definition of “project” in Section 2(11) and Section 4B(a)(2)(B) to require that certain projects result in the “creation or retention of primary jobs.”¹⁵⁴

¹⁵⁰ Op. Tex. Att’y Gen. No. JC-0118 (1999) (concluded that Section 4B sales tax proceeds could only be used for project costs).

¹⁵¹ Tex. H.B. 2912, 78th Leg., R.S. (2003).

¹⁵² *Id.*

¹⁵³ Tex. H.B. 2928, 79th Leg., R.S. (2005).

¹⁵⁴ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 2(11) (as amended by Tex. H.B. 3440, 80th Leg., R.S. (2007)), 4B(a)(2)(B) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.101 and 505.155 (Vernon Supp. 2008), effective April 1, 2009).

Accordingly, most Section 4B projects must now create or retain primary jobs. Yet not all projects contain this requirement. “Primary job” is defined to mean 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 meet any one of a certain enumerated sector numbers of the North American Industry Classification System (NAICS).¹⁵⁵ The enumerated sector numbers are:

111	Crop Production
112	Animal Production
113	Forestry and Logging
11411	Commercial Fishing
115	Support Activities for Agriculture and Forestry
211 to 213	Mining
221	Utilities
311 to 339	Manufacturing
42	Wholesale Trade
48 and 49	Transportation and Warehousing
51 (excluding 51213 and 512132)	Information (excluding movie theaters and drive-in theaters)
523-525	Securities, Commodity Contracts, and Other Financial Investments and Related Activities; Insurance Carriers and Related Activities; Funds, Trusts, and Other Financial Vehicles
5413, 5415, 5416, 5417, and 5419	Scientific Research and Development Services
551	Management of Companies and Enterprises
56142	Telephone Call Centers
922140	Correctional Institutions; or a job that is included in North American Industry Classification System (NAICS) sector number 928110, National Security, for corresponding index entries for Armed Forces, Army, Navy, Air Force, Marine Corps and Military Bases.

For more information on the North American Industry Classification System, please visit: <http://www.census.gov/epcd/naics02/naicod02.htm>.

A Section 4B corporation may do the projects listed under Section 2(11) of the Development Corporation Act of 1979, Article 5190.6, which encompasses the land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements (one or more) that are for the creation or retention of primary jobs that are found by the board of directors to be required or suitable for any of the following projects:

¹⁵⁵ *Id.* § 2(17) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.002(12) (Vernon Supp. 2008), effective April 1, 2009).

- Manufacturing and industrial facilities.
- Research and development facilities.
- Military facilities.
- Transportation facilities (including but not limited to airports, hangars, airport maintenance and repair facilities, air cargo facilities, related infrastructure located on or adjacent to an airport facility, ports, mass commuting facilities and parking facilities).¹⁵⁶
- Sewage or solid waste disposal facilities.
- Recycling facilities.
- Air or water pollution control facilities.
- Distribution centers.
- Small warehouse facilities.
- Primary job training facilities for use by institutions of higher education.
- Regional or national corporate headquarters facilities.

Additionally, Section 4B 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:¹⁵⁷

- Public safety facilities.
- Streets and roads.
- Drainage and related improvements.
- Demolition of existing structures.
- General municipally owned improvements.
- Any improvements or facilities that are related to any of those projects and any other projects that the board in its discretion determines promotes or develop new or expanded business enterprises that create or retain primary jobs.

Section 4B Projects Which Are Not Required to Create or Retain Primary Jobs

Some section 4B projects do not require the creation or retention of primary jobs. The following categories are also authorized Section 4B projects pursuant to Section 2(11) of the Act.

Job training classes. Certain job training required or suitable for the promotion of development and expansion of business enterprises can be a permissible project. Section 4B corporations may spend tax revenue for job training classes offered through a business enterprise only if the business enterprise commits in writing to certain conditions. The business enterprise must agree to create new jobs that pay wages at least equal to the prevailing wage for the applicable occupation in the local labor market area; or agree to increase its payroll to pay wages that are at least equal to the prevailing wage for the applicable occupation in the local labor market area.¹⁵⁸ The creation or retention

¹⁵⁶ *Id.* art. 5190.6, § 2(11)(A) (as amended by Tex. H.B. 3440, 80th Leg., R.S. (2007)).

¹⁵⁷ *Id.* § 4B(a)(2)(B) (to be codified at Tex. Loc. Gov't Code Ann. § 505.155 (Vernon Supp. 2008), effective April 1, 2009).

¹⁵⁸ *Id.* § 38(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.162 (Vernon Supp. 2008), effective April 1, 2009).

of primary jobs is not a mandatory requirement for funding permissible job training classes.

Certain infrastructural improvements which promote or develop new or expanded business enterprises. “Project” also includes expenditures found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises limited to streets and roads, rail spurs, water and sewer utilities, electric and gas utilities, drainage, site improvements and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico.¹⁵⁹ Accordingly, Section 4B corporations may assist with limited infrastructural improvement that the board finds will promote or develop new or expanded business development. The funding of these infrastructural improvements does not have to be conditioned upon the creation or retention of primary jobs.

Career centers. Certain career centers can also be provided land, buildings, equipment, facilities, improvements and expenditures found by the board of directors to be required or suitable for use if the area to be benefited by the career center is not located in the taxing jurisdiction of a junior college district.¹⁶⁰

Commuter Rail, Light Rail or Motor Buses. A Section 4B corporation, as authorized by the corporation’s board of directors, may spend tax revenue received under the Act for the development, improvement, expansion or maintenance of facilities relating to the operation of commuter rail, light rail or motor buses.¹⁶¹

Additionally, Section 4B(a)(2)(A), (C), (D), and (E) of the Act specifically permit expenditures of Section 4B tax proceeds for land, buildings, equipment, expenditures and improvements suitable for the following types of projects:

Professional and amateur sports and athletic facilities. Professional and amateur sports and athletics facilities, including stadiums and ballparks are permissible Section 4B projects.¹⁶²

Entertainment, tourist and convention facilities. Entertainment, tourist, and convention facilities, including auditoriums, amphitheatres, concert halls, museums and exhibition facilities are permissible Section 4B projects.¹⁶³

¹⁵⁹ *Id.* § 2(11)(C) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.103 (Vernon Supp. 2008), effective April 1, 2009).

¹⁶⁰ *Id.* § 2(11)(D) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.104 (Vernon Supp. 2008), effective April 1, 2009).

¹⁶¹ *Id.* art. 5190.6, § 38A (as added by Tex. S.B. 1089, 80th Leg., R.S. (2007)).

¹⁶² *Id.* § 4B(a)(2)(A) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.152) (Vernon Supp. 2008), effective April 1, 2009).

¹⁶³ *Id.*

Further, the 79th Legislature gave certain section 4B corporations the ability to undertake projects involving airports, ports and sewer or solid waste disposal facilities without the requirement of creating or retaining primary jobs.

Airport Facilities. Section 4B 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.¹⁷² Additionally, section 4B corporations may undertake a project which is required or suitable for the 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 corporation created by an eligible city; (i) that enters into a development agreement with an entity in which the entity acquires a leasehold or other possessory interest from the corporation and is authorized to sublease the entity's interest for other projects authorized by this subdivision; and (ii) the governing body of which has authorized the development agreement by adopting a resolution at a meeting called as authorized by law.¹⁷³

Airports, Ports, and Sewer or Solid Waste Disposal Facilities. Section 4B corporations located in a city wholly or partly in a county that is bordered by the Rio Grande, has a population of at least 500,000, and has wholly or partly within its boundaries at least four cities that each have a population of at least 25,000 (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 section 4B sales tax revenues do not support the project.¹⁷⁴

Lastly, certain section 4B corporations have been given a broader latitude in deciding what types of projects that they can do with the requirement of creating or retaining primary jobs, but they must meet the requisite conditions.

Revenue Requirement. Section 4B corporations that 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 the city council authorizes the project by adopting a resolution following two (2) separate readings conducted at least one (1) week apart.¹⁷⁵

¹⁷² *Id.* § 2(11)(D) (to be codified at Tex. Loc. Gov't Code Ann. § 501.104 (Vernon Supp. 2008), effective April 1, 2009).

¹⁷³ *Id.* art. 5190.6, § 4B(a)(2)(G) (as added by Tex. H.B. 3440, 80th Leg., R.S. (2007)).

¹⁷⁴ *Id.* § 2(11)(E) (to be codified at Tex. Loc. Gov't Code Ann. § 501.105 (Vernon Supp. 2008), effective April 1, 2009).

¹⁷⁵ *Id.* § 4B(a)(2)(F) (to be codified at Tex. Loc. Gov't Code Ann. § 505.156 (Vernon Supp. 2008), effective April 1, 2009).

Population Requirement. A Section 4B corporation in a city with a population of 20,000 or less may provide land, building, equipment, facilities, expenditures, targeted infrastructure, and improvements found by the board of directors to promote new or expanded business development, provided that for projects which require an expenditure of more than \$10,000 the city council adopts a resolution authorizing the project after giving the resolution at least two (2) separate readings.¹⁷⁶

Landlocked Communities. For Section 4B corporations located wholly or partly in a county with a population of two million or more (Dallas and Harris County) that has within its city limits and extraterritorial jurisdiction fewer 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 includes expenditures found by the board of directors to be required for the promotion of new or expanded business enterprises within the landlocked community.¹⁷⁷

Undertaking Projects Located Outside of the City

Section 23(a)(1) of the Act provides that an economic development corporation may undertake projects outside of the city limits with permission of the governing body that has jurisdiction over the property. In other words, if the corporation wants to undertake a project that is located completely in the city’s extraterritorial jurisdiction or beyond, it should get approval from the governing body of the county, the county commissioners court. The language of the Act, however, does not seem to require this approval if the project is located at least partially within the boundaries of the city. If the project is located completely within the jurisdiction of another municipality, the corporation would need approval of the city council for that municipality.

Use of Section 4B Tax for “Sports Venue” Facilities

As previously noted, Section 4B tax monies may be used to fund projects relating to professional and amateur athletic facilities. Under Texas law, there is additional statutory authority for funding an athletic facility that qualifies as a “sports venue.”¹⁷⁸ Special statutory provisions apply to projects involving such a “sports venue.” A facility qualifies as a “sports venue” if it is

¹⁷⁶ *Id.* § 4B(a)(3) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.158 (Vernon Supp. 2008), effective April 1, 2009).

¹⁷⁷ *Id.* § 4B(a)(4) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.157 (Vernon Supp. 2008), effective April 1, 2009).

¹⁷⁸ *Id.* § 4B(a-3), (a-4) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 505.201 and 505.202 (Vernon Supp. 2008), effective April 1, 2009). (Under Section 4B(a)(2) of the Development Corporation Act, a Section 4B corporation had authority to expend funds on sports and athletic facilities even before the addition of Section 4B(a-3) and (a-4). One question raised by these sections to Section 4B is whether those sections would require that a Section 4B corporation follow the procedures for engaging in a “venue project” every time the 4B corporation chooses to undertake a project that falls under the definition of that term. Currently, it does not appear that either a Texas court or the Texas Attorney General’s Office has opined on that issue.)

an arena, coliseum, stadium or other type of area or facility that meets all of the following three criteria:¹⁷⁹

1. The primary use or primary planned use of the facility is for one or more professional or amateur sports or athletics events.
2. A fee for admission to the sports or athletics events is charged or is planned to be charged, except that a fee need not be charged for occasional civic, charitable, or promotional events.
3. The facility is not and will not be owned and operated by a state-supported institution of higher education.¹⁸⁰

Texas law specifies that any money authorized by the voters to be spent on a “sports venue and related infrastructure” may be spent on any on-site or off-site improvements that relate to a sports venue and that enhance the use, value, or appeal of the sports venue, including areas adjacent to it. This would include any expenditures reasonably necessary to construct, improve, renovate, or expand the sports venue. The law specifically lists the following uses as examples of permissible “related infrastructure”: stores, restaurants, concessions, on-site hotels, parking facilities, area transportation facilities, roads, water or sewer facilities, parks, and environmental remediation. These facilities must relate to and enhance the sports venue.¹⁸¹

A city may submit to its voters a ballot proposition that would authorize the use of Section 4B tax monies for a specific sports venue project or category of projects, including any infrastructure related to that project or category. Such a ballot proposition could contain language enabling the Section 4B corporation to use any Section 4B tax money already collected to support the sports venue project. Before an election to authorize the use of the Section 4B tax for a sports venue, a public hearing must be conducted. At that hearing, the city’s residents must be informed of the cost and impact of the proposed project or category of projects. It appears that

¹⁷⁹ *Id* § 4B(a-4)(2) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.201(2) (Vernon Supp. 2008), effective April 1, 2009).

¹⁸⁰ Note that the definition of “sports venue” in Section 4B of the Development Corporation Act differs from that contained in Section 4A of the Act. Unlike Section 4A, Section 4B defines a “sports venue” to exclude a facility that is or will be owned and operated by a state-supported institution of higher education. This language was added at the request of the City of Corpus Christi. The city was concerned that the sports venue amendments to Section 4B might later be interpreted to require all Section 4B projects related to a sports venue to undergo the election process outlined in the sports venue amendments. The Section 4B corporation in the City of Corpus Christi was already planning a joint effort with Texas A&M University to construct a baseball facility and wanted to be sure that the new sports venue legislation would not interfere with that project. Therefore, the language in question was added to the definition of “sports venue” to ensure that the new legislation would not apply to the Corpus Christi project. *See* letter dated October 3, 1997, from Mr. Jeffery A. Leuschel (attorney representing Corpus Christi) to Mr. Jim Thomassen (Chief of the Public Finance Division of the Office of the Attorney General of Texas). This letter cites Rep. Berlanga during the House Floor debate on the amendment adding the language in question. During that debate, the letter quotes Rep. Berlanga as stating, “... the City of Corpus Christi is in ... the process of moving forward with an election -- this will grandfather us in under 4B.”

¹⁸¹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 4B(a-3)(1), 4B(a-4)(1) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 505.202 and 505.201(1) (Vernon Supp. 2008), effective April 1, 2009) and Tex. Loc. Gov’t Code Ann. § 334.001(3) (Vernon 2005) (defines “related infrastructure”).

the hearing may be conducted at any time before the election takes place, but the city is required to publish notice of the hearing in a newspaper of general circulation in the city at least 30 days before the date set for the hearing.¹⁸² The notice must include the time, date, place, and subject of the hearing and must be published on a weekly basis until the date of the hearing. Accordingly, the city will need to schedule its public hearing early enough so that it can provide at least 30 days notice of the hearing.

In an election to approve the use of Section 4B sales tax monies for a sports venue, the law requires that a specific sports venue project or category of projects be clearly described on the ballot.¹⁸³ The description must be clear enough for the voters to discern the limits of the specific project or category of projects to be authorized. State law does not indicate what constitutes a clear description or how to indicate the limits of the specific project. At a minimum, the ballot proposition should clearly indicate the types of projects anticipated. Additionally, if Section 4B monies are to be used to pay the maintenance and operating costs (and not just initial construction cost, etc.) of a sports venue project, then the ballot proposition must state that fact.¹⁸⁴

A city may have the voters consider the use of Section 4B funds for a sports venue at the same election in which the voters are considering the creation of the Section 4B tax itself. Also, a city may arguably have the voters consider authorizing the use of Section 4B funds for several different sports venue projects or categories of projects at the same election. Before the 79th Legislative Session, the initial authorization of the Section 4B tax would be considered by the voters as a separate ballot proposition. Similarly, any sports venue project must be considered by the voters as a separate ballot proposition. However, with the passage of House Bill 3195, it would seem that authorizing the Section 4B tax and the consideration of several sports venue projects can be considered by the voters in a combined ballot proposition.¹⁸⁵ But, a city is not required to combine these issues into one ballot proposition. A city that pursues such a combined proposition should consult with its local legal counsel and with the State Comptroller's Office on this issue. State law requires that any sports venue election be held on a uniform election date. If a sports venue project or category of projects fails to win voter approval, the city must wait at least one year before holding another election on that particular project or category.

Use of Section 4B Tax Proceeds for Training Seminars

Certain Section 4B economic development and city officials are required to complete a training seminar.¹⁸⁶ The officials must complete a seminar once every 24 months.¹⁸⁷ At least one person from each of the following are required to attend a seminar each 24-month period:

¹⁸² Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(a-3)(3) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.203 (Vernon Supp. 2008), effective April 1, 2009).

¹⁸³ *Id.* § 4B(a-3)(2) (to be codified at Tex. Loc. Gov't Code Ann. § 505.202 (Vernon Supp. 2008), effective April 1, 2009).

¹⁸⁴ *Id.*

¹⁸⁵ Tex. Tax Code Ann. § 321.409 (Vernon Supp. 2008).

¹⁸⁶ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 39 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 502.101 (Vernon Supp. 2008), effective April 1, 2009).

- the city attorney, the city administrator or city clerk; and
- the executive director or other person who is responsible for the daily administration of the corporation.¹⁸⁸

The corporation is authorized to use Section 4B sales tax proceeds to pay for the costs of attending a seminar.¹⁸⁹ The certificates of completion are issued by the person, entity, or organization providing the training seminars, on a form approved by the Comptroller's office.¹⁹⁰ The Comptroller's Office may impose an administrative penalty in an amount not to exceed \$1,000 for the failure to attend the seminar.¹⁹¹

Public Hearing Requirement for Expending Section 4B Tax Proceeds

Previously, a Section 4B corporation was required to hold at least one public hearing on any proposed project, including a proposal to expend funds on maintenance and operating expenses of a project.¹⁹² However, in 2007, the Act was amended to provide that a corporation created by an eligible city with a population of less than 20,000 is not required to hold a public hearing under this subsection if the proposed project is defined by Section 2 of this Act.¹⁹³ If a public hearing is required, the hearing must be held before the corporation expends any Section 4B funds on the project. There is nothing in the Act that prohibits the Section 4B corporation from holding one public hearing to consider a group of Section 4B projects. After the projects have been considered at a public hearing and 60 days have passed since the first public notice of the nature of the projects, the development corporation is free to make expenditures related to the projects pursuant to the adopted budget.

Public Notice Requirement and the 60-Day Right to Petition

The public has a right to gather a petition objecting to a particular Section 4B project.¹⁹⁴ The petition must be submitted within 60 days of the first published notice of a specific project or type of project and must be signed by more than 10 percent of the registered voters of the city. State law does not indicate what would constitute the first published notice of a project. A city should ensure that it provides 60 days notice of the specific project or the category of projects.

¹⁸⁷ *Id.* § 39(b) (to be codified at Tex. Loc. Gov't Code Ann. § 502.101 (Vernon Supp. 2008), effective April 1, 2009).

¹⁸⁸ *Id.* § 39(b)(1) & (b)(3) (to be codified at Tex. Loc. Gov't Code Ann. § 502.101(a)(1)&(2) (Vernon Supp. 2008), effective April 1, 2009).

¹⁸⁹ *Id.* § 39(d) (to be codified at Tex. Loc. Gov't Code Ann. § 502.101(d) (Vernon Supp. 2008), effective April 1, 2009).

¹⁹⁰ *Id.* § 39(h) (to be codified at Tex. Loc. Gov't Code Ann. § 502.103 (Vernon Supp. 2008), effective April 1, 2009).

¹⁹¹ *Id.* § 39(c) (to be codified at Tex. Loc. Gov't Code Ann. § 502.103(b) (Vernon Supp. 2008), effective April 1, 2009).

¹⁹² *Id.* § 4B(n) (to be codified at Tex. Loc. Gov't Code Ann. § 505.159 (Vernon Supp. 2008), effective April 1, 2009).

¹⁹³ *Id.* Art. 5190.6, § 4B(n) (as amended by Tex. S.B. 1523, 80th Leg., R.S. (2007)).

¹⁹⁴ *Id.* §§ 4B(a-1), 4B(a-2) (to be codified at Tex. Loc. Gov't Code Ann. §§ 505.160 and 505.303 (Vernon Supp. 2008), effective April 1, 2009).

If a petition is pursued by the public, the petition can ask that the city hold an election on the issue before that specific project or type of project is undertaken. If the petition is submitted in a timely manner and 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 Section 4B tax proceeds may not be used for that purpose.

It is important to note that a petition cannot force an election on a project if the voters have previously approved the specific project or that general category of projects at an earlier election called under the Act. Cities that know what types of projects they want to undertake may be well advised to specifically list each of these types of projects in the ballot wording when the Section 4B tax is first considered by the voters. If the city includes each of these types of projects in the original ballot proposition, it can assert that the public has already approved that type of project at a prior election. In this scenario, the city arguably would not be required to call an additional election even if a petition were submitted regarding the project.

Specific Costs of a Section 4B Project That May be Funded

Cities must understand what general categories are available for expenditures. Additionally, they need to know what types of specific expenditures are contemplated within each of these categories. For assistance in understanding what is permitted under the Act, cities should review the definition of the term “cost” under Section 2(4) of the Act. Section 2(4) of the Act defines what costs may be applied to a Section 4B project. It states in pertinent part that costs for a project may include:

Land and facility improvements: the cost of acquisition, construction, improvement, expansion of land, buildings and acquisition of right-of-way.

Machinery and supplies: the cost of machinery, equipment, inventory, raw materials and supplies.

Financial transaction costs: the cost of financing charges, certain interest prior to and during construction, and necessary reserve funds.

Planning costs: the cost of research and development, engineering and legal services, development of plans and specifications, surveys and cost estimates; and other expenses necessary or incident to determining the feasibility and practicability of undertaking the project.

Brownfield cleanup costs: Should the Texas Governor’s office or Texas Commission on Environmental Quality encourage or request a section 4B 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:¹⁹⁵

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

Due to the definition of the term “project” and of the term “cost” contained in the Development Corporation Act, a strong argument can be made that any expenditure by a Section 4B corporation, other than job training classes, must be related to the acquisition or physical improvement of land, buildings, equipment or facilities. Of course, an expenditure could also include administrative or planning costs associated with such an acquisition or improvement.

Administrative Expenses of a Section 4B Project Maintenance and Operating Expenses

Section 2 (4) of the Act states that the cost of a project may also include administrative and other expenses that are incident to placing the project into operation. The law provides that these expenses could include administrative expenses for the acquisition, construction, improvement, expansion and financing of the project. It is this authority that could be cited for the hiring of administrative staff to implement the work of the Section 4B development corporation with regard to its projects. Accordingly, cities that perform some of the administrative functions for the corporation could cite this authority for reimbursement from Section 4B funds for administrative costs related to projects that city staff oversee. Additionally, Section 4B(b) specifically permits a Section 4B corporation to contract with other private corporations to carry out industrial development programs or objectives. Effective June 20, 2003, should a Section 4B corporation contract with a broker, agent or other third party for business recruitment, a written contract approved by the board of directors is required for any payment of a commission, fee, or other thing of value to the third party.¹⁹⁶ Failure to enter into a written contract could result in a civil penalty not to exceed \$10,000.

Additionally, Section 4B(a-2) states that the costs of a publicly owned and operated project may include the maintenance and operating costs for the project. The Act, however, allows the voters to object to such an expenditure by submitting a petition of 10 percent of the registered voters of the city. The public has 60 days from the date when notice is first given that the tax will be used for this purpose to submit the petition. Such a petition would ask the city to hold an election to approve the payment of maintenance and operating costs for projects. An election is not required, however, if the voters had previously approved the use of Section 4B tax proceeds for this purpose at an earlier election under the Act.

Cities that are aware that they want to use Section 4B tax proceeds to pay the maintenance and operating costs of projects would be well advised to list this type of expenditure on the ballot when the Section 4B tax is considered by the voters. By including this provision in the original

¹⁹⁵ *Id.* § 4B(p) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.305 (Vernon Supp. 2008), effective April 1, 2009).

¹⁹⁶ *Id.* § 41 (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051 (Vernon Supp. 2008), effective April 1, 2009).

ballot proposition, the city can assert that the public has already approved this type of expenditure at a prior election. Accordingly, if the city uses such a ballot provision, it cannot be required to hold an additional election even if a petition is submitted regarding these costs.

Promotional Expenses

In the 2001 Legislative Session, the Texas Legislature clarified the use of Section 4B proceeds for promotional expenses. Now, Section 4B(b) limits Section 4B corporations to spending no more than 10 percent of the corporate revenues (Section 4B tax proceeds) for promotional purposes.¹⁹⁷ Yet, the Attorney General has concluded a promotional expenditure “must advertise or publicize the city for the purpose of developing new and expanded business enterprises.”¹⁹⁸ Further, a corporation is limited to spending not more than 10 percent of its current annual revenues for promotional purposes in any given year. Nonetheless, unexpended revenues specifically set aside for promotional purposes in past years may be expended along with 10 percent of current revenues without violating the cap.¹⁹⁹ Additionally, a city council may disapprove a promotional expenditure.²⁰⁰ If there is some question as to whether a particular expenditure should be considered a promotional or an administrative expense, the development corporation should consult with its local legal counsel.

Debt Obligations

The Section 4B development corporation may issue bonds, notes and other contractual obligations to fund its projects.²⁰¹ Prior to September 1, 2001, a Section 4B corporation’s bond and other obligations could not exceed \$135 million. This limitation was removed in the 77th Legislative Session.²⁰² Further, a bond or debt instrument of the corporation is not an obligation of the city, nor is it backed by the city ad valorem tax rate.²⁰³ The tax proceeds received by the Section 4B corporation may be used to pay the principal and interest on the bonds and any other related costs.²⁰⁴ The Legislature has not addressed whether a Section 4B development corporation is prohibited from paying principal or interest on a debt if the debt existed before the date the city created the Section 4B corporation.

¹⁹⁷ *Id.* § 4B(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.103 (Vernon Supp. 2008), effective April 1, 2009).

¹⁹⁸ Op. Tex. Att’y Gen. No. GA-0086 (2003) at 2.

¹⁹⁹ *Id.* at 6.

²⁰⁰ *Id.* at 3-5.

²⁰¹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 23(a)(6) - (a)(7) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 501.155 and 501.201 (Vernon Supp. 2008), effective April 1, 2009).

²⁰² *Id.* § 4B(h) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.104 (Vernon Supp. 2008), effective April 1, 2009).

²⁰³ *Id.* § 22 (to be codified at Tex. Loc. Gov’t Code Ann. § 501.207 (Vernon Supp. 2008), effective April 1, 2009).

²⁰⁴ *Id.* § 4B(h) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.104 (Vernon Supp. 2008), effective April 1, 2009).

Initiating an Election to Approve a Section 4B Tax

An election to adopt a Section 4B economic development sales tax may be initiated by either:

- city council approval of an ordinance calling for an election on the imposition of the tax;²⁰⁵ or
- a petition signed by a number of qualified voters that equals at least 20 percent of the voters who voted in the most recent regular city election. If the city council receives such a petition, it is required to pass an ordinance to call an election on the imposition of the tax.²⁰⁶

Most cities simply pass the ordinance calling for a Section 4B sales tax election on their own motion, and do not wait for the election to be initiated by a petition of the voters. When the city orders an election on the sales tax for economic development, it must follow all applicable requirements for special elections contained in the Texas Election Code, the Municipal Sales and Use Tax Act (Chapter 321 of the Texas Tax Code), and any other Texas statutes regarding elections. Notably, the following requirements must be followed:

Potential Election Dates. The election must be held on a uniform election date as provided by Chapter 41 of the Election Code. In the 2005 Legislative Session, the Texas Legislature changed the May election date and reduced the number of uniform election dates from 4 to 2. The current uniform election dates are:

- the second Saturday in May; or
- the first Tuesday after the first Monday in November.²⁰⁷

Time Frame for Ordering the Section 4B Election. The city should order the election at least 62 days prior to the date of the election, unless the election is the general election for state and county officers.²⁰⁸ If the election is the general election for state and county officers, then the city should order the election at least 70 days prior to the date of the election.²⁰⁹ The Tax Code requires only that the city order the election at least 30 days before the date of the election.²¹⁰ Nonetheless, it is advisable to provide at least 62 or 70 days notice, since this is the requirement applicable to most other special elections in Texas, and it allows time to comply with other Election Code requirements, such as early voting. Additionally, the special election must be submitted for “pre-clearance” to the

²⁰⁵ *Id.* § 4B(f) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009) (stating that Chapter 321 of the Texas Tax Code governs the imposition of a 4B tax) and Tex. Tax Code Ann. § 321.401(a) (Vernon 2002) (an election may be called by the adoption of a city ordinance by city council).

²⁰⁶ *See* Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(f) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009) (stating that Chapter 321 of the Texas Tax Code governs the imposition of a 4B tax) and Tex. Tax Code Ann. § 321.401(c) (Vernon 2002) (requiring that the city council pass an ordinance calling for a sales tax election if a petition is presented). *See* Tex. Elec. Code Ann. ch. 277 (Vernon 2003 & Supp. 2008) for requirements for petition signatures.

²⁰⁷ Tex. Elec. Code Ann. § 41.001(a) (Vernon Supp. 2008).

²⁰⁸ *Id.* § 3.005.

²⁰⁹ *Id.* § 3.005 (c).

²¹⁰ Tex. Tax Code Ann. § 321.403 (Vernon 2002).

U.S. Department of Justice. Additionally, the Legislature added a provision noting the Election Code provision “supersedes a law outside this code to the extent of any conflict.”²¹¹

Notice to be Provided for a Section 4B Election. The city must publish notice of the election at least once in a newspaper of general circulation in the city.²¹² The notice must be published no more than 30 days and no less than 10 days before the date of the election. The notice must state the nature and date of the election, the location of each polling place, hours that the polls will be open, and any other early voting and election-related information required by law. The notice must also include the wording of all the ballot propositions. The entire notice must generally be provided both in English and in Spanish.²¹³

Prohibition from Electioneering. The city is prohibited from expending public funds or public resources to influence the results of an election, commonly referred to as “electioneering.”²¹⁴ A city may publish fact sheets to inform the public of the applicable statistics and proposed plans for the use of the tax. However, city stationery, city funds and city staff (during the work day) may not be used to urge the public to vote one way or the other.

Additionally, in certain cases a court may find that a city has “made a contract” with the voters to use money for a specific purpose if the city has indicated to the voters through informational materials or by other means that the money would be used for that purpose.²¹⁵ Therefore, a city will want to be careful not to represent that money from the economic development sales tax will be used for a particular project unless the city intends to be legally limited by that representation.

Other Procedural Requirements. The city must follow all other procedural requirements under the Election Code for special elections. For further information about the requirements contained in the Election Code, contact the Secretary of State’s Office, Elections Division, at (800) 252-8683. For further information about the prohibition against expenditure of public funds to influence the results of an election, contact the Texas Ethics Commission at (800) 325-8506.

Ballot for a Section 4B Tax

Current law does not provide any required wording for the ballot for a Section 4B sales tax for economic development. Nonetheless, cities should use great care to include wording that describes all of the categories of projects that the city may want to have the development

²¹¹ Tex. Elec. Code Ann. § 3.005 (b) (Vernon Supp. 2008).

²¹² See *id.* Ch. 4 (Vernon 2003 & Supp. 2008) (general requirements for providing notice of an election).

²¹³ See *id.* Ch. 272.

²¹⁴ *Id.* § 255.003 (Vernon 2003).

²¹⁵ See *San Saba County v. McCraw*, 108 S.W. 2d 200 (Tex. 1937); *Black v. Strength*, 246 S.W. 79 (Tex. 1922); *Devorsky v. La Vega I.S.D.*, 635 S.W.2d 904 (Tex. App. -- Waco 1982, no writ); *Wright v. Allen*, 257 S.W. 980 (Tex. Civ. App.-- Dallas 1923, writ ref’d). But see *San Antonio I.S.D. v. Hudson*, 92 S.W.2d 527 (Tex. Civ. App. -- San Antonio 1936), *affirmed*, 95 S.W.2d 673 (Tex. 1936). See also Op. Tex. Att’y Gen. No. JC-400 (2001) at 4-5.

corporation pursue. For example, if a city includes only “the promotion of industrial and manufacturing programs and the development of city parks” in its ballot proposition, the city will be able to expend the Section 4B tax to accomplish only these two purposes.

In addition, the city should consider including a provision in the wording of the Section 4B ballot that would clearly indicate that the Section 4B tax proceeds may be expended on the “maintenance and operations expenses for any of the above described projects.” Including such a provision will clarify that the Section 4B tax proceeds may be used for the upkeep and day-to-day costs of any public facilities or programs undertaken with the Section 4B tax.²¹⁶ It is possible to use Section 4B proceeds for maintenance and operating costs of a project even if this use is not specifically included in the ballot proposition for the Section 4B tax. However, Section 4B tax proceeds may not be used to pay for maintenance and operating costs of a project unless the city publishes notice of this proposed use. If within 60 days of this notice, the proposed use is challenged by a petition of more than 10 percent of the voters, the city is required to hold an election to obtain voter approval of the use of Section 4B proceeds for maintenance and operating costs.

In Attorney General Opinion JC-400 (2001), the issue considered was whether a Section 4B corporation could expend Section 4B sales tax proceeds to fund certain public park projects. “Project” is defined to include “public park purposes” and “parks and park facilities.”²¹⁷ Yet, public park projects were not specifically enumerated in the city’s ballot originally adopting the Section 4B sales tax. The city’s Section 4B ballot had provided, in part, that sales and use tax proceeds could “be used and applied in the manner and to the purposes authorized by Section 4B of the Act, *including but not limited to*” Additionally, park projects were authorized under Section 4B when the city’s sales tax election was held. The conclusion reached by the Attorney General was that 4B sales tax proceeds could be spent on the public park project. The city’s Section 4B ballot language proposition had not limited the use of sales tax proceeds to the specified projects. Rather, it had indicated that projects other than those itemized could be funded with Section 4B sales tax by including the phrase “including but not limited to.”²¹⁸

In 2001, the Texas Legislature expanded the definition of “project” to include water supply facilities and water conservation programs.²¹⁹ Permissible water projects could include dams, transmission lines, well field development, other water supply alternatives, incentives to install water-saving plumbing fixtures, educational programs, brush control programs, and programs to

²¹⁶ *Id.* § 4B(a-2) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.303 (Vernon Supp. 2008), effective April 1, 2009).

²¹⁷ *Id.* § 4B(a)(2)(A) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.152 (Vernon Supp. 2008), effective April 1, 2009).

²¹⁸ Op. Tex. Att’y Gen. No. JC-400 (2001) (The city of Sonora’s ballot adopting the 4B sales tax read as follows: “The adoption of an additional one-half of one percent sales and use tax within the City pursuant to the provisions of Article 5190.6, V.A.T.C., with the proceeds thereof to be used and applied in the manner and to the purposes authorized by Section 4B of the Act, including but not limited to public facility improvements, commercial facilities, infrastructural improvements, new and expanded business enterprises, and other related improvements, facilities to furnish water to the general public, sewage and solid waste disposal facilities and maintenance and operating costs associated with all of the above projects.” JC-400 at 4).

²¹⁹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 4B(a)(2)(D) - (E) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.154 (Vernon Supp. 2008), effective April 1, 2009).

replace malfunctioning or leaking water lines and other water facilities. However, for a Section 4B corporation to undertake a water supply facility project or a water conservation program, a majority of the qualified voters of the city voting in an election called and held for that purpose must approve the water supply project or the water conservation program.”²²⁰

If a city were to include every type of project authorized under a Section 4B tax, and if it also chose to include the above wording with regard to maintenance and operations expenses, the ballot for a Section 4B tax could be worded as follows:

“The adoption of a Section 4B sales and use tax at the rate of (insert one-eighth, one-fourth, three-eighths, or one-half, as appropriate) of one percent to undertake projects as described in Section 2(11) and Section 4B of Article 5190.6 of Revised Civil Statutes, including but not limited to projects for the promotion of professional and amateur athletics and sports including stadiums, ball parks, auditoriums, projects related to entertainment, convention, tourist, and exhibition facilities, amphitheaters, concert halls, and public parks, park facilities and events, open space improvements, military facilities, including closed or realigned military bases, primary job training facilities for use by institutions of higher education, research and development facilities, regional or national corporate headquarters facilities, museums and related stores, restaurant, concession, and automobile parking facilities, related area transportation facilities, and related roads, streets, and water and sewer facilities, recycling facilities, and projects to promote new or expanded business enterprises that create or retain primary jobs, and public safety facilities, streets and roads, drainage, and related improvements, demolition of existing structures, development and expansion of affordable housing, and targeted infrastructure and any other improvements, expenditures, or facilities that are related to any of the above projects and any other project that the board determines will promote new or expanded business enterprises that create or retain primary jobs, and the maintenance and operations expenses for any of the above described projects.”

The actual wording used on the ballot must indicate what rate is proposed for the Section 4B sales tax.²²¹ The voters then vote for or against the proposition. The wording of the above ballot incorporates virtually all of the categories for expenditures currently provided under Section 4B of the Act. It also allows for the payment of maintenance and operations expenses on any of the above described projects. A city could change the ballot wording to take out any categories that are not related to the goals the city has for its economic development program. In any case, the ballot wording must clearly indicate that the tax to be adopted is a Section 4B sales tax. Cities should be sure to have their local legal counsel review any proposed ballot wording prior to its use in an election proposition.

²²⁰ *Id.* § 4B(a-5) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.304 (Vernon Supp. 2008), effective April 1, 2009).

²²¹ *Id.* § 4B(e) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.254 (Vernon Supp. 2008), effective April 1, 2009).

It is important to note that a city may make a contract with the voters by means other than the language contained in the ballot proposition.²²² Regardless of how broadly a city words the proposition to create a Section 4B tax, the use of that tax money may be limited to certain specific uses if the city represents to the voters through informational materials or by other means that it intends the tax money to be subject to such limits. Therefore, a city will want to be careful not to represent that money from the economic development sales tax will be used for a particular project unless the city intends to be legally limited by that representation.

Project and Time Limitations on Section 4B Ballots

As noted earlier, there is no required wording for a Section 4B tax ballot. Accordingly, there is no special wording that must be used to limit the use of the Section 4B tax to certain projects. If a city wants to limit the use of Section 4B tax proceeds to certain projects, it may choose to list only the types of projects it desires on the ballot. In 2007, the Act was amended to provide certain authorization to expand the types of projects undertaken if subsequently approved by the eligible voters.²²³

Additionally, in 2007, the Act was amended to provide that an eligible city may also allow the voters to vote on a ballot proposition that limits the length of time that a sales and use tax may be imposed. An eligible city that imposes a tax for a limited time under this subsection 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 in the same manner as an election held under Section 4A(n) of this Act.²²⁴

Combined Proposition to Reduce or Abolish a Section 4A Tax and Adopt a Section 4B Tax

As of September 1, 1999, a city may offer a combined ballot proposition that would reduce or abolish an existing Section 4A tax and at the same time approve the creation of a Section 4B tax.²²⁵ That is, the city can have the voters approve or reject both items together by one "yes" or "no" vote. However, a city is not required to combine these two issues into one ballot proposition. It is not clear under the Act what statutory wording would be used in the ballot proposition for this type of combined proposition. A city that pursues such a combined proposition should consult with its local legal counsel and with the Texas State Comptroller's Office on this issue.

²²² See *San Saba County v. McCraw*, 108 S.W. 2d 200 (Tex. 1937); *Black v. Strength*, 246 S.W. 79 (Tex. 1922); *Devorsky v. La Vega I.S.D.*, 635 S.W.2d 904 (Tex. App. -- Waco 1982, no writ); *Wright v. Allen*, 257 S.W. 980 (Tex. Civ. App.-- Dallas 1923, writ ref'd). *But see also*, *San Antonio I.S.D. v. Hudson*, 92 S.W.2d 527 (Tex. Civ. App. -- San Antonio 1936), *affirmed*, 95 S.W.2d 673. *See also*, Op. Tex. Att'y Gen. No. JC-400 (2001) at 4 & 5 discussing "contract with the voters" cases.

²²³ *Id.* art. 5190.6, § 4B(e-2) (as added by Tex. S.B. 1523, 80th Leg., R.S. (2007)).

²²⁴ *Id.* art. 5190.6, § 4B(e-2) (as added by Tex. S.B. 1523, 80th Leg., R.S. (2007)).

²²⁵ *Id.* § 4B(e) (to be codified at Tex. Loc. Gov't Code Ann. § 505.255 (Vernon Supp. 2008), effective April 1, 2009).

A city can still choose to have the voters vote on repealing or reducing a Section 4A tax and adopting a Section 4B tax as separate ballot propositions.²²⁶ If the city separates the items onto separate ballot propositions, it is possible that one, both, or neither of the items would be approved at such an election. A city that chooses to provide these options to the voters would use the ballot wording suggested earlier for each of these items. In no case, may a city offer ballot propositions that, if passed, would cause the city to exceed its two percent local sales tax cap.²²⁷

Combined Proposition of a Section 4B tax and Other Municipal Sales Taxes

The 79th Legislature passed House Bill 3195 that now allows cities to have combined ballots propositions to lower, repeal, raise or adopt various municipal sales taxes.²²⁸ This would include the Section 4B tax. If a city wants to lower the Section 4B tax and create a sales tax for property tax relief, the city could combine the ballot propositions instead of having separate ballot propositions. If the combined ballot proposition does not pass, then there will be no effect on those sales taxes.

Increasing, Reducing or Abolishing a Section 4B Tax

Section 4B Corporations Created Before September 1, 1999

For a Section 4B corporation created before September 1, 1999, there is no statutory authority that allows a Section 4B tax to be increased or decreased after its initial adoption.

The city could use its power by resolution under Section 34 of the Act to terminate or dissolve the development corporation. If the city takes such an action, the corporation and the tax would continue only for the time period necessary to pay off any outstanding debt.

There also is no authority for the voters to abolish a Section 4B tax prior to the payment of all outstanding bonds and other forms of indebtedness. However, once all of the debt is paid, the voters, through an action in district court, could arguably seek to compel the dissolution of the corporation and a termination of the collection of the tax.²²⁹

Section 4B Corporations Created on or after September 1, 1999

For a Section 4B corporation created on or after September 1, 1999, Texas law provides that a city must hold an election on the issue of dissolving the corporation if a proper petition is

²²⁶ *Id.*

²²⁷ *See id.* § 4B(f) (to be codified at Tex. Loc. Gov't Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009) and Tex. Tax Code Ann. § 321.101(f) (Vernon 2002). (However, there may be a limited exception to this principle for certain taxes to support a sports venue. *See* Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(a-3) and (a-4) and consult with local legal counsel if it appears that this exception may be applicable).

²²⁸ *See* Tex. Tax Code Ann. § 321.409 (Vernon Supp. 2008).

²²⁹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(i) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.258 (Vernon Supp. 2008), effective April 1, 2009).

submitted to the city council.²³⁰ Such a petition must request an election on the dissolution of the section 4B corporation and be signed by at least 10 percent of the registered voters of the city. The petition must also meet any other legal requirements that may be applicable, including the general petition requirements found in chapter 277 of the Texas Election Code. The election must be held on the first regular uniform election date that falls more than 44 days after the petition is filed with the city. At the election, the ballot must be printed to read as follows:²³¹

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

If a Section 4B corporation is dissolved pursuant to an election of this nature, then the corporation will continue to operate long enough to pay off all its debts and obligations.

Once the corporation’s debts and obligations are paid off, the corporation is dissolved and its property must be transferred to the city. The city must then notify the Comptroller, who must stop collecting the Section 4B sales tax by the last day of the first calendar quarter that begins after the city has notified the Comptroller.

Reporting Results of a Section 4B Tax Election

The Election Code requires that, no earlier than the eighth day and no later than the eleventh day²³² after an election, the governing body of the city must canvass the ballots and enter the resolution or ordinance declaring the results of the election into the minutes of a meeting. The resolution or ordinance must include the following:²³³

- The date of the election;
- The proposition on which the vote was held;
- The total number of votes cast for and against the proposition; and
- The number of votes by which the proposition was approved.

If the proposed change in the tax rate is approved by a majority of the qualified voters of the city voting at an election on the issue, the city may levy the approved tax. The city secretary must, by certified or registered mail, send the State Comptroller a certified copy of the resolution or ordinance and a map of the city clearly showing the city’s boundaries. After receiving the documents, the Comptroller has 30 days to notify the city secretary that the Comptroller’s Office will administer the tax.

²³⁰ *Id.* § 4B(o) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.352 (Vernon Supp. 2008), effective April 1, 2009).

²³¹ *Id.* § 4B(o)(2) (to be codified at Tex. Loc. Gov’t Code Ann. § 505.353 (Vernon Supp. 2008), effective April 1, 2009).

²³² Tex. Elec. Code Ann. § 67.003(a) (Vernon Supp. 2008). *But see* Tex. Tax Code Ann. § 321.405 (Vernon 2002) (which gives the city 10 days to canvass an election on the proposed adoption of a Section 4B sales tax. It is not clear whether the Election Code provision or the Tax Code provision is controlling on this issue. Therefore, it is recommended that cities follow the stricter provisions of the Election Code and canvass the election between eight and 11 days after it has taken place).

²³³ Tex. Tax Code Ann. § 321.405 (Vernon 2002).

If the election fails, the city must wait one full year before bringing the issue to the voters again.²³⁴ However, the Election Code allows the city to hold a subsequent election on the corresponding uniform election date that occurs approximately one year later, even if the date falls several days before a full year has elapsed.²³⁵

Effective Date of Section 4B Tax

The change in the sales tax rate becomes effective one full calendar quarter after notice of the election has been provided to the State Comptroller. The new tax rate applies to purchases on or after the first day of that calendar quarter as provided under Section 321.102(a) of the Tax Code.

May Election: Send notice to the Comptroller no later than the last week in June. On October 1, the new tax rate will take effect. The city will receive its first payment in December.

November Election: Send notice to the Comptroller no later than the last week in December. On April 1, the new tax rate will take effect. The city will receive its first payment in June.

If the city adopts a Section 4B sales tax and at the same election adopts a sales tax for property tax relief, both taxes will not take effect until the following October 1 (assuming at least a complete calendar quarter has passed since the election).²³⁶ If a complete calendar quarter had not passed since the election, the tax would not take effect until the following October 1.

Allocation of the Sales Tax Proceeds by the Comptroller

Once the sales tax is effective, the Comptroller remits the sales tax proceeds from the increase in the rate to the municipality with its other local sales tax proceeds. The Municipal Sales and Use Tax Act (Chapter 321 of the Tax Code) governs the imposition, computation, administration and use of the tax, except where it is inconsistent with the Act.²³⁷

The city, upon receiving its local sales tax allotment from the Comptroller, must remit any sales tax for economic development to the industrial development corporation responsible for administering the tax.²³⁸ However, the proceeds of a sales tax for property tax relief, if adopted, would remain with the city.²³⁹

²³⁴ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(f) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009), and Tex. Tax Code Ann. § 321.406 (Vernon 2002).

²³⁵ Tex. Elec. Code Ann. § 41.0041 (a) (Vernon 2003).

²³⁶ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(f) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009) and Tex. Tax Code Ann. § 321.102 (b) (Vernon 2002).

²³⁷ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(f) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.256 (Vernon Supp. 2008), effective April 1, 2009).

²³⁸ *Id.* § 4B(g) (to be codified at Tex. Loc. Gov't Code Ann. § 505.301 (Vernon Supp. 2008), effective April 1, 2009).

²³⁹ Tex. Tax Code Ann. § 321.101(b) (Vernon 2002) (Additional sales and use tax is for the benefit of the city.)

Creation of a Section 4B Development Corporation

A development corporation may be initiated either by the city or by a group of citizens.²⁴⁰ In either case, the development corporation must be created by a group of at least three persons who are at least 18 years old and qualified voters of the city. The group must file a written application with the city requesting approval of an industrial development corporation. The city may not charge a fee for consideration of the application. If the city determines that the corporation should be created, the city must approve the corporation's articles of incorporation by ordinance or resolution. The articles of incorporation must indicate what purposes the corporation can promote on the city's behalf. The articles of incorporation must also state that the corporation is to be governed by Section 4B of the Act.²⁴¹

If a city collects a sales and use tax under both Section 4A and Section 4B, the city must create separate corporations and boards of directors for Section 4A and Section 4B. However, members of the board of directors of one corporation may serve on the board of directors of the other corporation. A city may not create more than one corporation to implement the Section 4A tax or more than one corporation to implement a Section 4B tax.²⁴²

The articles of incorporation for all development corporations must contain the items required under Section 6 of the Act, and must be approved by the municipality's governing body.²⁴³ The city, at its sole discretion, may amend the articles of incorporation at any time.²⁴⁴

The articles of incorporation must be filed in triplicate with the Secretary of State's Office pursuant to Section 7 of the Act. Upon the issuance of the certificate of incorporation, the corporate existence of the development corporation begins. After the issuance of the certificate of incorporation, the board of directors of the corporation must hold an organizational meeting to adopt the bylaws and to elect officers.²⁴⁵ The initial bylaws must also be approved by resolution of the governing body of the city.²⁴⁶ The first meeting of the board of directors of the corporation should be held pursuant to the requirements of Section 12 of the Act.

There does not appear to be any authority for an entity formed under the Act to dissolve and turn over all its assets directly to a Section 4B corporation. Rather, any corporation created under the Act that wished to dissolve would be required to turn over all of its assets either to the city that created it²⁴⁷ or to a Section 4A corporation.²⁴⁸

²⁴⁰ See Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 4(a) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.051 (Vernon Supp. 2008), effective April 1, 2009).

²⁴¹ *Id.* § 4B(b) (to be codified at Tex. Loc. Gov't Code Ann. § 505.004 (Vernon Supp. 2008), effective April 1, 2009).

²⁴² *Id.* §§ 4A(b)(1), 4B(b) (to be codified at Tex. Loc. Gov't Code Ann. §§ 504.003(b) and 505.003(b) (Vernon Supp. 2008), effective April 1, 2009).

²⁴³ *Id.* § 4(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.051 (Vernon Supp. 2008), effective April 1, 2009).

²⁴⁴ *Id.* § 17(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.302 (Vernon Supp. 2008), effective April 1, 2009).

²⁴⁵ *Id.* § 12 (to be codified at Tex. Loc. Gov't Code Ann. § 501.063 (Vernon Supp. 2008), effective April 1, 2009).

²⁴⁶ *Id.* § 13 (to be codified at Tex. Loc. Gov't Code Ann. § 501.064 (Vernon Supp. 2008), effective April 1, 2009).

²⁴⁷ *Id.* § 36(c) (to be codified at Tex. Loc. Gov't Code Ann. § 501.406 (Vernon Supp. 2008), effective April 1, 2009).

Directors of a Section 4B Development Corporation

A Section 4B corporation is governed by a seven-member board of directors.²⁴⁹ The seven directors are appointed by a majority vote of the city council at an open meeting. Unlike Section 4A corporation boards, the Act does place qualifying criteria for a person who serves as a director on the Section 4B board. Prior to September 1, 1999, Texas law required a Section 4B director to be a city resident. Today there are two exceptions to this residency requirement.

First, in a city of less than 20,000 in population, a Section 4B director may either be a resident of the city, a resident of the county in which the major part of the area of the city is located, or reside in a place that is within 10 miles of the city's boundaries and is in a county bordering the county in which a major portion of the city is located.²⁵⁰ Second, the Act provides that a person may serve on a Section 4B board if that person was a Section 4A director at the time that a Section 4A corporation was dissolved and the 4A corporation was replaced with a Section 4B corporation.²⁵¹ Since the directors of a Section 4A corporation are not required to be residents of the city, this change in the law would allow a non-resident to serve as a Section 4B director in this limited circumstance.

State law also limits the number of Section 4B directors who are also city officers or employees: it states that no more than four of the seven directors may also be elected city officials or city employees. The directors serve without compensation, but they must be reimbursed for actual expenses.²⁵² A director serves at the pleasure of the city council for a term of two years; however, the city council may vote to remove a director at any time without having to specify cause.

A majority of the board (four members) constitutes a quorum. The industrial development corporation board of directors is subject to both the Open Meetings Act²⁵³ and the Public Information Act.²⁵⁴ Additionally, the Act requires the board to conduct all of its meetings within the city limits.²⁵⁵ It is worth mentioning that the Open Meetings Act generally applies when a quorum of a governmental body is present and discusses public business.²⁵⁶ However, it does not apply to purely social gatherings or to the attendance of public officials at conferences or training

²⁴⁸ *Id.* § 4A(l) (to be codified at Tex. Loc. Gov't Code Ann. § 501.407 (Vernon Supp. 2008), effective April 1, 2009).

²⁴⁹ *Id.* § 4B(c) (to be codified at Tex. Loc. Gov't Code Ann. § 505.051(a) (Vernon Supp. 2008), effective April 1, 2009).

²⁵⁰ *Id.*

²⁵¹ *Id.* § 4B(e-1) (to be codified at Tex. Loc. Gov't Code Ann. § 505.052 (Vernon Supp. 2008), effective April 1, 2009).

²⁵² *Id.* § 11(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.062(d) (Vernon Supp. 2008), effective April 1, 2009).

²⁵³ *Id.* § 11(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.072 (Vernon Supp. 2008), effective April 1, 2009).

²⁵⁴ *Id.* § 14A (to be codified at Tex. Loc. Gov't Code Ann. § 501.072 (Vernon Supp. 2008), effective April 1, 2009).

²⁵⁵ *Id.* § 4B(c) (to be codified at Tex. Loc. Gov't Code Ann. § 505.055 (Vernon Supp. 2008), effective April 1, 2009).

²⁵⁶ Tex. Gov't Code Ann. § 551.001(4) (Vernon Supp. 2008).

if no formal actions are taken and if the discussion of public business is only incidental to the social function, convention, workshop, ceremonial event or press conference.²⁵⁷ At one of its first meetings, the board is required to elect a president, a secretary and any other officers that the governing body of the city considers necessary. The corporation's registered agent must be a resident of Texas, and the corporation's registered office must be within the boundaries of the city.²⁵⁸

General Powers and Duties of Section 4B Development Corporations

Section 4B industrial development corporations have the following general powers and duties:

Power to Expend Tax Proceeds. The development corporation has the power to expend the proceeds of the economic development sales tax for purposes authorized by the Act. All such expenditures must be made pursuant to a majority vote of the governing body of the board, pursuant to oversight by the city.²⁵⁹ In Texas Attorney General Opinion JC-0488 (2002), the Attorney General noted the city's spending of sales tax proceeds was "contrary to the Act."²⁶⁰ Rather, it is for the corporation to expend the Section 4B tax proceeds for the purposes authorized by the Act, subject to city council approval.

Powers of a Nonprofit Corporation. The corporation shall have and exercise all powers and rights of a nonprofit corporation under the Texas Nonprofit Corporation Act (Article 1396-1.01 et seq.), except to the extent such powers would be in conflict or inconsistent with the Development Corporation Act.²⁶¹

Financial Transaction Powers. The corporation shall have the power to sell, to lease,²⁶² to make secured and unsecured loans,²⁶³ and to sue and be sued.²⁶⁴ Further, in Attorney General Opinion JC-109 (1999) it was noted that when an economic development corporation sells real property, the corporation is not required to comply with the notice and bidding requirements contained in chapter 272 of the Local Government Code. The Section 4B corporation must obtain fair market value when selling real property.²⁶⁵

²⁵⁷ *Id.* § 551.001(4)(B)(iv).

²⁵⁸ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(c) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.056 (Vernon Supp. 2008), effective April 1, 2009).

²⁵⁹ *Id.* § 23(a)(13) (to be codified at Tex. Loc. Gov't Code Ann. § 501.054(b)(2) (Vernon Supp. 2008), effective April 1, 2009).

²⁶⁰ Op. Tex. Att'y Gen. No. JC-0488 (2002) at 3.

²⁶¹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(a) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.054(a) (Vernon Supp. 2008), effective April 1, 2009).

²⁶² *Id.* § 23(a)(1)-(5) (to be codified at Tex. Loc. Gov't Code Ann. §§ 501.159, 501.153, and 501.154) (Vernon Supp. 2008), effective April 1, 2009).

²⁶³ *Id.* § 23(a)(6) (to be codified at Tex. Loc. Gov't Code Ann. § 501.155 (Vernon Supp. 2008), effective April 1, 2009).

²⁶⁴ *Id.* § 23(a)(9) (to be codified at Tex. Loc. Gov't Code Ann. § 501.060 (Vernon Supp. 2008), effective April 1, 2009).

²⁶⁵ Op. Tex. Att'y Gen. No. JC-0109 (1999) at 2.

Status as a Nonstock Corporation. The corporation is a nonprofit, nonmember, non-stock corporation.²⁶⁶

Exemption from Federal, State and Local Taxation. Generally, projects owned by the Section 4B corporation are exempt from local property taxation under Section 11.11 of the Tax Code, pursuant to Article 5190.6, Section 4B(k). In terms of state taxation, Section 4B corporations, pursuant to Section 32 of Article 5190.6, are considered public charities within the tax exemption of Article VIII, Section 2, of the Texas Constitution. Upon request, the State Comptroller's Office Section has treated Section 4B development corporations as exempt from state and local sales tax and the state franchise tax.²⁶⁷ In order to request these exemptions, corporations submit a copy of their articles of incorporation to the Exempt Organizations Section of the Office of the State Comptroller. If a development corporation has qualified for federal exemptions prior to applying for state exemptions, a copy of the determination letter from the Internal Revenue Service should be sent to the State Comptroller's Office at the time the corporation submits its articles of incorporation. However, development corporations are exempt from state and local sales and state franchise taxes regardless of their tax exempt status with the Internal Revenue Service. The articles of incorporation and any IRS determination letters should be submitted with a cover letter containing the development corporation's daytime phone number, charter number and tax identification number.

The Comptroller's address is: Texas State Comptroller, Exempt Organizations Section, P.O. Box 13528, Austin, TX 78711-3528.

To determine whether other state or local taxes are applicable to the development corporation or its activities, individuals may wish to visit with local legal counsel. For more information about tax exemptions, contact the Texas Comptroller's Office Tax Assistance at (800) 252-5555.

It is important to note that the Texas Legislature in 1999 changed the law with regard to the tax exempt status for property of Section 4B corporations that were created after September 1, 1999.²⁶⁸ Generally, a city may create a Section 4B corporation without imposing the accompanying economic development sales tax. As of September 1, 1999, if a city creates such a corporation, the property tax exemption will no longer apply to the ownership, leasehold or other possessory interest in Section 4B corporation property that is held by anyone other than the Section 4B corporation itself. For instance, a Section 4B project facility that is leased out or owned by a private entity will be subject to ad valorem property taxation if the Section 4B corporation is not supported by a voter-approved Section 4B sales tax. If the Section 4B corporation is supported by a Section 4B sales tax, then the project would generally retain its property tax exempt status.

²⁶⁶ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 5 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.052 (Vernon Supp. 2008), effective April 1, 2009).

²⁶⁷ Tex. Tax Code Ann. §§ 151.341, 171.074 (Vernon 2002).

²⁶⁸ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4B(k) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 505.161 (Vernon Supp. 2008), effective April 1, 2009). *See also*, Op. Tex. Att'y Gen. No. GA-0522 (2007).

Duty to Comply with Open Meetings Act and Public Information Act. The corporation and its board of directors are subject to the Open Meetings Act and the Public Information Act.²⁶⁹

Limited Eminent Domain Power. The city council must approve the corporation's exercise of eminent domain power.²⁷⁰ When the corporation exercises eminent domain power, it must do so in accordance with the procedures set forth in the laws applicable to the eligible city.

Limited Tort Liability Protection. The corporation and its directors and employees are not liable for damages arising out of the performance of governmental functions of the corporation.²⁷¹ The corporation is considered a governmental entity for purposes of the Texas Tort Claims Act.

Limited Power to Own or Operate Project. Generally, the corporation does not have the power to own or operate any project as a business entity other than as a lessor, seller or lender. However, the corporation does have all the powers necessary to own and operate a project as a business if the project is part of a military installation or military facility that has been closed or realigned, including a military installation or facility closed or realigned under the Defense Base Closure and Realignment Act of 1990 (10 United States Code Section 2687).²⁷²

Ability of Home Rule City to Provide an Economic Grant of Money to the Development Corporation. The Act generally prohibits a city from lending its credit or granting any public money or thing of value to an economic development corporation. In other words, a city may not provide any funding or services to a development corporation unless the city is fully reimbursed for the value of the expenditure. If a city and an economic development corporation enter into a contract for the provision of city services, such as accounting services, the economic development corporation must provide consideration in exchange for city services.²⁷³

In 2001 the Texas Legislature did create an exception to this general rule.²⁷⁴ A home rule city is now authorized to grant public money to a Section 4A or Section 4B corporation under a contract authorized by section 380.002 of the Texas Local Government Code. The Section 4A or Section 4B corporation is required to use the grant of city money for the "development and diversification of the economy of the state, elimination of

²⁶⁹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, §§ 11(b), 14A (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.072 (Vernon Supp. 2008), effective April 1, 2009).

²⁷⁰ *Id.* § 4B(j) (April 1, 2009 to be codified at Tex. Loc. Gov't Code Ann. § 505.105 (Vernon Supp. 2008), effective April 1, 2009).

²⁷¹ *Id.* § 4B(m) (to be codified at Tex. Loc. Gov't Code Ann. § 505.106 (Vernon Supp. 2008) effective April 1, 2009).

²⁷² *Id.* § 23(b) (to be codified at Tex. Loc. Gov't Code Ann. § 501.160 (Vernon Supp. 2008), effective April 1, 2009).

²⁷³ Op. Tex. Att'y Gen. No. JC-0109 (1999) at 3-5.

²⁷⁴ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 21 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.007 (Vernon Supp. 2008), effective April 1, 2009).

unemployment or underemployment in the state, and development and expansion of commerce in the state.”²⁷⁵

Ability of City to Provide City Insurance Coverage and Retirement Benefits to Development Corporation Staff/Officers. An economic development corporation may participate in the following types of insurance coverage from the city:²⁷⁶ health benefits coverage, liability coverage, workers’ compensation coverage and property coverage. These coverages can be obtained under the city’s insurance policies, the city’s self-funded coverage, or the coverage provided under an Interlocal Agreement with other political subdivisions. Health benefits coverage may be extended to the economic development corporation’s directors and employees and their dependents. Workers’ compensation benefits may be extended to the corporation’s directors, employees and volunteers. Liability coverage may be extended to protect the corporation and its directors and employees. The new law also allows economic development corporations to obtain retirement benefits under the city’s retirement program and extend those benefits to the corporation’s employees. An economic development corporation may not obtain any of these insurance coverages or retirements benefits unless the city consents. The law does not specifically address whether a development corporation must reimburse the city for any insurance or retirement benefits that are provided. However, a strong argument can be made that the development corporation must reimburse the city for any costs for such coverage due to the above noted limitation on the city from providing anything of value to the development corporation. If a city chooses to extend such benefits to the development corporation board or staff, it should consult with local legal counsel.

Reverse Auction Procedures for Purchasing. Reverse Auction Procedures is a method of purchasing where suppliers of services or goods, anonymous to each other, submit bids to provide their services or goods. The bidding is a real-time process usually lasting either one hour or two weeks. The bidding takes place at a previously scheduled time period and at a previously scheduled Internet location.²⁷⁷ Economic development corporations are now authorized to use reverse auction procedures, as defined by section 2155.062 (d), Government Code, for the purchase of goods or services.²⁷⁸

Performance Agreements

Section 4B corporations cannot simply provide gifts of sales tax proceeds. The Texas Attorney General has noted expenditures of sales tax proceeds must be made pursuant to a contract or other arrangement sufficient to ensure that the funds are used for the intended and authorized

²⁷⁵ Tex. Loc. Gov’t Code Ann. § 380.002(b) (Vernon 2005).

²⁷⁶ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(c)-(d) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.067 (Vernon Supp. 2008), effective April 1, 2009).

²⁷⁷ Tex. Gov’t Code Ann. § 2155.062 (d) (Vernon Supp. 2008).

²⁷⁸ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(e) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.074 (Vernon Supp. 2008), effective April 1, 2009).

purposes.²⁷⁹ In 2003, legislation was passed requiring certain written performance agreements. The Texas Legislature now requires Section 4B corporations to enter into a written performance agreement with a business enterprise when corporations provide funding or make expenditures on behalf of a business enterprise in furtherance of a permissible Section 4B project.²⁸⁰ This performance agreement between the corporation and the business enterprise at a minimum must contain the following: (1) a schedule of additional payroll or jobs to be created or retained; (2) the capital investment to be made by the business enterprise; and (3) the terms under which repayment must be made by the business enterprise to the Section 4B corporation should the business fail to meet the performance requirements specified in the agreement.²⁸¹

In 2007, the Texas Legislature passed House Bill 1196, which requires that both governmental entities and economic development corporations put certain language in any written agreement involving public subsidies to businesses, which would include those given by 4B corporations. The language must specify that the business does not and will not knowingly employ an undocumented worker (which statement must also be any application for the subsidy). The language must also require repayment of the subsidy with specified rate and terms of interest if the business is convicted of federal immigration violations under 8 U.S. Code Section 1324a(f), not later than the 120th day after receiving notice of the violation from the public entity or economic development corporation.

Requirement for Third-Party Contracts for Business Recruitment

Section 4A and 4B corporations are required to enter into written contracts approved by the board of directors when the corporation uses a third party for certain business recruitment efforts. The written contract requirement does not apply to the payment of an employee of the Section 4A or 4B corporation.²⁸² Nonetheless, should the corporation pay a commission, fee, or other thing of value to a broker, agent, or other third party for business recruitment or development, a written contract is required.²⁸³ Failure to enter into a written contract with a third party recruiter could result in a civil penalty up to \$10,000.²⁸⁴ The Texas Legislature authorized the Office of the Attorney General to commence an action to recover the penalty in Travis County district court or in the county district court where the violation occurred.²⁸⁵

²⁷⁹ Op. Tex. Att’y Gen. Nos. JC-0118 (1999) at 9 (“Expenditures for even project costs must be pursuant to a contractual or other arrangement sufficient to ensure that the funds are used for the purposes authorized.”); LO 97-061 (1997) at 4-5; LO 94-037 (1994) at 3.

²⁸⁰ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 40(a) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.158 (Vernon Supp. 2008), effective April 1, 2009).

²⁸¹ *Id.* § 40(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 501.158(b) (Vernon Supp. 2008), effective April 1, 2009).

²⁸² *Id.* § 41(a) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051 (Vernon Supp. 2008), effective April 1, 2009).

²⁸³ *Id.* § 41(b) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051 (Vernon Supp. 2008), effective April 1, 2009).

²⁸⁴ *Id.* § 41(c) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051(b) (Vernon Supp. 2008), effective April 1, 2009).

²⁸⁵ *Id.* § 41(d) (to be codified at Tex. Loc. Gov’t Code Ann. § 502.051(c) (Vernon Supp. 2008), effective April 1, 2009).

Incentives to Purchasing Companies

In 2003 the Texas Legislature addressed purchasing companies and their ability to receive an incentive from a Section 4A or 4B corporation.²⁸⁶ Section 4A and 4B corporations may not offer to provide an economic incentive to a business whose business consists primarily of purchasing taxable items using a resale certificate and then reselling those same items to a related party. A related party means a person or entity which owns at least eighty percent (80%) of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.²⁸⁷

Oversight of Section 4B Development Corporations

Section 21 of the Development Corporation Act provides that the city shall approve all programs and expenditures of the development corporation and shall annually review any financial statements of the corporation. It further provides that at all times the city will have access to the books and records of the corporation. Additionally, Section 23(a)(13) of the Act states that the powers of the corporation shall be subject at all times to the control of the city's governing body. And finally, Section 34 of the Act gives the city authority to alter the structure, organization, programs, or activities of the development corporation at any time. This authority is limited by constitutional and statutory restrictions on the impairment of existing contracts. Additionally, bond covenants may also restrict the restructuring or dissolution of an economic development corporation.

Section 4B Development Corporation Is Not Considered a Political Subdivision

State law typically imposes certain requirements or conditions upon political subdivisions such as cities. A frequent concern is whether state law requirements imposed upon cities also applies to Section 4A or Section 4B economic development corporations. Section 22 of the Act states, in part, that an economic development corporation "is not intended to be and shall not be a political subdivision or political corporation within the meaning of the constitution and the laws of the state." Accordingly, a statute's use of the term "political subdivision" does not include a Section 4A or Section 4B economic development corporation.

The Attorney General has considered whether certain statutes apply to economic development corporations and has concluded that the Texas conflicts of interest statute, chapter 171 of the Local Government Code, does not apply to an economic development corporation.²⁸⁸ Chapter 272 of the Local Government Code, governing the city sale of real property, is not applicable to economic development corporations.²⁸⁹ Nor is the prevailing wage law contained in chapter 2258 of the Government Code applicable to a worker employed by or on behalf of an economic

²⁸⁶ *Id.* § 42 (to be codified at Tex. Loc. Gov't Code Ann. § 501.161 (Vernon Supp. 2008), effective April 1, 2009).

²⁸⁷ *Id.* § 42(a) (to be codified at Tex. Loc. Gov't Code Ann. § 501.161(a) (Vernon Supp. 2008), effective April 1, 2009).

²⁸⁸ Op. Tex. Att'y Gen. No. JC-0338 (2001) at 2.

²⁸⁹ Op. Tex. Att'y Gen. No. JC-0109 (1999).

development corporation.²⁹⁰ Nonetheless, Section 4B corporations should consult their local legal counsel when considering the application of a particular statute.

Annual Reporting Requirement for 4B Corporations

Section 4C of the Act, added during the 1997 Legislative Session, requires both Section 4A and Section 4B economic development corporations to submit an annual, one-page report to the State Comptroller's Office. The report must be submitted by February 1 of each year and must be in the form required by the Comptroller.

The report must include the following:

- A statement of the corporation's primary economic development objectives.
- A statement of the corporation's total revenues for the preceding fiscal year.
- A statement of the corporation's total expenditures for the preceding fiscal year.
- A statement of the corporation's total expenditures during the preceding fiscal year in each of the following categories:
 - administration
 - personnel
 - marketing or promotion
 - direct business incentives
 - job training
 - debt service
 - capital costs
 - affordable housing
 - payments to taxing units, including school districts
- A list of the corporation's capital assets, including land and buildings (for example, industrial parks, recreation and sports facilities, etc.).
- Any other information required by the Comptroller.

If a corporation fails to file the required report or to include all the required information, the Comptroller may impose a \$200 administrative penalty against the corporation. However, before imposing such a penalty, the Comptroller must provide written notice to the corporation of its error in filing the report. That notice must include information on how to correct the error. Once it has received notice, the corporation has 30 days to correct its reporting error before the Comptroller may impose the \$200 penalty. The form may be submitted to the Comptroller's Office by mail or by fax at (512) 475-0664.

For more information on filing the required form, contact the Texas Comptroller's Office at (800) 531-5441, extension 3-4679.

²⁹⁰ Op. Tex. Att'y Gen. No. JC-0032 (1999).

Federal Taxation of Section 4A and Section 4B Development Corporations²⁹¹

A development corporation created under Section 4A or Section 4B of the Act may qualify for exemption from federal income tax under at least three different Internal Revenue Code sections. The following is a summary of these Code sections, their purposes, and some of their advantages and disadvantages. A development corporation will want to consult with its accountants and legal counsel to determine which, if any, of these exemptions apply to its operations.

Federal Tax Code Section 115

Federal Tax Code Section 115 exempts income that an entity receives from the exercise of an essential governmental function that accrues to a political subdivision. Organizations similar to Section 4A and Section 4B development corporations have been determined to be exempt under this section. Additionally, the Internal Revenue Service (the IRS) has informally indicated that it would grant an exemption for income of a development corporation that involves the performance of a governmental function (e.g., funding public infrastructure improvements). If a development corporation otherwise qualifies under this federal tax code section, it does not have to apply to the IRS to be exempt under this provision. A Federal Tax Code Section 115 exemption is usually relied upon when a qualifying entity does not desire a written determination letter from the IRS. Development corporations with this type of exemption may issue tax-exempt bonds for governmental purposes as specifically provided by Texas statute. Most bond counsel will not require an IRS determination for the issuance of tax-exempt bonds. Most entities described in this section also do not have to file an annual federal income tax return. Contributions to Section 115 entities are generally tax deductible. If a development corporation wants a formal written determination from the IRS that it is exempt under this Section, such a determination can be obtained by filing a private letter ruling request with the Washington Office of the IRS.

Federal Tax Code Section 501 (c) (3)

Federal Tax Code Section 501 (c) (3) exempts the income of corporations organized and operated exclusively for charitable purposes. Charitable purposes have in the past been found to include efforts by entities to lessen the burdens of government by performing duties previously undertaken by the government. To be exempt under this provision, the development corporation must file Form 1023 with the IRS requesting this exemption. This process is much less expensive than obtaining a written determination under Section 115 (discussed earlier). Most development corporations that qualify under Section 501 (c) (3) are not required to file an annual federal income tax return, but they should obtain a determination to that effect when they file their Form 1023 with the IRS. If the development corporation has unrelated business income, it will have to file a federal tax return and may have to pay tax on that income. An entity can obtain a Section 501 (c) (3) determination even though it also considers itself exempt under Section 115. The Section 501 (c) (3) exemption is usually relied upon when a written determination from the IRS is desired by the development corporation. Some bond counsel may insist that if this type of

²⁹¹ This material on federal taxation of development corporations was written by James P. Plummer and Jeffrey Kuhn with the law firm of Fulbright and Jaworski in San Antonio, Texas.

entity issues bonds, it would only be eligible to issue Section 501 (c) (3) bonds, which are more expensive to issue than governmental bonds. Contributions to this type of entity are generally tax deductible.

Federal Tax Code Section 501 (c) (4) and 501 (c) (6)

Federal Tax Code Section 501 (c) (4) and 501 (c) (6) exempts the income of corporations organized and operated as community development organizations and business leagues. To obtain a written determination that an organization is exempt under this provision, Form 1024 must be filed with the IRS. This type of exemption is not difficult to qualify for, but it may not have as many advantages as other IRS Code sections. The only major benefit of a Federal Tax Code Section 501 (c) (4) and 501 (c) (6) designation is that it generally allows the exemption of the income of the development corporation from federal taxation. Development corporations qualifying under these sections should not have to file annual federal income tax returns (unless they have unrelated business income) if they receive a determination to this effect from the IRS when they file Form 1024. Contributions to this type of organization are not considered deductible as charitable contributions. These organizations cannot issue tax exempt bonds unless they also qualify under Federal Section 115.

II. Alternative Tax Initiatives for Local Development

City/County Venue Project Tax

During the 1997 Session, the Texas Legislature passed House Bill 92, the sports and community venue project legislation. It has been suggested that the original intent of this legislation was to provide cities and counties with greater authority to finance the construction of stadium facilities for professional sports teams. However, as finally enacted, the bill provides cities and counties with broad authority to finance a wide array of economic development projects, in addition to the construction of sports stadiums. Cities and counties may choose to propose a venue project tax if they are interested in diversifying the sources of revenue they have to promote a specific economic development project. The venue project revenue sources that can be adopted include a sales tax, a hotel occupancy tax, a short-term motor vehicle rental tax, an event parking tax, an event admissions tax and a venue facility use tax. Additionally, the venue sales tax can be proposed in certain limited cases even if the city is already at its maximum sales tax rate; in this circumstance, the legislation allows the voters to approve an automatic reduction of another existing sales tax to make room for the venue tax. Before a local government may use any of the taxes authorized by House Bill 92, both the tax and the venue project on which it will be spent must be approved by the voters. The proceeds from such a tax may be spent only on the approved venue project.

The sports and community venue legislation added Chapter 334 and Chapter 335 to the Local Government Code and Section 321.508 to the Tax Code. Within these provisions, cities and counties are authorized to propose at an election both the approval of certain public projects and the revenue sources that would fund those projects. A city or county may undertake a venue project under Chapter 334 only if it receives approval of the project and its financing at such an election. At this election, the city or county must specifically indicate which of six different taxes or fees it will use to pay for the costs of the project.

Alternatively, two or more cities, two or more counties, or a combination of cities and counties may create a “sports and community venue district” under Chapter 335 of the Local Government Code. Subject to voter approval, such a district may carry out the same type of projects and propose the same financing methods as an individual city or county could under Chapter 334.

Finally, Section 321.508 of the Tax Code allows a city to call an election on the dedication of up to 25 percent of its existing sales tax to pay off debt issued to finance one or more economic development projects located in the city.

Eligibility to Undertake a Venue Project

Chapter 334 of the Texas Local Government Code appears to apply to all cities and counties in Texas, with certain special conditions set forth for the City of Houston and Harris County.²⁹² The legislation otherwise applies to cities and counties regardless of population and geography and can be utilized even if the city or county is already participating in a rapid transit authority or is currently at its limit for the local sales tax. In the case of an entity that is at its maximum local sales tax rate, the ballot would have to indicate which sales tax would be reduced to accommodate the newly proposed sales tax to fund the venue project.

Permissible Projects Under Chapter 334

Chapter 334 allows a city or county to undertake a “venue project.” The term “venue project” is defined as a “venue and related infrastructure that is planned, acquired, established, developed, constructed, or renovated under this chapter.” The term “venue” is defined as being one of the following:²⁹³

An arena, coliseum, stadium or other type of area or facility:²⁹⁴

- That is used or will be used for professional or amateur sports, or for community and civic and charitable events; and
- Where a fee for admission to these events will be charged;

A convention center or a related improvement that is located in the vicinity of the convention center. The term “related improvement” is used rather broadly and includes such things as civic center hotels, auditoriums, theaters, opera or music halls, exhibition halls, rehearsal halls, parks, zoos, museums or plazas;

A tourist development area along an inland water way;

²⁹² See Tex. Loc. Gov’t Code Ann. § 334.002 (Vernon 2005) (setting limits on the application of Chapter 334 to the City of Houston and to Harris County. Some authorities have interpreted the language of Section 334.002 to make Chapter 334 applicable only to Houston and Harris County. However, nothing in the language of that section appears to limit the applicability of Chapter 334 with regard to other cities or counties. Rather, that section simply sets forth special restrictions that apply to Houston and to Harris County. Further, the legislative history of the House Bill 92 (enacting Chapter 334) indicates that the bill was intended to have general application, with special limitations only for Houston and Harris County. Finally, several sections of Chapter 334, by their own terms, can apply only to cities and counties other than Houston and Harris County. If Chapter 334 were interpreted to apply only to Houston and Harris County, those sections would be rendered meaningless. The above legal reasoning is taken from a letter written by Carolyn B. Hall, Senior Legislative Counsel for the Texas Legislature. The letter is addressed to the Honorable Kim Brimer, state representative from Arlington, and is dated August 29, 1997).

²⁹³ Id. § 334.001(4).

²⁹⁴ See *Id.* § 334.0415. (It should be noted that a city or county would not be able to use the provisions of Chapter 334 to finance a professional sports stadium if the city or county had already contracted with a professional sports team prior to November 1, 1998, for the team to relocate and play in the stadium. This prohibition only applies if the team is already playing under an existing contract in a stadium owned by another Texas city or county. Even in this circumstance, a stadium may be financed under Chapter 334 if the other city or county (where the team is currently playing) consents).

A municipal parks and recreation system, improvements or additions to a parks and recreation system, or an area or facility that is part of a municipal parks and recreation system. However, neither the motor vehicle rental tax nor the local hotel tax authorized by Chapter 334 may be used as a revenue source to pay for a venue project of this nature;²⁹⁵

A certain economic development project authorized by Section 4A or Section 4B of the Development Corporation Act of 1979, Article 5190.6 of Texas Revised Civil Statutes, as that Act existed on September 1, 1997; or

A certain watershed protection and preservation project; recharge or recharge feature protection projects; conservation easements; or open-space preservation programs intended to protect water.

Section 334.001(3) defines the term “related infrastructure” to include any on-site or off-site improvements that relate to and enhance the use, value or appeal of a venue, and any other expenditure that is necessary to construct or improve a venue. The statute lists the following examples of improvements that would qualify as related infrastructure: stores, restaurants, on-site hotels, concessions, parking, transportation facilities, roads, water or sewer facilities, parks or environmental remediation.

A city or county may only use Chapter 334 to construct a project that falls within the definition of the term “venue” or within the definition of “related infrastructure.” However, once the venue facility is constructed, state law permits the facility to be used for an event that is not related to one of the above-described venue purposes, such as a community-related event.²⁹⁶ Also, if an already existing facility would qualify as a venue project under Chapter 334, a city or a county may use the authority granted under Chapter 334 to aid that facility even though it was originally constructed or undertaken under the authority of other law.²⁹⁷

Procedure for Authorizing a Venue Project

Step One:

The city or county must obtain approval for the project from the Comptroller’s Office.

Before a city or county may have an election to undertake a venue project, it must obtain approval of the project from the Comptroller’s Office.²⁹⁸ The Comptroller reviews the project to determine whether the proposed financing would “have a significant negative fiscal impact on state revenue.” To obtain this approval, the city or county must send to the Comptroller a copy of

²⁹⁵ *Id.* §§ 334.1015, 334.2515.

²⁹⁶ *Id.* § 334.004.

²⁹⁷ *Id.* § 334.003 (as amended by Tex. S. B. 191, 80th Leg., R.S. (2007)).

²⁹⁸ *Id.* §§ 334.021, 334.024. *But see* Sections 7, 8 and 9 of Tex. H.B. 92, 75th Leg., R.S. (1997) (excepting certain cities, counties and venue districts from the requirements of holding an election and obtaining Comptroller approval).

the resolution proposing the venue project.²⁹⁹ This resolution must indicate each proposed project and each method of financing for the project.³⁰⁰ Within 14 days of the Comptroller's receipt of the resolution, it must perform the required analysis and provide the city or county with written notice of its decision.³⁰¹ If the Comptroller determines that the resolution would have a significant negative impact on state revenue, the Comptroller must indicate in writing how the local government could change the resolution so that there would not be such a negative impact. If the Comptroller fails to provide the required analysis in less than 30 days, the resolution is considered to be approved by the Comptroller.³⁰²

If the Comptroller finds that a venue project resolution will have a negative impact on state revenue, the involved city or county has 10 days to appeal the negative ruling.³⁰³ Such an appeal is again made to the Comptroller, and the Comptroller would have another 10 days to provide a new analysis. If the Comptroller's ruling is still negative, the analysis must again include information on how the local government could change the resolution so that there would not be a negative impact on state revenue. If the Comptroller fails to provide the required analysis within 30 days, the resolution is automatically considered approved. If the Comptroller's Office continues to hold that the venue project would have a negative impact on state revenue, the city or county would be unable to order the required election on the venue project.³⁰⁴

Step Two:

Certain cities must also obtain approval from the local transit authority.

If a venue project resolution contains a proposed sales tax, the city or county must determine if that tax would result in the reduction of a sales tax rate that funds a transit authority created under either Chapter 451 or Chapter 452 of the Texas Transportation Code.³⁰⁵ This issue would only arise if the area was subject to a transit authority sales tax and if the adoption of a venue project sales tax would place the city or county beyond the two percent cap for the local sales tax. If these circumstances would arise because of the proposed venue project, the city must send the transit authority a copy of the venue resolution for approval by the authority. This resolution must designate each venue project and each method of financing that the city or county proposes to use to finance the project.³⁰⁶ If the proposed financing for the venue project would not cause a reduction in the transit authority sales tax, this approval from the transit authority is not required.

Within 30 days of the transit authority's receipt of the resolution, it must determine whether the reduction in the transit authority's tax rate would have a significant negative impact on its ability to provide services or would impair any existing contracts.³⁰⁷ The transit authority must also provide the written results of its analysis to the city or county within this 30 day period. If the

²⁹⁹ Tex. Loc. Gov't Code Ann. § 334.022(a) (Vernon 2005).

³⁰⁰ *Id.* § 334.021(b).

³⁰¹ *Id.* § 334.022(b)(1) & (2).

³⁰² *Id.* § 334.022(d).

³⁰³ *Id.* § 334.023.

³⁰⁴ *Id.* § 334.024.

³⁰⁵ *Id.* § 334.0235.

³⁰⁶ *Id.* § 334.021.

³⁰⁷ *Id.* § 334.0235(c).

transit authority fails to provide this analysis within the required period, the authority is deemed to have approved the resolution. Also, if the transit authority's ruling is negative, it must state how the city or county could change the venue project resolution so that there would not be a negative impact on the transit authority's ability to provide transit service or fulfill existing contracts.

If the transit authority finds that a venue project resolution would have a negative impact on the authority's ability to provide service or would impair existing contracts, the involved city or county may appeal the negative ruling within 10 days.³⁰⁸ Such an appeal is again made to the transit authority, and the authority must provide a new analysis within 10 days of its receipt of the appeal. If the transit authority's ruling is still negative, the analysis must include information on how the local government could change the resolution so that there would not be a negative impact on the authority's ability to provide service or fulfill existing contracts. If the transit authority fails to provide the required analysis within 10 days, the resolution is automatically considered approved. If the transit authority continues to find that the venue project would have a negative impact, the city or county will be unable to hold the required election to approve the proposed venue project.³⁰⁹

Step Three:

The city or county must hold an election on the venue project.

In order to undertake a venue project, a city or county must receive voter approval of the project and the proposed means of financing the project.³¹⁰ As discussed above, the local government cannot proceed with such an election without approval from the Comptroller's Office and, if applicable, from the local transit authority. Once it has received the required approvals, the city or county may order the required election. The order calling the election must meet all of the following criteria:

- Allow the voters to vote separately on each venue project;
- Designate the venue project(s);
- Designate each method of financing authorized by Chapter 334 that the city or county wants to use to finance the venue project and designate the maximum rate for each method; and
- Allow the voters to vote (in the same proposition or in separate propositions) on each method of financing authorized by Chapter 334 that the municipality or county wants to use to finance the project and the maximum rate of each method.

In addition to the above requirements for the election order, there is required wording for the ballot proposition. The ballot must be printed to allow voting for or against the following proposition:³¹¹

³⁰⁸ *Id.* § 334.0236.

³⁰⁹ *Id.* § 334.024.

³¹⁰ *Id.* *But see* Sections 7, 8, and 9 of Tex. H.B. 92, 75th Leg., R.S. (1997) (excepting certain cities, counties and venue districts from the requirements of holding an election and of obtaining Comptroller approval).

³¹¹ Tex. Loc. Gov't Code Ann. § 334.024(c) (Vernon 2005).

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert the type of tax and the maximum rate of the tax) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition.³¹²

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert each type of tax and the maximum rate of each tax) for the purpose of financing the venue project.”

If the venue project is for improvements or additions to an existing park or recreation facility, then the description of the project in the ballot proposition must identify each park or recreation facility by name or location. If the venue project is for the acquisition or improvement of a new park or recreation facility, then the description of the project in the ballot must specify the general location where the new park, recreational system or facility will be located. If the venue project includes improvements and/or additions to all parks and/or recreation facilities of the city, then the ballot proposition description need not contain the name or location of the facilities.³¹³

The Texas Election Code governs the procedures for holding an election under Chapter 334. A city will want to check with the Elections Division at the Secretary of State’s Office if the city has any questions about the requirements of the Election Code. The Elections Division may be reached by phone at (800) 252-8683.

Imposing a Sales Tax Under Chapter 334

General Authority to Impose a Venue Project Sales Tax

If approved by the voters at an election on the issue, a city (by ordinance) or a county (by order) may impose, reduce or repeal a sales tax under authority of Chapter 334.³¹⁴ As indicated earlier, a sales tax may not be imposed unless both the venue project and the tax itself have been approved at an election.

Ballot Proposition to Adopt a Venue Project Sales Tax

The adoption of the venue project sales tax may be included in the same ballot proposition that proposes the venue project. The ballot must be printed to allow voting for or against the following proposition:³¹⁵

³¹² *Id.* § 334.024(d).

³¹³ *Id.* § 334.024(f).

³¹⁴ *Id.* § 334.081(c)(2).

³¹⁵ *Id.* § 334.024(c).

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert the type of tax and the maximum rate of the tax) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition.³¹⁶

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert each type of tax and the maximum rate of each tax) for the purpose of financing the venue project.”

Increasing the Venue Project Sales Tax

A sales tax that was adopted under Chapter 334 to benefit a venue project may be increased if the increase is approved at an election.³¹⁷ If there is an election to approve an increase in the sales tax to fund a venue project, the ballot wording must permit voting for or against the following proposition:³¹⁸

“The adoption of a sales and use tax for the purpose of financing (insert description of venue project) at the rate of of one percent (insert rate).”

The rate of the sales tax imposed or increased under Chapter 334 can be one-eighth, one-fourth, three-eighths, or one-half of one percent.³¹⁹ With certain exceptions, other issues concerning administration of a Chapter 334 sales tax by a city are governed by the provisions of Chapter 321 of the Tax Code. If the Chapter 334 sales tax is imposed by a county, Chapter 323 of the Tax Code generally governs the administration of the tax.³²⁰

Effective Date of Venue Project Sales Tax

A sales tax imposed under Chapter 334 cannot take effect until at least one full quarter after the city or county has sent notice to Comptroller of the election results.³²¹ After one full quarter has expired, the tax will then take effect on the first day of the next calendar quarter. The Comptroller is responsible for collecting the sales tax and remitting it to the city or county, which must then deposit the money into the venue project fund.³²²

³¹⁶ *Id.* § 334.024(d).

³¹⁷ *Id.* § 334.084.

³¹⁸ *Id.* § 334.084(c).

³¹⁹ *Id.* § 334.083.

³²⁰ *Id.* § 334.082.

³²¹ *Id.* § 334.087.

³²² *See id.* § 334.088.

Termination of Venue Project Sales Tax

When all bonds and obligations payable from money in the venue project fund are paid, the venue project sales tax must be abolished.³²³ Alternatively, if the full amount of money needed to pay these obligations, excluding guaranteed interest, has been set aside in a trust account dedicated to pay these obligations, the sales tax must be ended. Additionally, a city or county may abolish the Chapter 334 sales tax on its own motion. Regardless of the cause for the termination of the sales tax, the city or county must notify the Comptroller of the tax's abolition no later than 60 days before the date on which the tax is set to expire.

Application of 2 Percent Local Sales Tax Cap to Chapter 334 Sales Tax

Generally, state law requires that all local sales taxes, when combined, not exceed a total rate of two percent in any area. However, a city or county is not automatically forbidden from adopting or increasing a sales tax to pursue a Chapter 334 venue project merely because the adoption of the tax would cause the combined local sales taxes in an area to exceed this two percent cap.³²⁴ Instead, state law allows the adoption of the venue sales tax to cause the local sales tax rate of one of the other taxing authorities in the area to be automatically reduced.³²⁵

In other words, if an area is already at its maximum local sales tax (two percent) and a proposed venue project election would place the locality beyond the maximum local sales tax rate, the venue project sales tax election is also treated as an election to reduce the tax rate of another taxing authority. Only two types of taxing authority are eligible to have their sales tax rate automatically reduced in this manner: 1) a crime control district created under Texas Local Government Code Chapter 363; and 2) an industrial development corporation created under Section 4A or 4B of Texas Civil Statutes Article 5190.6. If there is only one such authority whose sales tax is affected, the ballot proposition for the adoption of the Chapter 334 sales tax must clearly state that the affected taxing authority's tax rate will be reduced. If more than one such taxing authority's tax rate is affected, the Chapter 334 sales tax election must allow voters to choose which authority's tax will be reduced. The sales tax rate of the chosen taxing authority is then reduced to the highest rate that would allow the locality not to exceed the two percent cap.

If another taxing entity's sales tax rate is reduced automatically at such an election, the taxing entity's sales tax rate is reduced throughout the entity's jurisdiction. A taxing authority does not have the power to reduce its sales tax rate only in one part of its jurisdiction; the rate must be uniform throughout its jurisdiction. However, the taxing authority's sales tax would automatically increase if the Chapter 334 rate is later reduced or later expires. Special rules also apply if the sales tax rate of a transit authority would be affected. These rules are discussed below.

³²³ *Id.* § 334.089.

³²⁴ *Id.* § 334.085 (Vernon Supp. 2008).

³²⁵ It is important to note that reducing an existing sales tax, such as the sales tax associated with an economic development corporation, may raise constitutional issues regarding the impairment of contracts. Currently, it appears that these issues have not been addressed in the statute, in Texas case law, or in an Attorney General Opinion.

As of September 1, 2005, voters may adopt or raise any dedicated or special purpose municipal sales tax on a combined ballot proposition that also lowers or repeals any such tax.³²⁶ The language in the ballot must contain the language appropriate for such changes to the tax as required in any stand-alone election. A negative vote on the combined ballot would leave the sales tax situation unchanged. This would not apply to counties wishing to adopt or to raise a venue project sales tax. Also, it should be noted that repeal or lowering of a municipal venue project sales tax at a later date would not automatically return sales taxes other than the crime control and economic development taxes to their prior levels.

Required Withdrawal from a Transit Authority To Adopt a Venue Project Sales Tax

If the enactment or increase of a Chapter 334 sales tax would cause the combined local sales tax rate to exceed two percent and the taxing entity whose sales tax would have to be reduced is a transit authority, special rules apply. Specifically, before the Chapter 334 sales tax is imposed, the city or county imposing the tax must withdraw from the transit authority. There are two types of transit authorities to which this rule applies. The first type, called a “rapid transit authority,” is created under Chapter 451 of the Texas Transportation Code. The second type, referred to as a “regional transportation authority,” is created under Chapter 452 of that code. The rules are slightly different for each type of transit authority and are discussed separately below:

Chapter 451 Rapid Transit Authority. If the transit authority is organized under Chapter 451 of the Transportation Code, a separate election first must be held on the issue of withdrawing the affected cities from the transit authority.³²⁷ The Chapter 334 sales tax may not be imposed in a city unless the voters of that city have previously approved their city’s withdrawal from the transit authority. Once a city has voted to withdraw from the transit authority, the transit authority no longer has any duty to provide services within the city unless required to do so by federal law. In conducting an election to decide whether a city will withdraw from a Chapter 451 transit authority, a city must follow the requirements of Subchapter M in Chapter 451 of the Transportation Code.

Chapter 452 Regional Transportation Authority. If voters will be asked to reduce the sales tax rate of a transportation authority organized under Chapter 452 of the Texas Transportation Code in order to enact or increase a Chapter 334 venue project sales tax, different procedures must be followed. The election to approve or increase the Chapter 334 venue sales tax is treated as an election to withdraw from the transportation authority.³²⁸ The ballot language at this election must clearly state that the adoption of the Chapter 334 sales tax will result in automatic withdrawal of the county or city from the transportation authority. Even if the voters choose to withdraw from the transportation authority by approving the Chapter 334 tax, the city or county still may not impose the Chapter 334 sales tax until the county or city’s financial obligations to the transportation

³²⁶ Tex. Tax Code Ann. § 321.409 (Vernon 2008)

³²⁷ Tex. Loc. Gov’t Code Ann. § 334.085(b-1) (Vernon Supp. 2008).

³²⁸ *Id.* § 334.0855 (Vernon 2005).

authority are satisfied in accordance with Subchapter Q of Transportation Code Chapter 452. In conducting an election on whether to withdraw from a Chapter 452 transportation authority, a city must follow the requirements of Subchapter Q in Chapter 452 of the Transportation Code.

Additional Taxes and Fees that Voters Can Approve

1. Short-Term Motor Vehicle Rental Tax

Authority to Adopt the Motor Vehicle Rental Tax

With permission of the voters, a city or a county may fund venue projects within its jurisdiction by imposing a tax on the rental of a motor vehicle within the city or county.³²⁹ Any such tax must be approved at an election held in accordance with the rules of Chapter 334. The ballot language for the motor vehicle rental tax must specify the maximum rate of the rental tax that can be adopted.³³⁰ In addition, the rental tax may only be imposed if the city or county issues bonds or other obligations for the venue project within one year of imposing the rental tax.³³¹ The tax would apply only to agreements to rent a motor vehicle to another for consideration for a period of not longer than 30 days.³³² It is important to note that the motor vehicle rental tax may not be imposed to fund a venue project that is an area or facility that is part of a municipal parks and recreation system.³³³

Ballot Proposition to Adopt a Motor Vehicle Rental Tax

The adoption of the Motor Vehicle Rental Tax may be included in the same ballot proposition that proposes the venue project. The ballot must be printed to allow voting for or against the following proposition:

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert the type of tax and the maximum rate of the tax) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition:

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert each type of tax and the maximum rate of each tax) for the purpose of financing the venue project.”

³²⁹ *Id.* § 334.102.

³³⁰ *Id.*, *Id.* § 334.103(b).

³³¹ *Id.* § 334.112.

³³² *See id.* § 334.101(a)(2) (defining the term “rental” to mean an agreement by an owner of a vehicle authorizing exclusive use of that vehicle by another for consideration *for 30 days or less* [emphasis added]).

³³³ *Id.* § 334.1015.

Effective Date of the Motor Vehicle Rental Tax

After approval by the voters, the motor vehicle rental tax becomes effective on the date prescribed by the ordinance or order imposing the tax.³³⁴ The tax is on the gross receipts from the rental of a motor vehicle. Its rate may be set only in increments of one-eighth of one percent, and in most cases may not exceed five percent.³³⁵ All revenue from the tax must be deposited in the venue project fund.³³⁶ Additionally, the city or county cannot continue to impose a motor vehicle rental tax once the bonds or other obligations for the project have been paid in full.

Ability to Decrease, Abolish or Increase the Motor Vehicle Rental Tax

Once in place, the motor vehicle rental tax may be decreased or abolished, by ordinance or order, on the city or county's own motion.³³⁷ However, the tax may only be increased if the increase is approved at an election on the issue and the resulting tax rate will not in most cases exceed five percent.³³⁸ At an election to increase the motor vehicle rental tax, the ballot must be worded to allow voting for or against the following proposition:³³⁹

“The increase of the motor vehicle rental tax for the purpose of financing (insert description of venue project) to a maximum rate of percent (insert new rate).”

In 2003, the Texas Legislature allowed Dallas County, with voter approval, to establish a motor vehicle rental tax rate not to exceed six percent.³⁴⁰ At an election to increase the motor vehicle rental tax, the ballot must be worded to allow voting for or against the following proposition.³⁴¹

“The increase of the motor vehicle rental tax for the purpose of financing (insert description of venue project) to a maximum rate of percent (insert new maximum rate not to exceed six percent).”

Collection and Enforcement of the Motor Vehicle Rental Tax

The Comptroller's Office is not involved in the collection of the motor vehicle rental tax. Instead, the tax is collected by the owner of the motor vehicle rental agency and remitted to the

³³⁴ *Id.* § 334.112.

³³⁵ *Id.* § 334.103(a). *See also id.* §§ 334.103(c), 334.1041. (allowing a county with a population of 2 million or more that is adjacent to a county with a population of more than 1 million may by order increase the rate to a maximum 6% if the increased is approved by the voters).

³³⁶ *Id.* § 334.115.

³³⁷ *Id.* § 334.102.

³³⁸ *Id.* § 334.104(a).

³³⁹ *Id.* § 334.104(b).

³⁴⁰ *Id.* § 334.1041 (Dallas County has a population of 2,218,899 with nearby Tarrant County having a population of 1,446,219).

³⁴¹ *Id.* § 334.1041(c).

city or county.³⁴² The order or ordinance imposing the tax should specify how the rental tax is to be reported and remitted to the city or county.³⁴³ Additionally, the order or ordinance may also prescribe penalties for the failure to keep the required records, to report when required, or to pay the tax when due. Finally, the city or county attorney is empowered to bring a lawsuit to collect the rental tax.

All the gross receipts of an entity that rents out motor vehicles are presumed to be subject to the motor vehicle rental tax, except for those receipts for which the entity can provide an exemption certificate.³⁴⁴ In addition to any local record-keeping requirements, state law requires motor vehicle rental agencies to keep records reflecting the gross receipts from motor vehicle rentals and the tax paid on each rental.³⁴⁵ These records must be kept for at least four years, and failure to keep such records is a misdemeanor offense.³⁴⁶

State law also requires that persons buying a motor vehicle rental business retain out of the purchase price an amount sufficient to cover any delinquent motor vehicle rental taxes that are due to the city or county.³⁴⁷ The buyer must withhold this amount until the seller provides a proper receipt from the city or county showing that the tax has been paid or that no tax is due. If the buyer does not withhold the required amount, the buyer becomes liable for any delinquent rental taxes owed by the purchased motor vehicle rental business.³⁴⁸ The buyer of a motor vehicle rental business may request that the city or county provide a receipt showing that no motor vehicle rental tax is due from the business to be purchased or, if tax is due, what amount of tax is owed. The city or county is then required to issue the statement not later than the 60th day after the request. If the city or county fails to issue the statement within the deadline, the purchaser is released from the obligation to withhold the amount due from the purchase price.³⁴⁹

Cities and counties are now required to allow a person who is required to collect and remit the motor vehicle rental tax to retain one percent of the amount collected as reimbursement for the costs of collecting the tax.³⁵⁰ Nonetheless, a person required to collect and remit the motor vehicle rental tax is not entitled to the one percent reimbursement if the person fails to remit the tax to the city or county within 15 days of the end of the collection period.³⁵¹ The date postmarked by the United States Postal Service is considered to be the date of receipt by the city or county.

³⁴² *Id.* §§ 334.105, 334.113. *See Id.* § 334.108. (state law requires that each bill or other receipt for a taxed rental contain the following language in a conspicuous location: “____ (insert name of taxing county or city) requires that an additional tax of ____ percent (insert tax rate) be imposed on each motor vehicle rental for the purpose of financing ____ (describe venue project).”).

³⁴³ *Id.* § 334.113.

³⁴⁴ *Id.* § 334.109.

³⁴⁵ *Id.* § 334.110.

³⁴⁶ *Id.* § 334.111.

³⁴⁷ *Id.* § 334.114.

³⁴⁸ *Id.* § 334.114 (b).

³⁴⁹ *Id.* §§ 334.114 (c)-(d).

³⁵⁰ *Id.* § 334.1135(a).

³⁵¹ *Id.* § 334.1135(b).

Exemptions from the Motor Vehicle Rental Tax

As suggested above, certain entities (primarily public entities) are exempt from a motor vehicle rental tax imposed under Chapter 334 of the Local Government Code.³⁵² The city or county should consult Subchapter E in Chapter 152 of the Texas Tax Code to discern which entities are exempt from the rental tax. Additionally, certain types of vehicles do not fall within the definition of “motor vehicle” under Chapter 334 and cannot be taxed. For instance, the rental of trailers, road-building machines, trucks with a rating of more than one-half ton, trains, farm machines or bicycles is not taxable. For the definition of the term “motor vehicle,” a city or county should consult Section 334.101 of the Texas Local Government Code.

It is important to note that there is no clear authority for a local government, on its own motion, to exempt anyone from the motor vehicle rental tax. It appears that the only entities exempt from the tax are those exempted by state law.

2. Admissions Tax on Tickets Sold at a Venue Project

If a city or county has issued bonds for a venue project, the city or county may impose a tax not to exceed 10 percent on each admission ticket sold for an event at the venue project.³⁵³ The admissions tax must have been approved at an election held in accordance with the rules of Chapter 334, and the ballot language must specify the maximum rate of the tax being adopted.³⁵⁴ The city or county is not authorized to impose an admissions tax once the venue project bonds have been paid in full or if no such bonds are issued.³⁵⁵

Ballot Proposition to Adopt an Admissions Tax

The adoption of the admissions tax may be included in the same ballot proposition that proposes the venue project. The ballot must be printed to allow voting for or against the following proposition:

“Authorizing (*insert name of city or county*) to (*insert description of venue project*) and to impose a tax at the rate of (*insert the type of tax and the maximum rate of the tax*) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition:

³⁵² *Id.* § 334.107.

³⁵³ *Id.* § 334.151. (Some legal analysts have suggested that the admissions tax may constitute an unconstitutional local occupation tax. This issue arises since the state does not levy such a tax and the purpose of the tax is to raise revenue rather than to function as a fee for licensing and regulation.) See Tex. Const. art. VIII, § 1 (f); *Hoefling v. City of San Antonio*, 20 S.W. 85, 88 (Tex. 1892); *City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322, 326-327 (Tex. App. -- Houston [14th Dist.] 1994, pet. denied); *State v. Rope*, 419 S.W.2d 890, 897 (Tex. Civ. App. -- Austin 1967, writ ref'd n.r.e.).

³⁵⁴ Tex. Loc. Gov't Code Ann. §§334.151, 334.152 (Vernon 2005).

³⁵⁵ *Id.* § 334.155(b).

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert each type of tax and the maximum rate of each tax) for the purpose of financing the venue project.”

Effective Date of Admissions Tax

After approval by the voters, the venue project admissions tax becomes effective on the date prescribed by the ordinance or order imposing the tax.³⁵⁶ The tax rate may be set at any uniform percentage, but may not exceed 10 percent of the price of an admission ticket.³⁵⁷ The admissions tax is imposed only on tickets sold as admission to an event held at the venue project, and all revenue from the tax must be deposited into the venue project fund.³⁵⁸

Decrease, Abolition or Increase of the Admissions Tax

Once in place, the admissions tax may be decreased or abolished on the city or county’s own action.³⁵⁹ The tax can be increased only if the increase is approved at an election and the resulting tax rate will not exceed 10 percent.³⁶⁰ At an election to increase the admissions tax, the ballot must be worded to allow voting for or against the following proposition:

“The increase of the admissions tax for the purpose of financing (insert description of venue project) to a maximum rate of percent (insert new rate) of the price of each ticket sold as admission to an event held at an approved venue.”

Collection and Enforcement of the Admissions Tax

The Comptroller’s Office is not involved in the collection of the admissions tax. Instead, the tax is collected by the owner or lessee of the venue project and remitted to the city or county.³⁶¹ The order or ordinance imposing the admissions tax should specify how the tax is to be reported and remitted to the city or county.³⁶² Additionally, the order or ordinance may prescribe penalties for the failure to keep the required records, to report when required, or to pay the tax when due. Finally, the city or county attorney is empowered to bring a lawsuit to collect the admissions tax.

A county or city may allow the lessee or owner of the venue project to retain a percentage of the admission taxes collected as reimbursement for the costs of collecting the tax.³⁶³ The ordinance or order may also provide that the venue project owner or lessee may only retain this

³⁵⁶ *Id.* § 334.155(a).

³⁵⁷ *Id.* § 334.152(b).

³⁵⁸ *Id.* §§ 334.152, 334.157.

³⁵⁹ *Id.* § 334.152.

³⁶⁰ *Id.* § 334.153.

³⁶¹ *Id.* §§ 334.154, 334.156.

³⁶² *Id.* § 334.156.

³⁶³ *Id.* § 334.156(c).

reimbursement if the owner or lessee meets the local requirements for paying the tax and filing the reports.

3. Tax on Event Parking at a Venue Project

A city or a county may impose a tax of not more than \$3.00 for each motor vehicle that parks in a parking facility of a venue project.³⁶⁴ As with other taxes imposed under Chapter 334, the parking tax must have been approved at an election held in accordance with the rules of Chapter 334, and the ballot language must specify the maximum rate of the tax being adopted.³⁶⁵

Ballot Proposition to Adopt an Event Parking Tax

The adoption of the event parking tax may be included in the same ballot proposition that proposes the venue project. The ballot must be printed to allow voting for or against the following proposition:

“Authorizing (*insert name of city or county*) to (*insert description of venue project*) and to impose a tax at the rate of (*insert the type of tax and the maximum rate of the tax*) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition:

“Authorizing (*insert name of city or county*) to (*insert description of venue project*) and to impose a tax at the rate of (*insert each type of tax and the maximum rate of each tax*) for the purpose of financing the venue project.”

Effective Date for Event Parking Tax

After approval by the voters, the parking tax becomes effective on the date prescribed by the ordinance or order imposing the tax.³⁶⁶ The tax rate may be designated as a percentage of the price charged for event parking by the owner or lessee of the venue project or as a flat amount on each parked motor vehicle. In no case may the tax exceed \$3.00 per vehicle for a venue event. Additionally, this tax only applies to parking that occurs during a period beginning three hours before and ending three hours after an event at a venue project.³⁶⁷

The city or county is only authorized to impose the parking tax if bonds or other obligations have been issued under Chapter 334 for the venue project. The tax may continue only until those

³⁶⁴ *Id.* § 334.202.

³⁶⁵ *Id.* §§ 334.201, 334.202.

³⁶⁶ *Id.* § 334.205.

³⁶⁷ *Id.* §§ 334.201(b), 334.202, 334.203(a).

bonds or other obligations have been fully paid,³⁶⁸ and all revenue from the parking tax must be deposited in the venue project fund.³⁶⁹

Decrease, Abolition or Increase of the Event Parking Tax

The parking tax may be decreased or abolished, by ordinance or order, on the city or county's own motion.³⁷⁰ The tax may only be increased if the increase is approved at an election and the resulting tax rate will not exceed \$3.00.³⁷¹ At an election to increase the parking tax, the ballot must be worded to allow voting for or against the following proposition:

“The increase of the parking tax for the purpose of financing (*insert description of venue project*) to a maximum rate of (*insert new rate*).”

Collection and Enforcement of the Event Parking Tax

The Comptroller's Office is not involved in the collection of the event parking tax. Instead, the tax is collected by the owner or lessee of the venue project and remitted to the city or county.³⁷² The order or ordinance imposing the parking tax should specify how the tax is to be reported and remitted to the city or county.³⁷³ Additionally, the order or ordinance may prescribe penalties for the failure to keep the required records, to report when required, or to pay the tax when due. Finally, the city or county attorney is empowered to bring a lawsuit to collect the parking tax.

By order or ordinance, a county or city may allow the lessee or owner of the venue project to retain a percentage of the parking taxes collected as reimbursement for the costs of collecting the tax.³⁷⁴ The ordinance or order may also provide that the venue project owner or lessee may only retain this reimbursement if the owner or lessee meets the local requirements for paying the tax and filing reports.

4. Imposing an Additional Hotel Occupancy Tax

In order to fund a venue project within its boundaries, a city (by ordinance) or a county (by order) may impose an additional hotel occupancy tax of up to two percent on the use of a hotel room.³⁷⁵ In 2003, the Texas Legislature authorized Dallas County to impose an additional hotel occupancy tax up to three percent of the price paid for a room in a hotel.³⁷⁶ This additional hotel occupancy tax must be approved at an election held in accordance with the rules of Chapter 334,

³⁶⁸ *Id.* § 334.205.

³⁶⁹ *Id.* §§ 334.202, 334.207.

³⁷⁰ *Id.* § 334.202.

³⁷¹ *Id.* § 334.203.

³⁷² *Id.* §§ 334.204, 334.206.

³⁷³ *Id.* § 334.206.

³⁷⁴ *Id.* § 334.206.

³⁷⁵ *Id.* § 334.254(a).

³⁷⁶ *Id.* § 334.254(c) (Dallas County has a population of 2,218,899 with nearby Tarrant County having a population of 1,446,219).

and the ballot language must specify the maximum rate of the tax being adopted.³⁷⁷ It is also important to note that the additional local hotel occupancy tax may not be imposed to fund a venue project that is an area or facility that is part of a municipal parks and recreation system or certain Section 4A or Section 4B Economic Development projects.³⁷⁸ Nor may the hotel occupancy tax be imposed to finance a watershed protection and preservation project, recharge protection project, conservation easement or open space preservation program.³⁷⁹ Nonetheless, in a specific legislative exemption, hotel occupancy tax revenue may be used by the city of Grand Prairie for a convention center facility or related infrastructure to be constructed on certain park property acquired by purchase or lease.³⁸⁰

In 2005, the Legislature adopted Senate Bill 1730, which allows the voters to set aside ad valorem (property) tax revenue when the additional hotel occupancy tax has been approved. See the section below on General Powers and Duties for further explanation.

Application of the Additional Hotel Occupancy Tax

If approved by the voters, the Chapter 334 hotel tax is in addition to any local hotel occupancy tax that the city or county may impose under Chapter 351 or 352 of the Texas Tax Code.³⁸¹ The rate of a hotel tax imposed under Chapter 334 may be set at any percentage that was approved by the voters but generally may not exceed two percent of the price of a hotel room.³⁸² Again, the Texas Legislature authorized Dallas County to impose a three percent rate with voter approval.³⁸³

The legislation does not appear to prohibit the adoption of this additional tax even if the city or county is already at its statutory maximum for the local hotel occupancy tax under Chapter 351 or Chapter 352 of the Tax Code. The additional hotel occupancy tax may only be charged for a room that 1) meets the definition of “hotel” under Section 156.001 of the Texas Tax Code; 2) costs at least \$2.00 per night; and 3) is ordinarily used for sleeping.³⁸⁴

Ballot Proposition to Adopt an Additional Hotel Occupancy Tax

The adoption of the additional hotel occupancy tax may be included in the same ballot proposition that proposes the venue project. The ballot must be printed to allow voting for or against the following proposition:

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert the type of tax and the maximum rate of the tax) for the purpose of financing the venue project.”

³⁷⁷ *Id.* §§ 334.254(b), 334.252.

³⁷⁸ *Id.* § 334.2515.

³⁷⁹ *Id.* § 334.2517.

³⁸⁰ *Id.* § 334.2516.

³⁸¹ *Id.* § 334.253(c).

³⁸² *Id.* § 334.254(a).

³⁸³ *Id.* § 334.254(c).

³⁸⁴ *Id.* §§ 334.251, 334.252.

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition:

“Authorizing (*insert name of city or county*) to (*insert description of venue project*) and to impose a tax at the rate of (*insert each type of tax and the maximum rate of each tax*) for the purpose of financing the venue project.”

Effective Date of the Additional Hotel Occupancy Tax

Once approved, the hotel tax becomes effective on the date prescribed by the ordinance or order imposing the tax.³⁸⁵ The hotel tax may only be imposed if the city or county issues bonds or other obligations for a venue project within one year of imposing the tax.³⁸⁶ A city or county is not authorized to impose or continue a venue project hotel occupancy tax if the bonds or obligations for the venue project have been paid in full or if no such obligations were issued. All revenue from the tax must be deposited into the venue project fund.³⁸⁷

Decreasing, Abolishing or Increasing the Additional Hotel Occupancy Tax

Other than requiring the hotel tax to be discontinued when all the venue project obligations are paid off, Chapter 334 does not appear to provide any clear authority for a city or county to decrease or abolish the additional hotel occupancy tax. On the other hand, Chapter 334 expressly states that the additional hotel occupancy tax may only be increased if the increase is approved at an election on the issue and the resulting additional tax rate will not exceed two percent (or three percent for Dallas County).³⁸⁸ At an election to increase the hotel occupancy tax, the ballot must be worded to allow voting for or against the following proposition:

“The increase of the hotel occupancy tax for the purpose of financing (*insert description of venue project*) to a maximum rate of percent (*insert new rate*).”

Collection of the Additional Hotel Occupancy Tax

The Comptroller’s Office is not involved in the collection of any local hotel occupancy tax. Instead, the tax is collected by the local hotels and remitted to the city or county.³⁸⁹ The order or ordinance imposing the hotel tax should specify how the tax is to be reported and remitted to the city or county. Section 334.253 of the Local Government Code makes certain provisions of the Texas Tax Code applicable to the imposition, computation, administration, collection and remittance of the Chapter 334 hotel tax. These tax statutes provide for specific penalties which

³⁸⁵ *Id.* § 334.257.

³⁸⁶ *Id.*

³⁸⁷ *Id.* § 334.258.

³⁸⁸ *Id.* § 334.254.

³⁸⁹ *See id.* § 334.253 (making parts of Tax Code Chapters 351 and 352 applicable to a hotel occupancy tax imposed under Chapter 334 of the Local Government Code. While nowhere expressly stated, it is clear from the language of Chapters 351 and 352 that the intent of those chapters was to have local hotel owners collect the tax and remit it directly to the city or county).

may be assessed against hotel operators who file late or false tax returns.³⁹⁰ The city ordinance may also include a provision that makes it a criminal misdemeanor offense to fail to collect the tax, fail to file a return, file a false return, or fail to timely make the remittances. Municipal courts may assess a fine not to exceed \$500 for any such offense.³⁹¹ Under the applicable sections of the Tax Code, it does not appear that counties are given the authority to criminalize the failure to comply with local hotel tax requirements.

Cities and counties are also given the authority to take the following actions against a hotel operator who fails to report or collect the local hotel occupancy tax:³⁹²

- require the forfeiture of any revenue the city allowed the hotel operator to retain for its cost of collecting the tax (only a city can do this, not a county);
- bring a civil suit against the hotel operator for noncompliance;
- ask the district court to enjoin operation of the hotel until the report is filed and/or the tax is paid; and
- any other remedies provided under Texas law.

The most noteworthy of these remedies is the ability to request that the district court close down the hotel if the hotel occupancy taxes are not turned over. Often, a city or county has gained compliance simply by informing the hotel operator of the possibility of such a closure.

The hotel tax ordinance or order may also require that persons buying a hotel retain out of the purchase price an amount sufficient to cover any delinquent hotel occupancy taxes that are due to the city or county.³⁹³ If the buyer does not remit to the city or county such amount or show proof that the hotel is current in remitting its hotel occupancy taxes, the buyer becomes liable for any delinquent hotel occupancy taxes due on the purchased hotel.³⁹⁴ The buyer of a hotel may request that the city or county provide a receipt showing that no hotel occupancy tax is due on the property to be purchased. The city or county is then required to issue the statement not later than the 60th day after the request. If the city or county fails to issue the statement within the deadline, the purchaser is released from the obligation to withhold the amount due from the purchase price.

Cities or counties may allow hotel operators to retain up to one percent of the amount of hotel occupancy taxes collected as reimbursement for the costs of collecting the tax.³⁹⁵ Cities and counties are not themselves permitted to retain any of the collected tax to cover costs of imposing or collecting the tax. Cities, but not counties, may also require that such reimbursement will automatically be forfeited by a hotel that fails to pay tax or file a report as required by the city.³⁹⁶

³⁹⁰ Tex. Tax Code Ann. §§ 351.004, 352.004 (Vernon 2008).

³⁹¹ Tex. Loc. Gov't Code Ann. §54.001.

³⁹² See Tex. Tax Code Ann. §§ 351.004, 351.005, 352.004 (Vernon 2008).

³⁹³ *Id.* §§ 351.0041, 352.0041.

³⁹⁴ *Id.* § 351.0041(b)-(d), 352.0041(b)-(d).

³⁹⁵ *Id.* §§ 351.005, 352.005.

³⁹⁶ *Id.* § 351.005.

Hotel owners should note that each bill or receipt for a hotel charge that is subject to the Chapter 334 hotel tax must contain a statement listing the applicable hotel occupancy tax rate collected by the hotel from the customer. This statement must list the State of Texas and the State's rate (6%), as well as all other taxing authorities and the hotel occupancy rate they impose.³⁹⁷

Exemptions from the Chapter 334 Hotel Tax

As implied above, certain entities are exempt from the hotel tax imposed under Chapter 334 of the Local Government Code.³⁹⁸ Texas statutes allow an exemption from the hotel tax for persons who have contracted to use a hotel room for more than 30 consecutive days.³⁹⁹ Additionally, the hotel occupancy tax does not apply to certain federal and other high-level officials traveling on federal or state business.⁴⁰⁰ Rather than paying the hotel tax, federal employees, foreign diplomatic personnel and certain high-level state employees simply present a tax exemption certificate to the hotel.⁴⁰¹

Officers or employees of a state agency, institution, board or commission who are traveling on official business are also exempt from the tax.⁴⁰² However, such state employees must still pay the hotel occupancy tax when paying their bill. The state and local government then refund the hotel occupancy tax to the exempt employer through a separate process. For information on how the state handles refunds of the state hotel occupancy tax, contact the State Comptroller's Office at (800) 531-5441, extension 3-3849. A city may want to request a copy of the Comptroller's refund application form for the state hotel occupancy tax and adapt that form for handling refunds of the municipal hotel occupancy tax.

It should be noted that city and county officers and employees are not exempt from the state or local hotel occupancy tax even if the officers or employees are traveling on official business. Similarly, employees of institutions of higher education also are not exempt from the tax. Further, cities may not authorize additional exemptions from the hotel occupancy tax. For example, with regard to a hotel tax imposed under Chapter 351 of the Tax Code, the Attorney General ruled in JM-865 (1988) that cities could not grant an exception to the tax for religious, charitable or educational organizations without new constitutional or statutory authority to do so.

Additionally, certain types of accommodations do not fall within the definition of the term "hotel" for purposes of the Chapter 334 hotel tax. For instance, hospitals, sanitariums, nursing

³⁹⁷ Tex. Loc. Gov't Code Ann. § 334.256(a) (Vernon 2005).

³⁹⁸ Tex. Tax Code Ann. §§ 351.002(c), 351.006, 352.002(c), 352.007 (Vernon 2008).

³⁹⁹ *Id.* §§ 351.002(c), 352.002(c).

⁴⁰⁰ See the ruling in *LaQuinta v. Sharp*, cause # 95-15739, 53rd Judicial District, Travis County, Texas. This case strikes down the requirement that federal employees traveling on federal business first pay the state hotel tax and then request a refund. Rather, such federal employees are exempt from having to pay the state tax in the first place. The court was not asked to rule on whether federal employees must first pay the local hotel tax and then request a refund from the local government. However, the court would presumably have found such a requirement to be just as unconstitutional for the local tax as it is for the state tax. See also Tex. Tax Code Ann. §§ 351.006 and 352.007 (Vernon 2008).

⁴⁰¹ 34 Tex. Admin. Code § 3.161).

⁴⁰² Tex. Tax Code Ann. §§ 351.006, 352.007 (Vernon 2008).

homes, and dormitories or other non-hotel housing facilities owned by institutions of higher education may not charge the tax. Also, while recreational vehicles (RVs) and RV rental spaces are not expressly listed in the statute, the State Comptroller's Office has interpreted the statute to exclude these vehicles from taxation unless they become fixed in place and lose their mobile nature. The following businesses are considered "hotels" and are required to charge the tax⁴⁰³: a hotel, motel, tourist home, tourist court, lodging house, inn, rooming house, or bed and breakfast.

5. Facility Use Tax on Members of a Major League Team

If bonds have been issued under Chapter 334 by a county or city for a venue project within the city or county, the city or the county may impose a tax not to exceed \$5,000 per game against each member of a major league team playing in the venue project.⁴⁰⁴ The facility use tax must have been approved at an election held in accordance with the rules of Chapter 334, and the ballot language must specify the maximum rate of the tax being adopted.⁴⁰⁵

Ballot Proposition to Adopt a Facility Use Tax

The adoption of the Facility Use Tax may be included in the same ballot proposition that proposes the venue project. The ballot must be printed to allow voting for or against the following proposition:

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert the type of tax and the maximum rate of the tax) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the following proposition:

“Authorizing (insert name of city or county) to (insert description of venue project) and to impose a tax at the rate of (insert each type of tax and the maximum rate of each tax) for the purpose of financing the venue project.”

Effective Date of the Facility Use Tax

After approval by the voters, the facility use tax becomes effective on the date prescribed by the ordinance or order imposing the tax.⁴⁰⁶ The tax rate may be set at any uniform monetary amount,

⁴⁰³ Tex. Loc. Gov't Code Ann. § 334.251 (Vernon 2005) (The term "hotel" has the meaning assigned by Tex. Tax Code Ann. §156.001 (Vernon 2008)).

⁴⁰⁴ Tex. Loc. Gov't Code Ann. §§ 334.302, 334.306 (Vernon 2005). (Some legal analysts have suggested that the facility use tax may constitute an unconstitutional local occupation tax. This issue arises since the state does not levy such a tax and the purpose of the tax is to raise revenue rather than to function as a fee for licensing and regulation.) See Tex. Const. art. VIII, Section 1 (f); *Hoefling v. City of San Antonio*, 20 S.W. 85, 88 (Tex. 1892); *City of Houston v. Harris County Outdoor Advertising Association*, 879 S.W.2d 322, 326-327 (Tex. App. -- Houston [14th Dist.] 1994, pet. denied); *State v. Rope*, 419 S.W.2d 890, 897 (Tex. Civ. App. -- Austin 1967, writ ref'd n.r.e.).

⁴⁰⁵ Tex. Loc. Gov't Code Ann. §§ 334.302, 334.303 (Vernon 2005).

⁴⁰⁶ *Id.* § 334.306.

but may not exceed \$5,000 per game per member of a professional sports team playing in the venue project.⁴⁰⁷ The facility use tax may be imposed only on games actually held in the venue project. The city or county is not authorized to collect such a facility use tax if the venue project bonds have been paid in full or if no such bonds are issued.⁴⁰⁸ All revenue from the tax must be deposited in the venue project fund.⁴⁰⁹

Decrease, Abolition, or Increase of Facility Use Tax

Once in place, the facility use tax may be decreased or abolished, by ordinance or order, on the city or county's own motion.⁴¹⁰ The tax may only be increased if the increase is approved at an election and the resulting tax rate would not exceed \$5,000 per member per game.⁴¹¹ At an election to increase the facility use tax, the ballot must be worded to allow voting for or against the following proposition:⁴¹²

“The increase of the facility use tax for the purpose of financing (*insert description of venue project*) to a maximum rate of a game (*insert new rate*).”

Collection and Enforcement of the Facility Use Tax

The Comptroller's Office is not involved in the collection of the facility use tax. Instead, the tax is collected by the owner or lessee of the venue project and remitted to the city or county.⁴¹³ The order or ordinance imposing the facility use tax should specify how the tax is to be reported and remitted to the city or county.⁴¹⁴ Additionally, the order or ordinance may prescribe penalties for the failure to keep the required records, to report when required, or to pay the tax when due. Finally, the city or county attorney is empowered to bring a lawsuit to collect the facility use tax.

By order or ordinance, a county or city may allow the lessee or owner of the venue project to retain a percentage of the facility use taxes collected as reimbursement for the costs of collecting the tax.⁴¹⁵ The ordinance or order may also provide that the venue project owner or lessee may only retain this reimbursement if the owner or lessee meets the local requirements for paying the tax and filing reports.

It is important to note that the facility use tax may only be collected from members of a “major league team” as defined by Section 334.301 of the Texas Local Government Code. That section defines this term to include a team that is a member of the National Football League, the National Basketball Association or the National Hockey League. The term also includes a major league baseball team or any other professional team.

⁴⁰⁷ *Id.* § 334.303.

⁴⁰⁸ *Id.* § 334.306(b).

⁴⁰⁹ *Id.* § 334.308.

⁴¹⁰ *Id.* § 334.303(d).

⁴¹¹ *Id.* § 334.304(a).

⁴¹² *Id.* § 334.304(b).

⁴¹³ *Id.* §§ 334.305, 334.307.

⁴¹⁴ *Id.* § 334.307.

⁴¹⁵ *Id.* § 334.307(c).

6. Special Motor Vehicle Tax Authorized in Certain Cities

A city with a population of more than 500,000 that is located in a county bordering Mexico has special authority to impose a tax on the rental of motor vehicles.⁴¹⁶ Unlike the regular Chapter 334 motor vehicle rental tax, this tax may only be used to pay for the costs associated with an annual post-season college bowl game held in the city.⁴¹⁷ Otherwise, however, this tax is governed by the same provisions as govern the regular Chapter 334 motor vehicle rental tax, including the requirement that the tax be approved at an election.⁴¹⁸ At present, this provision only applies to the city of El Paso.

General Powers and Duties of the City or County Undertaking a Venue Project

Once a venue project has been approved by the voters, the city or county has the following general powers and duties with regard to that project:⁴¹⁹

Delegate Management of Project. A city or county may contract with a public or private entity, including a sports team, to develop the venue project or to perform any other action that the city or county could do under Chapter 334.⁴²⁰ If such a contract is with a school district, junior college or institution of higher education (as defined in the Education Code), the contract may provide for joint ownership and operation or for joint use of the venue project. However, in no circumstance is the city or county authorized to contract with another entity to have that entity conduct a city or county election under Chapter 334.

Property Tax Exemption for Venue Project Property. Section 334.044 of the Local Government Code states that a venue project is exempt from taxation under Section 11.11 of the Texas Tax Code while the city or county owns the project. However, each year the operators of a venue project must pay to a school district an amount equal to the taxes that would have been paid on the unimproved real property. This requirement does not apply if the venue project operator is a political subdivision of the state.

Exemption from Competitive Bidding. Competitive bidding laws do not apply to an approved venue project.

Limit on Use of Property Taxes. A city or county generally may not use ad valorem (property) taxes to construct, operate, maintain or renovate a venue project. However, the voters of a city or county that imposes an additional hotel occupancy tax described above may approve use of a specific percentage or a fixed amount of the revenue derived from

⁴¹⁶ *Id.* §§ 334.352, 334.353.

⁴¹⁷ *Id.* §§ 334.351, 334.354.

⁴¹⁸ *Id.* § 334.353.

⁴¹⁹ *See generally id.* § 334.041.

⁴²⁰ *Id.* § 334.041(c).

property taxes for that entity.⁴²¹ At such an election, the ballot must be worded to allow voting for or against the following proposition:

“Authorizing _____ (insert name of municipality or county) to use an amount not to exceed _____ (insert percentage of property tax revenue or dollar amount to be used) of the revenue derived from the _____ (insert “county” or “municipal”) property tax, in addition to the hotel occupancy tax and any other applicable taxes, for the purpose of financing the _____ (describe the venue project).”

Ability to Dispose of Property. A city or county may acquire or dispose of an interest in property, including a venue project, under the terms and conditions that seem advisable to the city or county.

Application of Public Information Act. Any records of a city or county that relate to an approved venue project or its financing are subject to the Public Information Act.⁴²²

Harris County Exception. In a county with a population of over 2.8 million, no tax on real or personal property may be used for any venue authorized by an election on November 5, 1996, and constructed after that date.⁴²³

Sale of Park. A 2005 amendment specifies that voters need not approve sale or lease of a public square or municipal park related to an approved venue project.⁴²⁴

Establishing the Venue Project Fund

Under Chapter 334, a city or county must establish, by resolution, a “venue project fund.”⁴²⁵ The fund must have a separate account for each of the various revenue sources for the venue project. The city or county must then deposit the following monies into the fund: 1) the proceeds of any tax imposed by the city or county under authority of Chapter 334; 2) all revenue from the sale of bonds or other obligations under Chapter 334; and 3) any other money required by law to be deposited into the fund.

A city or county is not required to deposit money into the venue project fund unless it falls into one of the above three categories. However, if a city or county wishes to do so, it may also deposit the following monies into the fund: 1) money received from innovative funding concepts such as the sale or lease of luxury boxes or the sale of licenses for personal seats; and 2) any other revenue received by the city or county from the venue project (e.g., stadium rental payments and revenue from parking and concessions). Any money deposited into the venue project fund is considered the property of the city or county that deposited it.

⁴²¹ *Id.* § 334.0241, 334.041(f)(2).

⁴²² *Id.* § 334.0425.

⁴²³ *Id.* § 334.006.

⁴²⁴ *Id.* § 334.045.

⁴²⁵ *Id.* § 334.042.

Once funds are deposited into the venue project fund, the money may be used only for the following purposes: 1) paying the costs of planning, acquiring, developing, establishing, constructing or renovating a venue project in the city or the county; 2) paying costs related to bonds and other obligations issued by the city or county for the project; or 3) paying the costs of operating or maintaining the venue projects.

Authority to Issue Bonds

Once a venue project is approved by the voters, the city or county may issue bonds and other obligations to pay for the costs of the project.⁴²⁶ These bonds or other obligations must be payable from and secured by the revenues in the venue project fund and must mature within 30 years of the date on which they are issued. Additionally, any such obligations must be approved by the Public Finance Division of the Texas Attorney General's Office. Bonds or other obligations issued under Chapter 334 are not a debt of the city or county. Such obligations do not create a claim against city or county tax revenue or property other than against the revenue sources that are specifically pledged and the venue project for which the bonds are issued.

Special Uses of Venue Revenues

In 2007, the Legislature amended chapter 334 in two different ways regarding potentially unforeseen uses of the venue fund proceeds. First, it prohibited use of the venue fund related to the improvement, renovation or expansion of a particular venue for the demolition of the venue and the construction of a new venue.⁴²⁷ Second, it allowed a local entity already imposing taxes to fund a venue project to call for an election to approve the use of revenue from these taxes (excluding hotel occupancy taxes) to finance a "related" venue project. This allows the use of revenue to support the improvement and maintenance of a facility not originally funded by the venue tax or specified in the original election but yet related to the facility first funded by these taxes. The language in the ballot must read:

"Authorizing _____ (insert name of municipality or county) to use an amount not to exceed _____ (insert each type of tax) of the revenue derived from the _____ (insert each type of tax) tax, to finance the _____ (describe the related venue project and its relation to the previously approved venue project)."⁴²⁸

Chapter 335 Sports and Community Venue Districts

Like Chapter 334 of the Local Government Code, Chapter 335 appears to apply to all cities and counties in Texas. Chapter 335 authorizes cities and counties to join together as a group to

⁴²⁶ *Id.* § 334.043.

⁴²⁷ Tex. Loc. Gov't Code Ann. § 334.003 (Vernon Supp. 2008) (as amended by Tex. S.B. 191, 80th Leg., R.S. (2007)).

⁴²⁸ *Id.* § 334.0242 (as added by Tex. H.B. 1524, 80th Leg., R.S. (2007)).

undertake community and sports venue projects. Under this chapter, any city or county may join with any other city and/or county to form a “venue district.” There is no limit to the number of cities and/or counties that may join to form a single venue district. Once formed, the district is vested with all the powers that an individual city or county would have under Chapter 334. The formation of such venue districts may be of particular use for communities that are too small to individually handle or fund a venue project.

Permissible Projects Under Chapter 335

If approved in an election held according to the rules set forth in Chapter 335, a venue district may undertake a “venue project” as defined in Chapter 334 of the Local Government Code (discussed previously).⁴²⁹ The term “venue project” is defined as a “venue and related infrastructure that is planned, acquired, established, developed, constructed or renovated under this chapter.”⁴³⁰ The term “venue” is defined as being one of the following:

An arena, coliseum, stadium or other type of area or facility:⁴³¹

- that is used or will be used for professional or amateur sports, or for community civic and charitable events; and
- where a fee for admission to these events will be charged;

A convention center or related improvement that is located in the vicinity of the convention center. The term “related improvement” is used rather broadly and includes such things as civic center hotels, auditoriums, theaters, opera or music halls, exhibition halls, rehearsal halls, parks, zoos, museums or plazas;

A tourist development area along an inland water way;

A municipal parks and recreation system, improvements or additions to a parks and recreation system, or an area or facility that is part of a municipal parks and recreation system.⁴³² However, it appears that neither the motor vehicle rental tax nor the local hotel tax authorized by Chapter 335 may be used as a revenue source to pay for a venue project of this nature;⁴³³

⁴²⁹ *Id.* §§ 335.001, 335.051 (Vernon 2005).

⁴³⁰ *Id.* § 334.001(5).

⁴³¹ See *id.* Section 335.0715. (It should be noted that a district would not be able to use the provisions of Chapter 334 to finance a professional sports stadium if the city or county had already contracted with a professional sports team prior to November 1, 1998, for the team to relocate and play in the stadium. This prohibition only applies if the team is already playing under an existing contract in a stadium owned by another Texas city or county. Even in this circumstance, a stadium may be financed under Chapter 334 if the other city or county (where the team is currently playing) consents).

⁴³² *Id.* § 335.001 (defining “venue” and “venue project” to have the same meaning as under Tex. Loc. Gov’t Code Ann. § 334.001).

⁴³³ *Id.* § 335.071(e) (venue district may impose any tax authorized by Chapter 334 and must impose the tax in the same manner as a city or county would under that chapter). See *id.* §§ 334.1015, 334.2515.

A certain economic development project authorized by Section 4A or Section 4B of the Development Corporation Act of 1979, Article 5190.6 of Texas Revised Civil Statutes, as that Act existed on September 1, 1997;⁴³⁴ or

A certain watershed protection and preservation project, recharge or recharge feature protection projects, conservation easements or an open-space preservation program intended to protect water.⁴³⁵

Section 334.001(3) defines the term “related infrastructure” to include any on-site or off-site improvements that relate to and enhance the use, value or appeal of a venue, and any other expenditure that is necessary to construct or improve a venue. The statute lists the following examples of improvements that would qualify as related infrastructure: stores, restaurants, on-site hotels, concessions, parking, transportation facilities, roads, water and sewer facilities, parks or environmental remediation.

A district may only use Chapter 335 to construct a project that falls within the definition of the term “venue” or within the definition of “related infrastructure” given in Chapter 334. However, once the venue facility is constructed, state law permits the facility to be used for an event that is not related to one of the above-described venue purposes, such as a community-related event.⁴³⁶ Also, if an existing facility would qualify as a venue project under Chapter 334, a district may use the authority granted under Chapter 335 to aid that facility even though it was originally constructed or undertaken under the authority of other law.⁴³⁷

Procedure for Authorizing a Venue Project

Step One:

The venue district must obtain approval for the project from the Comptroller’s Office.

Before a venue district may have an election to undertake a venue project, it must obtain approval of the project from the Comptroller’s Office.⁴³⁸ The Comptroller reviews the project to determine whether the proposed financing would “have a significant negative fiscal impact on state revenue.” To obtain this approval, the district must send to the Comptroller a copy of the resolution proposing the venue project.⁴³⁹ This resolution must indicate each proposed project and each method of financing for the project.⁴⁴⁰ Within 14 days of the Comptroller’s receipt of the resolution, it must perform the required analysis and provide the district with written notice

⁴³⁴ *Id.* § 334.001(4)(E).

⁴³⁵ *Id.* § 334.001(4)(F).

⁴³⁶ *Id.* § 335.003.

⁴³⁷ *Id.* § 335.002 (Vernon Supp. 2008).

⁴³⁸ *Id.* §§ 335.051, 335.054 (Vernon 2005). *But see* Sections 7, 8 and 9 of Texas House Bill 92, 75th Legislature, Regular Session (1997) (excepting certain cities, counties and venue districts from the requirements of holding an election and of obtaining Comptroller approval).

⁴³⁹ Tex. Loc. Gov’t Code Ann. § 335.052 (Vernon 2005).

⁴⁴⁰ *Id.* § 335.051.

of its decision.⁴⁴¹ If the Comptroller determines that the resolution would have a significant negative impact on state revenue, the Comptroller must indicate in writing how the district could change the resolution so that there would not be such a negative impact. If the Comptroller fails to provide the required analysis in less than 30 days, the resolution is considered to be approved by the Comptroller.

If the Comptroller finds that a venue project resolution will have a negative impact on state revenue, the district has 10 days to appeal the negative ruling.⁴⁴² Such an appeal is again made to the Comptroller, and the Comptroller would have another 10 days to provide a new analysis. If the Comptroller's ruling is still negative, the analysis must again include information on how the district could change the resolution so that there would not be a negative impact on state revenue. If the Comptroller fails to provide the required analysis within 30 days, the resolution is automatically considered approved. If the Comptroller's Office continues to hold that the venue project would have a negative impact on state revenue, the venue district will not be able to hold the required election on the approval of the venue project and the related means of financing.⁴⁴³

Step Two:

Certain venue districts must also obtain approval from the local transit authority.

If a venue project resolution contains a proposed sales tax, the venue district must determine if that tax would result in the reduction of a sales tax rate that funds a transit authority created under either Chapter 451 or Chapter 452 of the Texas Transportation Code.⁴⁴⁴ This issue would only arise if the area was subject to a transit authority sales tax and if the adoption of a venue project sales tax would place the district beyond the two percent cap for the local sales tax. If these circumstances would arise because of the proposed venue project, the district must send the transit authority a copy of the venue resolution for approval by the authority. The resolution sent to the transit authority must designate each venue project and each method of financing that the district proposes to use to finance the project.⁴⁴⁵ If the proposed financing for the venue project would not cause a reduction in the transit authority sales tax, approval from the transit authority is not required.

Within 30 days of the transit authority's receipt of the resolution, it must determine whether the reduction in the transit authority's tax rate would have a significant negative impact on its ability to provide services or would impair any existing contracts.⁴⁴⁶ The transit authority must also provide the written results of its analysis to the district within this period. If the transit authority fails to provide this analysis within the required period, the authority is deemed to have approved the resolution. Also, if the transit authority's ruling is negative, it must state how the district could change the venue project resolution so that there would not be a negative impact on the transit authority's ability to provide transit service or fulfill existing contracts.

⁴⁴¹ *Id.* § 335.052.

⁴⁴² *Id.* § 335.053.

⁴⁴³ *Id.* § 335.054.

⁴⁴⁴ *Id.* § 335.0535.

⁴⁴⁵ *Id.* § 335.051.

⁴⁴⁶ *Id.* § 335.0535.

If the transit authority finds that a venue project resolution would have a negative impact on the authority's ability to provide service or would impair existing contracts, the district may appeal the negative ruling within 10 days.⁴⁴⁷ Such an appeal is again made to the transit authority, and the authority must provide a new analysis within 10 days of its receipt of the appeal. If the transit authority's ruling is still negative, the analysis must include information on how the district could change the resolution so that there would not be a negative impact on the authority's ability to provide service or fulfill existing contracts. If the transit authority fails to provide the required analysis within 10 days, the resolution is automatically considered approved.

If the transit authority continues to find that the venue project would have a negative impact, the district will be unable to hold the required election for the approval of the venue project and its financing.⁴⁴⁸

Step Three:

The venue district must hold an election on the venue project.

In order to undertake a venue project, a venue district must receive voter approval of the project and the proposed means of financing the project.⁴⁴⁹ As discussed above, the district cannot proceed with such an election without approval from the Comptroller's Office and, if applicable, from the local transit authority. Once it has received the required approvals, the district may order the required election. The order calling the election must meet all of the following criteria:

- Allow the voters to vote separately on each venue project;
- Designate the venue project;
- Designate each method of financing that the district wants to use to finance the venue project and designate the maximum rate for each method; and
- Allow the voters to vote (in the same proposition or in separate propositions) on each method of financing that the district wants to use to finance the project and the maximum rate of each method.

In addition to the above requirements for the election order, there is required wording for the ballot proposition. The ballot must be printed to allow voting for or against the following proposition:

⁴⁴⁷ *Id.* § 335.0536.

⁴⁴⁸ *Id.* § 335.054.

⁴⁴⁹ *Id.*, *id.* § 335.051. *But see* Sections 7, 8 and 9 of Texas House Bill 92, 75th Legislature, Regular Session (1997) (excepting certain cities, counties and venue districts from the requirements of holding an election and of obtaining Comptroller approval).

“Authorizing (insert name of the venue district) to (insert description of venue project) and to impose a tax at the rate of (insert the type of tax and the maximum rate of the tax) for the purpose of financing the venue project.”

If more than one method of financing is to be voted on in one proposition, the ballot must be printed to permit voting for or against the proposition:

“Authorizing (insert name of the venue district) to (insert description of venue project) and to impose a tax at the rate of (insert each type of tax and the maximum rate of each tax) for the purpose of financing the venue project.”

If the venue project is for improvements or additions to an existing park or recreation facility, the description of the project in the ballot proposition must identify each park or recreation facility by name or location. If the venue project is for the acquisition or improvement of a new park or recreation facility, the description of the project in the ballot must specify the general location where the new park, recreational system or facility will be located. If the venue project includes improvements and/or additions to all parks and/or recreation facilities of the city, the ballot proposition description need not contain the name or location of the facilities.⁴⁵⁰

The Texas Election Code governs the procedures for holding an election under Chapter 335. A venue district will want to check with the Elections Division at the Secretary of State’s Office if the district has any questions about the requirements of the Election Code. The Elections Division may be reached by phone at (800) 252-8683.

General Powers and Duties of a Venue District

Once a venue project has been approved by the voters, the venue district has the following general powers and duties with regard to that project:⁴⁵¹

- **Power to Impose Taxes and Fees.** Subject to the approval of the district voters, a venue district may impose any tax that a city or county can impose under Chapter 334 of the Texas Local Government Code. The district must follow all the rules set forth for such taxes in Chapter 334.

Under Chapter 334 of the Local Government Code, there are slightly different regulations governing the imposition of an additional hotel occupancy tax by a city and the imposition of such a tax by a county.⁴⁵² The conservative course would be to follow the rules set out for a county since these rules are slightly more restrictive than those applicable to cities.

⁴⁵⁰ Tex. Loc. Gov’t Code Ann. § 335.071(e) (Vernon 2005) (district may impose any tax authorized under Chapter 334, subject to voter approval as prescribed by that chapter). *See also id.* § 334.024(f).

⁴⁵¹ *Id.* § 335.071.

⁴⁵² *See id.* § 334.253.

Similarly, under Chapter 334, there are different regulations governing the imposition of a city sales tax for a venue project and the imposition of a county sales tax for a venue project, and it is currently unclear which rules a venue district should follow.⁴⁵³ A venue district wishing to impose either a sales tax or a hotel occupancy tax should discuss this problem with local legal counsel.

- **Power of Eminent Domain.** Subject to the requirements of Chapter 21 of the Texas Property Code, a venue district has the power of eminent domain. Additionally, Section 335.071 sets forth special provisions for a venue district involved in the appeal of an eminent domain proceeding.
- **Employment of Staff and Adoption of Rules.** The district may employ the necessary personnel and adopt rules to govern the operation of the district and its employees and property.⁴⁵⁴
- **Inability to Adopt a Property Tax.** A venue district may not levy an ad valorem (property) tax.⁴⁵⁵
- **Ability to Accept Donations.** The district may accept donations.⁴⁵⁶
- **Application of the Public Information Act.** The district is subject to the Public Information Act.⁴⁵⁷
- **Application of the Open Meetings Act.** The district is subject to the Open Meetings Act.⁴⁵⁸
- **Status as Political Subdivision.** A venue district is considered to be a political subdivision of the state of the cities and counties that created it.⁴⁵⁹
- **Power to Delegate Management of Project.** A venue district may contract with a public or private entity, including a sports team, to develop the venue project or to perform any other action that the district could do under Chapter 335.⁴⁶⁰ If such a contract is with a school district, junior college or institution of higher education (as defined in the Education Code), the contract may provide for joint ownership and operation or for joint use of the venue project. However, in no circumstance is the

⁴⁵³ See *id.* § 334.082.

⁴⁵⁴ *Id.* § 335.071(a)(4) & (5).

⁴⁵⁵ *Id.* § 335.071(f).

⁴⁵⁶ *Id.* § 335.071(a)(2).

⁴⁵⁷ *Id.* §§ 335.0725, 335.023(c)(specifying that the Public Information Act applies to district records related to an approved venue project and the revenue used to finance the project).

⁴⁵⁸ *Id.* § 335.023(b).

⁴⁵⁹ *Id.* § 335.023(a).

⁴⁶⁰ *Id.* § 335.071.

district authorized to contract with another entity to have that entity conduct a district election under Chapter 335.

- **Property Tax Exemption for Venue District Property.** Section 335.074 of the Local Government Code states that a venue project is exempt from taxation under Section 11.11 of the Texas Tax Code while the venue district owns the project. However, each year the operators of a venue project must pay to a school district an amount equal to the taxes that would have been paid on the unimproved real property. This requirement does not apply if the venue project operator is a political subdivision of the state.
- **Exemption from Competitive Bidding.** Competitive bidding laws do not apply to an approved venue project.⁴⁶¹
- **Ability to Dispose of Property.** A venue district may acquire or dispose of an interest in property, including a venue project, under the terms and conditions that seem advisable to the district board.⁴⁶²
- **Sue and be Sued.** A venue district, through its board, may sue and be sued in any state court in the name of the district.⁴⁶³

Establishing the Venue Project Fund

Under Chapter 335, a venue district must establish, by resolution, a “venue project fund.”⁴⁶⁴ The fund must have a separate account for each of the various revenue sources for the venue project. The district must then deposit the following monies into the fund: 1) the proceeds of any tax imposed by the district under authority of Chapter 335; 2) all revenue from the sale of bonds or other obligations under Chapter 335; 3) money received under Local Government Code Section 335.075 from a political subdivision that created the district; and 4) any other money required by law to be deposited into the fund.

A district is not required to deposit money into the venue project fund unless it falls into one of the above four categories. However, if a district wishes to do so, it may also deposit the following monies into the fund: 1) money received from innovative funding concepts such as the sale or lease of luxury boxes or the sale of licenses for personal seats; and 2) any other revenue received by the district from the venue project (e.g., stadium rental payments and revenue from parking and concessions). Any money deposited into the venue project fund is considered the property of the district that deposited it.

Once funds are deposited into the venue project fund, the money may be used only for the following purposes: 1) paying the costs of planning, acquiring, developing, establishing,

⁴⁶¹ *Id.* § 335.071(d).

⁴⁶² *Id.* § 335.071(a)(3).

⁴⁶³ *Id.* § 335.005.

⁴⁶⁴ *Id.* § 335.072.

constructing, or renovating a venue project in the venue district; 2) paying costs related to bonds and other obligations issued by the district for the project; or 3) paying the costs of operating or maintaining the venue projects.

Authority to Issue Bonds

Once a venue project is approved by the voters, the venue district may issue bonds and other obligations to pay for the costs of the project.⁴⁶⁵ These bonds or other obligations must be payable from and secured by the revenues in the venue project fund and must mature within 30 years of the date on which they are issued. Additionally, any such obligations must be approved by the Public Finance Division of the Texas Attorney General's Office. Bonds or other obligations issued under Chapter 335 are not a debt of the venue district. Such obligations do not create a claim against district tax revenue or property other than against the revenue sources that are specifically pledged and the venue project for which the bonds are issued.

It is important to note that a venue district has the authority to issue short-term obligations and enter into credit agreements under Texas Government Code Chapter 1371. For purposes of that statute, a district is considered to be a "issuer" and an approved venue project is an "eligible project."

Contributions from Other Political Subdivisions

If a political subdivision receives sales tax revenue from businesses operating in a venue project sponsored by a venue district, the political subdivision may voluntarily contribute part or all of those sales tax revenues to the venue district.⁴⁶⁶ In order to do this, the governing body of the political subdivision must find that the venue project which generated the sales tax will add to the economic, cultural or recreational well-being of the political subdivision's residents. Additionally, if the sales tax revenue is contributed to assist the district in securing debt that was issued to fund a venue project, then such contributions must stop as soon as the debt is paid off. As with tax money raised by the venue district, sales tax contributions from other political subdivisions must be deposited into the venue project fund. However, it appears that such contributions from a political subdivision would not need to be approved by the voters as would other methods of financing.⁴⁶⁷

Creating a Venue District

Two or more counties, two or more cities, or any combination of cities and counties may create a venue district.⁴⁶⁸ In order to do this, each of the cities and/or counties that wish to join in the

⁴⁶⁵ *Id.* § 335.073.

⁴⁶⁶ *Id.* § 335.075.

⁴⁶⁷ *Id.* § 335.075(d) (states that such contributions are not to be considered a "method of financing" for purposes of Subchapter D of Chapter 335. That subchapter (Section 335.051) requires that the voters approve all the Chapter 335 "methods of financing" used by a venue district).

⁴⁶⁸ *Id.* § 335.021.

creation of the district must adopt a concurrent order.⁴⁶⁹ The concurrent orders must meet all of the following criteria:⁴⁷⁰

- All of the concurrent orders must contain identical provisions;
- The boundaries of the venue district must be defined to be coextensive with the combined boundaries of each of the cities and counties creating the district;
- The number of directors on the district board of directors must be designated. State law requires that there be at least four directors on the board;
- State law requires that the directors be appointed by the county judges (if only counties are forming the district), the mayors (if only cities are forming the district), or the county judges and mayors (if both cities and counties are forming the district). However, the method by which this body of county judges and/or mayors will appoint the directors is not set forth by state law and must be specified in the concurrent orders; and
- The concurrent orders must designate the manner in which the chair of the board will be appointed.

Directors of a Venue District

To be eligible for service on the board of directors of a venue district, a person must meet certain requirements set forth in state law.⁴⁷¹ First, the person must be a resident of the appointing political subdivision. Second, if an officer, employee or member of a city or county governing body serves as a director, that person may not have any personal interest in a contract executed by the district.

Members of a venue district board of directors serve staggered two-year terms, and their successors are appointed in the same manner as the original appointees (according to the concurrent orders).⁴⁷² A director may be removed by the appointing mayor or county judge at any time without cause and is not entitled to any compensation other than reimbursement for actual expenses.⁴⁷³ Additionally, directors are required to file certain financial statements required of state officers under chapter 572 of the Texas Government Code.⁴⁷⁴ The financial statements must be filed with the board of directors and with the Texas Ethics Commission.⁴⁷⁵ A director commits a Class B misdemeanor if the director fails to file the financial statement.⁴⁷⁶

⁴⁶⁹ *Id.* § 335.022.

⁴⁷⁰ *Id.* §§ 335.022, 335.031.

⁴⁷¹ *Id.* § 335.031.

⁴⁷² *Id.* § 335.031(c).

⁴⁷³ *Id.* § 335.032.

⁴⁷⁴ *Id.* § 335.1085(a).

⁴⁷⁵ *Id.* § 335.1085(a)(1)-(2).

⁴⁷⁶ *Id.* § 335.1085(c).

The presiding officer of a venue district board of directors is designated as provided by the concurrent order setting up the district.⁴⁷⁷ The directors must also designate a secretary from among the board's members and any other officers the board considers necessary. The board of directors is subject to the Texas Open Meetings Act,⁴⁷⁸ and all board meetings must be conducted within the boundaries of the venue district.⁴⁷⁹

Pledge of Existing City Sales Tax Revenue for Venue Projects

In House Bill 92, the 1997 Legislature also added Section 321.508 to the Texas Tax Code. That section allows a city to pledge up to 25 percent of its existing sales tax to pay off debt issued for one or more venue projects located in the city. This authority is separate from and in addition to any authority a city may have under Chapters 334 or 335 of the Local Government Code. The term "venue project" has the same definition in Section 321.508 as it does in Chapter 334.⁴⁸⁰

The only types of sales tax that may be pledged for a venue project under Section 321.508 are the general city sales tax ("municipal sales and use tax") and the sales tax for property tax relief ("additional municipal sales and use tax"). A dedicated sales tax collected for specific purposes may not be pledged under the authority of this statute. For instance, a city could not use this section to pledge part of a Section 4A or Section 4B economic development sales tax.

A city may only pledge its sales tax under the authority of Section 321.508 if it is authorized to do so by the voters at an election held on this issue. The ballot at this election must be printed to allow voting for or against the following proposition:

“Authorizing the City of (insert name of city) to pledge not more than percent (insert percentage of sales tax to be pledged) of the revenue received from the (insert “municipal sales and use tax,” “additional municipal sales and use tax,” or both) previously adopted in the city to the payment of obligations issued to pay all or part of the costs of (insert description of each venue project).”

If the voters approve the pledge of the sales tax, the city may issue bonds and other forms of debt that are payable from and secured by the pledged sales tax revenue. The money from this debt may only be used to pay for the costs of the venue projects described in the ballot proposition. This pledge of the sales tax continues only until the debt is paid off. The city may direct the Comptroller to deposit the pledged money into a trust or account as required by the terms of the debt.

⁴⁷⁷ *Id.* § 335.034.

⁴⁷⁸ *Id.* § 335.023(b).

⁴⁷⁹ *Id.* § 335.033.

⁴⁸⁰ *Id.* § 334.001.

III. Local Property Tax Incentives

Property Tax Abatement

Local governments often use tax abatement to attract new industry and commercial enterprises and to encourage the retention and development of existing businesses. More than 700 tax abatement agreements have been executed by Texas local governments since the early 1980s. These agreements are credited with producing many new or retained jobs.⁴⁸¹ In 2001, the Texas Legislature re-authorized local governments to continue using property tax abatements until September 1, 2009.⁴⁸² The statutes governing tax abatement are located in chapter 312 of the Texas Tax Code.

Incorporated cities, counties and special districts are allowed to enter into tax abatement agreements. However, most school districts may not enter into tax abatement agreements under Chapter 312 of the Texas Tax Code.⁴⁸³ A school district's ability to limit appraised values on certain property is found in the Texas Economic Development Act, chapter 313 of the Tax Code.⁴⁸⁴

Whether a city or a county may initiate a tax abatement agreement depends upon the location of the property that would be subject to the tax abatement.⁴⁸⁵ If the property subject to abatement is located within the city limits, the city would be the lead party in the tax abatement. If the property to be abated is located within the extraterritorial jurisdiction (ETJ) of the city, either the city or the county may serve as the lead party. If the property is located outside the city's boundaries and outside the city's ETJ, the county must serve as the lead party for tax abatement.

Tax abatement involves six steps for any participating taxing unit:

Step One:

Each taxing unit that wants to consider tax abatement proposals must adopt a resolution indicating its intent to participate in tax abatement.⁴⁸⁶

The resolution can be a mere statement indicating the local government's "intent" to consider providing tax abatements. The resolution does not bind the government to grant approval of any proposed agreements. The resolution must be adopted at an open meeting by a simple majority vote of the taxing unit's governing body. If the entity is a home rule city, it is possible that the city's charter may require more than a simple majority for approval for the abatement.

⁴⁸¹ See Biennial Reports of Reinvestment Zone for Tax Abatement Registry, Tax Abatement Agreement Registry & Tax Increment Financing Zone Registry, See 2004 published by Texas Comptroller of Public Accounts.

⁴⁸² Tex. Tax Code Ann. § 312.006 (Vernon 2008).

⁴⁸³ *Id.* § 312.002 (f).

⁴⁸⁴ *Id.* ch. 313.

⁴⁸⁵ See *id.* §§ 312.204, 312.206, 312.401.

⁴⁸⁶ *Id.* § 312.002(a).

Step Two:

Each taxing unit must adopt tax abatement guidelines and criteria.⁴⁸⁷

The guidelines and criteria are a set of conditions that any tax abatement proposal must meet in order to be eligible for tax abatement by the involved taxing unit. Some taxing units adopt very general guidelines and criteria in order to have flexibility in the types of proposals they may consider. Other local governments prefer to include very specific criteria that must be met in order to limit the number of requests for tax abatement.

The guidelines and criteria are effective for a period of two years.⁴⁸⁸ They must provide for the availability of tax abatement to both new facilities and structures and for the expansion or modernization of existing facilities and structures.⁴⁸⁹ The guidelines and criteria may be amended or repealed only by a favorable vote of three-fourths of the members of the governing body.⁴⁹⁰ It is important to note, however, that these guidelines do not limit a governing body's discretion to choose whether or not to enter into any particular abatement agreement, and they do not give any person a legal right to require the governing body to consider or grant a specific application for tax abatement.⁴⁹¹ Further, the guidelines and criteria adopted by a county may include a requirement of a tax abatement application fee not to exceed \$1000.⁴⁹²

Each taxing unit may have a different set of guidelines and criteria that it adopts. However, local governments such as the city, county and other districts frequently will adopt similar (and sometimes identical) guidelines and criteria to make participation in tax abatement more convenient for businesses. The Texas Comptroller's Office acts as the state registry for all tax abatement documents.⁴⁹³

Step Three:

After holding a public hearing and providing notice, the taxing unit that is the lead party in the tax abatement must designate an area as a "reinvestment zone."⁴⁹⁴

Incorporated cities or towns may designate reinvestment zones only within the city limits or within the city's ETJ.⁴⁹⁵ The designation of the reinvestment zone by a city must be made by ordinance.⁴⁹⁶ A county may designate a reinvestment zone only within an area outside the taxing jurisdiction of an incorporated city or town, and must make such a designation by order.⁴⁹⁷ School districts may designate reinvestment zones only when the area is entirely within the

⁴⁸⁷ *Id.*

⁴⁸⁸ *Id.* § 312.002(c).

⁴⁸⁹ *Id.* § 312.002(a).

⁴⁹⁰ *Id.* § 312.002(c).

⁴⁹¹ *Id.* § 312.002(d)(1), (3).

⁴⁹² *Id.* § 312.002(e).

⁴⁹³ *Id.* § 312.005(a). See Tax Abatement Agreement Registry, Biennial Report Dec. 2004 published by Texas Comptroller of Public Accounts.

⁴⁹⁴ *Id.* § 312.201 (Vernon 2008).

⁴⁹⁵ *Id.* § 312.201(a).

⁴⁹⁶ *Id.*

⁴⁹⁷ *Id.* § 312.401(a).

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territory of the school district.⁴⁹⁸ This authority supersedes any tax abatement restrictions placed on school districts by other sections of Chapter 312 of the Tax Code.

Special districts and appraisal districts are not authorized to designate reinvestment zones.⁴⁹⁹ Only one taxing unit (city, county or school district) needs to designate a reinvestment zone.

The designation of the reinvestment zone must be preceded by a public hearing. Seven days' written notice of the hearing must be given to the presiding officer of each of the other taxing units that has taxing jurisdiction over real property within the zone.⁵⁰⁰ Notice of the hearing must also be published at least seven days before the hearing in a newspaper of general circulation in the city.⁵⁰¹ There is no statutorily required wording that must be used for either of the above notices.

At the public hearing on the reinvestment zone, the governing body that is designating the reinvestment zone (city, county or school district) must make several findings. First, the governing body must find that the improvements sought are feasible and practical and would be a benefit to the zone after the expiration of the tax abatement agreement.⁵⁰² Additionally, the governing body must find that the zone meets one of the applicable criteria for reinvestment zones. The criterion usually cited is that the designation of the zone is reasonably likely to contribute to the retention or expansion of primary employment or to attract major investment to the zone. The above findings should be approved by the governing body at an open meeting and should be noted in the minutes for that meeting.

If a zone includes several properties, each property owner has a right to ask for the same terms in any tax abatement agreement that is executed. The taxing unit is not obligated to grant a tax abatement to the property owner. However, if an abatement is provided, it must be on the same terms (number of years and percentage of abatement) as the other agreements within that zone.⁵⁰³ Some taxing units make the boundaries of the zone contiguous with the property that is subject to the tax abatement. By limiting the zone to the involved property, the taxing unit is not obligated to use the same terms or percentage of tax abatement for other properties that are located outside of the zone. A larger reinvestment zone is often adopted by a taxing unit that wants to target a particular area of the city or of the county for development. In 2001, the average commercial or industrial reinvestment zone was about 68 acres in size while the average residential zone was about nine acres. It is important to note, though, that a city is not limited to declaring only one reinvestment zone. Nothing requires a city to enter into a tax abatement agreement with every property owner within a single reinvestment zone.

A reinvestment zone may be almost any shape or size. However, the Attorney General has concluded that such a zone must be contiguous and must include some portion of the earth's surface. For instance, a tax abatement reinvestment zone cannot be confined to one floor of a

⁴⁹⁸ *Id.* § 312.0025.

⁴⁹⁹ *Id.* § 312.002(g).

⁵⁰⁰ *Id.* § 312.201(d)(2).

⁵⁰¹ *Id.* § 312.201(d)(1).

⁵⁰² *Id.* § 312.201(d).

⁵⁰³ *Id.* § 312.204(b).

multistory building.⁵⁰⁴ Also, whatever shape and size a reinvestment zone does finally take, once the zone is officially designated there is no authority to modify its boundaries.

Any interested person is entitled to speak and present evidence for or against the designation of a reinvestment zone at the public hearing.⁵⁰⁵ If the zone designation is approved, the designation lasts for five years and may be renewed for successive periods of up to five years.⁵⁰⁶ The term of a tax abatement agreement may continue for up to 10 years, even if the reinvestment zone is not renewed after the initial five-year term.⁵⁰⁷

It should be noted that designation of an area as an enterprise zone under the Texas Enterprise Zone Act (Government Code Chapter 2303) would also constitute designation of the area as a reinvestment zone.⁵⁰⁸ Reinvestment zones that are enterprise zones are effective for the duration of the enterprise zone (seven years). Participants would still need to execute the tax abatement agreement according to the rest of the administrative requirements contained in chapter 312 of the Tax Code (outlined below). According to the Governor's Office of Texas Economic Development and Tourism, \$103.8 million in revenue was foregone by local taxing units in FY2002 through incentives given to businesses within enterprise zones, including \$75.4 million (72%) in property tax abatements.

Step Four:

At least seven days before the lead taxing unit grants a tax abatement, it must deliver written notice of its intent to enter into the agreement to the presiding officer of each of the other taxing units in which the property is located. The notice must include a copy of the proposed tax abatement agreement.⁵⁰⁹

A tax abatement agreement may exempt from taxation all or part of the increase in the value of the real property for each year covered by the agreement.⁵¹⁰ The agreement may be for a period not to exceed 10 years.⁵¹¹ There is a trend toward tax abatements with shorter time periods. While the median time frame for tax abatement agreements has historically been seven years, many new tax abatement agreements are for terms of only one to five years.

The tax abatement must be conditioned on the property owner making specific improvements or repairs to the property,⁵¹² and only the increase in the value of the property may be exempted.

⁵⁰⁴ Op. Tex. Att'y Gen. No. DM-456 (1997) (A county is not authorized to amend a Tax Code chapter 312 tax abatement agreement by deleting land from an existing reinvestment zone. A county reinvestment zone under chapter 312 must be contiguous and may not consist of only a portion of a building. The Texas Legislature intended to leave the substance of criteria for tax abatement agreements to the discretion of each county commissioners court, subject to very general constraints and certain specific limitations imposed by chapter 312).

⁵⁰⁵ Tex. Tax Code Ann. § 312.201(d) (Vernon 2008).

⁵⁰⁶ *Id.* § 312.203.

⁵⁰⁷ *Id.*

⁵⁰⁸ *Id.* § 312.2011.

⁵⁰⁹ *Id.* § 312.2041.

⁵¹⁰ *Id.* § 312.204(a).

⁵¹¹ *Id.* See also Op. Tex. Att'y Gen. No. JC-133 (1999).

⁵¹² Tex. Tax Code Ann. § 312.204(a) (Vernon 2008). See also Op. Tex. Att'y Gen. No. JC-106 (1999) (which concluded that the movement of a structure from one location to another location on a piece of property could in

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The real property's current value may not be exempted. The current value of real property is the taxable value of the real property and of any fixed improvements as of January 1 of the year in which the tax abatement agreement is executed. For example, consider a business that has a property site valued at \$500,000 as of January 1 of the year of the tax abatement agreement. If the business agrees to significantly enlarge the facility, resulting in its valuation increasing to \$800,000, the taxing units may abate from taxation up to \$300,000 of the property value (the portion of the value that exceeds the base value of \$500,000).

Property within the zone that is owned or leased by a member of the governing body of the city or by a member of a zoning or planning board or commission of the city is not eligible for tax abatement.⁵¹³ However, if the property owner's property is subject to a tax abatement agreement when the owner becomes a member of the governing body or zoning or planning commission, the property owner would not lose the benefit of the tax abatement agreement due to the person's new membership on the governing body, board or commission.⁵¹⁴ Similarly under Tax Code Section 312.402 (d), property owned or leased by a member of the commissioners court may not be subject to a tax abatement agreement by a county. But again, should the property owner become a member of the county commissioners court, the member would not lose the benefit of a tax abatement agreement already in effect due to the person's new membership on the commissioners court.⁵¹⁵ The tax abatement laws do not address similar conflicts with other taxing entities. However, regardless of what taxing unit is involved, a Texas Attorney General opinion indicates that the Tax Code does not preclude a governing body from entering into a tax abatement agreement with a corporation merely because a member of the governing body owns a very small percentage of shares in that corporation.⁵¹⁶ If a governing body is considering granting a tax abatement to a corporation in which one of the governing body's members has a financial interest, the governing body will want to consult with legal counsel regarding the possible application of these and other laws.

The tax abatement agreement may also abate all or part of the value of tangible personal property (including inventory or supplies)⁵¹⁷ that is brought onto the site after the execution of the tax abatement agreement. A taxing unit may not abate the value of personal property that was already located on the real property at any time before the period covered by the tax abatement agreement.⁵¹⁸ The abatement for personal property cannot be for a term that exceeds 10 years. Under a recent Attorney General opinion, a prior tax abatement agreement concerning specific property does not preclude a municipality from agreeing to abate taxes on different business

certain circumstances constitute a specific improvement or repair to the property for purposes of a tax abatement agreement if it improves the property in the ordinary sense and if the improvement or repair is consistent with the reinvestment zone designation).

⁵¹³ Tex. Tax Code Ann. § 312.204(d) (Vernon 2008).

⁵¹⁴ *Id.*

⁵¹⁵ *Id.* § 312.402(d).

⁵¹⁶ Op. Tex. Att'y Gen. No. 98-001 (1998) (concluded that the Tax Code would prohibit such a tax abatement agreement only if the member in question has some degree of control over the property of the corporation receiving the tax abatement. That opinion does not address the circumstances under which chapter 171 of the Local Government Code (conflicts of interest) or Section 39.06 of the Penal Code (misuse of official information) would apply to such a situation).

⁵¹⁷ Tex. Tax Code Ann. § 312.204(a) (Vernon 2008).

⁵¹⁸ *Id.*

personal property at the same location.⁵¹⁹ A study by the TTARA indicated that in 51% of the reinvestment zones, personal property tax abatement had been provided.

A review of past tax abatement agreements shows a number of trends. For example, tax abatement agreements have generally been aimed at industrial projects that generate at least \$2.5 million in capital investments. Tax abatements in the past often provided a 100% abatement of the increase in property value. Today, many agreements provide a declining annual percentage of abatement or a constant level of abatement at less than 100%. There is also some limited usage (12%) of tax abatements for purposes other than industrial or commercial projects, such as for residential area improvements. Residential tax abatement has involved abatement of the value of certain multifamily dwellings and of certain residential infrastructure improvements. These trends vary greatly depending on the city size and location.

Certain information provided by a property owner regarding a request for tax abatement is considered confidential for a limited time period.⁵²⁰ The confidentiality of the information continues until the tax abatement agreement is executed. This confidentiality may be, and often is, waived by the mutual consent of both the taxing unit and the property owner.

Step Five:

To adopt the tax abatement agreement, the taxing unit must approve the agreement by a majority vote of its governing body at its regularly scheduled meeting.⁵²¹

It is important to note that the approval of the agreement by the taxing unit must occur at a “regularly scheduled meeting.” The statute does not define the term “regularly scheduled meeting.” It may be advisable to schedule the adoption of an agreement only at a regular meeting of the governmental body (not specially called or emergency meetings.)

At the meeting to consider approval of the tax abatement agreement, the governing body of the taxing unit must make a finding that the terms of the agreement and the property subject to the agreement meet the applicable guidelines and criteria.⁵²² Upon approval of the agreement by the governing body, the agreement is executed in the same manner as other contracts entered into by the applicable taxing unit.

Section 312.205(a) of the Tax Code sets out certain mandatory provisions for a tax abatement agreement. A tax abatement agreement must:

- include a list of the kind, number and location of all proposed improvements to the property;

⁵¹⁹ Op. Tex. Att’y Gen. No. GA-304 (2005).

⁵²⁰ Tex. Tax Code Ann. § 312.003 (Vernon 2008). (Information that is provided to a taxing unit in connection with an application or request for tax abatement under this chapter and that describes the specific processes or business activities to be conducted or the equipment or other property to be located on the property for which tax abatement is sought is confidential and not subject to public disclosure until the tax abatement agreement is executed. That information in the custody of a taxing unit after the agreement is executed is not confidential under this section.)

⁵²¹ *Id.* § 312.207.

⁵²² *Id.* § 312.002(b).

- provide access to and authorize inspection of the property by the taxing unit to ensure compliance with the agreement;
- limit the use of the property consistent with the taxing unit’s development goals;
- provide for recapturing property tax revenues that are lost if the owner fails to make the improvements as provided by the agreement;
- include each term that was agreed upon with the property owner and require the owner to annually certify compliance with the terms of the agreement to each taxing unit; and
- allow the taxing unit to cancel or modify the agreement at any time if the property owner fails to comply with the terms of the agreement.

Section 312.205(b) of the Tax Code contains a list of optional provisions that may be included in the abatement agreement. The lead entity executing the agreement may want to incorporate any desired provisions from this list and include any other provisions that may be beneficial.

Step Six:

The other taxing units may enter into an abatement agreement or choose not to provide an abatement. There is no penalty for choosing not to abate.⁵²³

As mentioned earlier, if the property subject to abatement is located within the city limits, the city must be the lead party in the tax abatement. If the property to be abated is located within the ETJ of the city, either the city or the county may serve as the lead party. If the property is located outside the city’s boundaries and outside the city’s ETJ, the county must serve as the lead party for tax abatement.

Should a city execute a tax abatement agreement pertaining to property located within the city, the remaining taxing units may execute a written tax abatement agreement. Further, there is no deadline for the remaining taxing units to execute their tax abatement agreement.⁵²⁴ Each taxing unit may adopt a tax abatement agreement with terms that differ from the agreement adopted by the city.⁵²⁵

A county may be the first taxing entity to grant a tax abatement only if the property was located outside of the taxing jurisdiction of an incorporated city or town.⁵²⁶ If the county is the first to adopt the abatement, the other eligible taxing units may either grant a tax abatement agreement or choose not to participate in the tax abatement.⁵²⁷ Again, there is no deadline for the other taxing units to execute their abatement agreement. Further, the other taxing units have the option of granting a tax abatement with terms that differ from the abatement granted by the county.⁵²⁸

⁵²³ *Id.* § 312.206(a).

⁵²⁴ *Id.*

⁵²⁵ *Id.* (“ . . . The agreement is not required to contain terms identical to those contained in the agreement with the municipality. . . “).

⁵²⁶ *Id.* § 312.401(a).

⁵²⁷ *Id.* §§ 312.206(a), 312.402(b).

⁵²⁸ *Id.*

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If a property subject to abatement is located within the ETJ of the city, once the city or the county designates the reinvestment zone, any taxing unit may initiate a tax abatement agreement. If the city adopts a tax abatement agreement in its ETJ, the agreement takes effect upon the later annexation of the property by the city.⁵²⁹ If a city designates a reinvestment zone that includes property within the ETJ of the city, but does not execute an abatement agreement, the governing bodies of the other taxing units (the county and certain special districts) may initiate a tax abatement agreement. The terms of the agreement do not have to be identical to the terms of a municipal agreement.⁵³⁰ Further, a taxing unit may execute an agreement even if the city does not execute an agreement for the property.

A county commissioners court may, but is not required to, enter into a tax abatement agreement for a district that by statute has its tax rate set or levied by the county.⁵³¹ Before the county may enter into an agreement on behalf of such a district, the county itself must have entered into a tax abatement agreement for the same property. However, the agreement on behalf of the district need not contain the same terms as the agreement entered into by the county.

Previously, each taxing unit that designated a reinvestment zone or executed a tax abatement agreement was required to deliver a report to the Comptroller's Office describing the guidelines and criteria, reinvestment zone, terms of any abatement agreements and any other information required by the Comptroller. Now, the chief appraiser of each appraisal district that appraises property for a taxing unit that has designated a reinvestment zone or has executed a tax abatement agreement must deliver to the Comptroller's Office a report describing the zone, its size, types of property located on it, its duration, the guidelines and criteria, terms of any abatement agreements, and any other information required by the Comptroller.⁵³² These reports must be submitted by June 30 of the year following the designation of a zone or the execution of a tax abatement agreement. To facilitate the required reporting process, the Comptroller's Office has standard reporting forms that can be used to remit this information. Requests for these forms may be made to the Comptroller's Office at fax number (512) 305-9801. Phone inquiries can be made to (800) 252-9121.

The taxing units will also want to advise any property owner who is given an abatement to be timely in filing an exemption application for the tax abatement each year with the appraisal district. An application must be filed by April 30 for each tax year that the abatement is in effect.⁵³³

⁵²⁹ *Id.* § 312.204(c).

⁵³⁰ *Id.* § 312.206(c).

⁵³¹ *Id.*

⁵³² *Id.* § 312.005(a)(1)-(3).

⁵³³ *Id.* § 11.43.

School Districts

A school district may not enter into tax abatement agreement under chapter 312 of the Tax Code.⁵³⁴ A school district's ability to limit appraised property values is governed by the Texas Economic Development Act found in chapter 313 of the Tax Code.⁵³⁵

Lessees of Real Property

Several years ago, it was debated whether a taxing unit could enter into a tax abatement agreement with a lessee of real property. Section 312.204 (a) of the Tax Code read, in part, “the governing body of a municipality eligible to enter into tax abatement agreements under section 312.002 may agree in writing with the owner of taxable real property... .” Further, section 312.206(a) of the Tax Code allowed the other taxing units, once the city had abated taxes, to enter into a “written tax abatement agreement with the owner of the property... .” This debate generated an attorney general opinion request. In Texas Attorney General Opinion JC-300 (2000), the question presented was whether the county could enter into a tax abatement agreement with the lessee of real property. Pursuant to the Tax Code, the attorney general concluded section 312.206 (a) of the Tax Code allowed a commissioners court to enter into a tax abatement agreement only with the owner of taxable real property. In response to this opinion, sections 312.204(a) and 312.402 (a) of the Tax Code were amended by the 77th Legislature. Today, eligible taxing units may enter into tax abatement agreement with the owner and “the owner of a leasehold interest” in real property.⁵³⁶ Additionally, prior agreements made with lessees to exempt a portion of tangible personal property located on real property are validated as of the date the agreements were entered into.⁵³⁷

Special Tax Abatement Provisions to Encourage Voluntary Cleanup

Section 312.211 of the Tax Code was adopted in 1997 to allow a special type of tax abatement when a property owner voluntarily agrees to clean up contaminated property. In order to qualify for this special treatment, a property must meet all of the following criteria:⁵³⁸

The property must be located in a reinvestment zone;

- The property cannot be an improvement project financed by tax increment bonds; and
- The property must be subject to a voluntary cleanup agreement under Section 361.606 of the Texas Health and Safety Code.

There are several important differences between the traditional tax abatement and a Section 312.211 voluntary cleanup tax abatement. Unlike regular tax abatement, the city or county may abate more than just the increase in value that takes place after the abatement agreement is

⁵³⁴ *Id.* §312.002(f).

⁵³⁵ *Id.* ch. 313.

⁵³⁶ *Id.* §§ 312.204(a), 312.402(a).

⁵³⁷ Tex. H.B. 1448, § 4, 77th Leg., R.S. (2001).

⁵³⁸ Tex. Tax Code Ann. § 312.211(a) (Vernon 2008).

signed. If a voluntary cleanup property meets the above criteria, a city may agree to abate up to 100% of the total value of the property during the first year of the agreement. During the second year of the agreement, a city may agree to abate up to 75% of the property's total value. Up to 50% of the property's total value may be abated in the third year and up to 25% in the fourth year.⁵³⁹ In other words, the tax abatement may include abatement of not only the increase in value, but also a percentage of the original value of the property. Also in contrast to a regular tax abatement, an agreement under this section may not last longer than four years. Finally, a city or county must establish guidelines for a Section 312.211 tax abatement that are separate from the city's guidelines for a traditional tax abatement. Unlike the guidelines that a city or county must establish for regular tax abatements, the guidelines for a Section 312.211 tax abatement are not required to make tax abatement available for both new facilities and for the expansion or modernization of existing facilities.⁵⁴⁰ Rather, the guidelines for a Section 312.211 tax abatement must base the granting of a tax abatement on successful cleanup of the property involved.

In order for an agreement under Section 312.211 to take effect, the property owner must first receive a certificate of completion for the property under Section 361.609 of the Texas Health and Safety Code. Additionally, the city (or county) may cancel or modify an agreement under Section 312.211 if the use of the land changes from what was specified in the certificate of completion and the city determines that the new use may result in an increased risk to human health or to the environment.⁵⁴¹ If a city (or county) enters into an abatement agreement under Section 312.211, the city (or county) may not simultaneously enter into a regular tax abatement agreement for the same property.⁵⁴² And in no case may a school district enter into a tax abatement agreement under Section 312.211.⁵⁴³

Before the property owner may receive a voluntary cleanup tax abatement, he or she must submit a copy of the certificate of completion to the chief appraiser of the appraisal district where the property is located.⁵⁴⁴ The certificate should be submitted to the chief appraiser with an application for an exemption under Section 11.28 of the Tax Code. The abatement agreement takes effect on January 1 of the next tax year after the certificate is received by the chief appraiser. Once the proper certificate is submitted, the property owner will not need to submit it again each year.⁵⁴⁵ Of course, the appraisal district can approve a tax exemption for a tax abatement only if the local governments have already approved the abatement by vote of their governing bodies.

⁵³⁹ *Id.* § 312.211(b).

⁵⁴⁰ *Id.* § 312.002(a).

⁵⁴¹ *Id.* § 312.211(f)(1), (2).

⁵⁴² *Id.* § 312.211(g).

⁵⁴³ *Id.* § 312.211(h). *See also id.* § 312.002(f).

⁵⁴⁴ *Id.* § 312.211(c).

⁵⁴⁵ *Id.* § 312.211(d).

In all other respects, it appears that a tax abatement under Section 312.211 of the Tax Code functions like any other tax abatement. For instance, all the normal public hearing and notice requirements apply to a reinvestment zone and to a tax abatement established under this section.⁵⁴⁶ Other taxing units, with the exception of school districts, may join in the Section 312.211 abatement subject under the same procedural rules as apply to a regular abatement.⁵⁴⁷ Also, the terms of such an abatement are subject to the same general rules as are the terms of a regular tax abatement.⁵⁴⁸ Those terms must include a recapture provision, list the proposed improvements to the property, and provide access to the property so that city employees may ensure compliance, among others.⁵⁴⁹ Counties may initiate a Section 312.211 abatement in the same areas where they may initiate a regular tax abatement.⁵⁵⁰

Tax Increment Financing

Tax increment financing is a tool that local governments can use to publicly finance needed structural improvements and enhanced infrastructure within a defined area. These improvements usually are undertaken to promote the viability of existing businesses and to attract new commercial enterprises to the area. The statutes governing tax increment financing are located in Chapter 311 of the Texas Tax Code.

The cost of improvements to the area is repaid by the contribution of future tax revenues by each taxing unit that levies taxes against the property. Specifically, each taxing unit can choose to dedicate all, a portion, or none of the tax revenue that is attributable to the increase in property values due to the improvements within the reinvestment zone. The additional tax revenue that is received from the affected properties is referred to as the tax increment. Each taxing unit determines what percentage of its tax increment, if any, it will commit to repayment of the cost of financing the public improvements.

Tax increment financing may be initiated only by a city or county.⁵⁵¹ If a property is located outside of the city limits (within the city's extraterritorial jurisdiction or beyond), it is not eligible for tax increment financing unless annexed into the city. Once a city or county has begun the process of establishing a tax increment financing reinvestment zone, counties, school districts

⁵⁴⁶ *Id.* § 312.201.

⁵⁴⁷ *Id.* § 312.206(a).

⁵⁴⁸ *Id.* § 312.211(g).

⁵⁴⁹ *Id.* § 312.205(a).

⁵⁵⁰ *Id.* § 312.402.

⁵⁵¹ *Id.* § 311.003 (counties were allowed to form zones under Tex. H.B. 2120, 79th Leg., R.S. (2005)). However, the reader should note that the Texas constitutional provision allowing the legislature to authorize incorporated cities or towns to implement tax increment financing was not amended to extend that authorization to counties. (Tex. Const. art VIII § 1-g (b) ("The legislature by general law may authorize an incorporated city or town to issue bonds or notes to finance the development or redevelopment of an unproductive, underdeveloped, or blighted area within the city or town and to pledge for repayment of those bonds or notes increases in ad valorem tax revenues imposed on property in the area by the city or town and other political subdivisions.") (Emphasis added.) Thus county-initiated tax increment financing may potentially be subject to constitutional challenge until such time as the constitution is amended.

and special districts are allowed to consider participating in the tax increment financing agreement.⁵⁵²

Initiating the Process

There are two ways that tax increment financing can be initiated. First, it can be started by petition of the affected property owners.⁵⁵³ The petition must be submitted by owners of property that constitute at least 50% of the appraised property value within the proposed zone. There are a number of special rules regarding zones that are created by petition. If the zone is created in this manner, the city or county should refer to Chapter 311 of the Tax Code regarding the applicable requirements and provisions.

Tax increment financing may also be initiated by the city or county's governing body without the need for a petition.⁵⁵⁴ If not initiated by petition, an area may be considered for tax increment financing only if it meets at least one of the following three criteria:⁵⁵⁵

- The area's present condition must substantially impair the city or county's growth, retard the provision of housing, or constitute an economic or social liability to the public health, safety, morals or welfare. Further, this condition must exist because of the presence of one or more of the following conditions: a substantial number of substandard or deteriorating structures, inadequate sidewalks or street layout, faulty lot layouts, unsanitary or unsafe conditions, a tax or special assessment delinquency that exceeds the fair market value of the land, defective or unusual conditions of title, conditions that endanger life or property by fire or other cause, or, if the city has a population of 100,000 or more, structures (which are not single-family residences) in which less than 10 percent of the square footage has been used for commercial, industrial, or residential purposes during the preceding 12 years. Attorney General Opinion GA-514 (2007) makes it clear that this criteria or one of the others below must be met even if the financing plan for the area does not include issuance of bonds or notes;
- The area is predominantly open and, because of obsolete platting, deteriorating structures or other factors, it substantially impairs the growth of the local government; or
- The area is in or adjacent to a "Federally assisted new community" as defined under Tax Code Section 311.005(b).

Within developed areas of the city or county, the criterion usually cited to justify a reinvestment zone is that the area's present condition substantially impairs the local government's growth because of a substantial number of substandard or deteriorating structures. If the area is not

⁵⁵² *Id.* § 311.013(f).

⁵⁵³ *Id.* §§ 311.005(a)(5), 311.007(b).

⁵⁵⁴ *Id.* § 311.003.

⁵⁵⁵ *Id.* § 311.005(a)(1) - (3).

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developed, the city or county often cites the criterion that the area is predominantly open, and that it substantially impairs the growth of the city or county because of obsolete platting, deteriorating structures or other factors.

A decision by a local government that an area meets the first or second criteria to become a reinvestment zone will be given much deference by a reviewing court should that decision be challenged by a private lawsuit. Unless the decision is arbitrary or capricious, willful and unreasoning, taken without consideration and in disregard of the facts and circumstances, it will be upheld.⁵⁵⁶

The Tax Code places several further restrictions on the creation of a reinvestment zone for tax increment financing.⁵⁵⁷

- No more than 10% of the property within the reinvestment zone (excluding publicly-owned property) may be used for residential purposes.⁵⁵⁸ This requirement, however, does not apply if the district is created pursuant to a petition of the landowners.⁵⁵⁹
- A reinvestment zone may not contain property that cumulatively would exceed 15% of the total appraised property value within the city and its industrial districts.⁵⁶⁰
- A city may not create a reinvestment zone or change the boundaries of an existing zone if the zone would contain more than 15% of the total appraised value of real property taxable by a county or school district.⁵⁶¹

Subject to the above limitations, the boundaries of an existing tax increment financing zone may be reduced or enlarged by ordinance or resolution of the governing body that created the zone. Any such change is conducted according to the requirements of Section 311.007 of the Tax Code. If the boundaries of a tax increment reinvestment zone are enlarged, a school district is not required to pay into the tax increment fund any of the district's tax increment produced from property located in the added area.⁵⁶² However, the school district may voluntarily enter into an agreement with the city that created the zone to contribute all or part of the district's tax increment from such an area. The district may enter into such an agreement at any time before or after the reinvestment zone is created or enlarged. The agreement may include conditions for payment of the tax increment into the fund and must specify the portion of the tax increment to be paid into the fund and the years for which the tax increment is to be paid into the fund.

⁵⁵⁶ See *Hardwicke v. City of Lubbock*, 150 S.W.3d 708, 716-17 (Tex. App.-Amarillo 2004, no pet.)

⁵⁵⁷ Tex. Tax Code Ann. § 311.006 (Vernon 2008).

⁵⁵⁸ *Id.* § 311.006(a)(1).

⁵⁵⁹ *Id.* § 311.006(e).

⁵⁶⁰ *Id.* § 311.006(a)(2).

⁵⁶¹ *Id.* § 311.006(c).

⁵⁶² *Id.* § 311.013(k).

If an area qualifies for tax increment financing, the process involves 10 steps. The 10 steps are as follows:

Step One:

The governing body must prepare a preliminary reinvestment zone financing plan.⁵⁶³

A copy of the plan must be sent to each local government that levies taxes on real property within the zone. The Tax Code does not specify what the preliminary financing plan must contain. However, it may be prudent to include each of the items that are required for the final financing plan discussed under Step Seven of this article.

Step Two:

The local government creating the zone must provide a 60-day written notice of its intent to designate a reinvestment zone and of the hearing on the proposed zone to the other taxing units that levy property taxes within the area.⁵⁶⁴

The notice must contain a description of the proposed boundaries of the zone, the tentative plans for the zone's development, and an estimate of the general impact of the zone on property values and tax revenues. The governing body of the affected taxing units may agree to waive the 60-day notice requirement. A taxing unit that receives the city or county's 60-day notice may ask the local government for additional information. The city or county's governing body is under a duty to provide any such information to the "extent practicable."⁵⁶⁵

Step Three:

Once the local government creating the zone has provided its 60-day notice of a proposed zone, the other affected taxing units within 15 days must designate a representative to meet with the local government creating the zone to discuss the project and financing plans.⁵⁶⁶

With advance notice, the city or county creating the zone may call a meeting or meetings of these representatives. The meetings may be called at least 15 days after the 60-day notice of the proposed zone. The meetings may include discussions of the following items:

- The boundaries of the development within the zone;
- Development in the zone;
- The tax increment that each taxing unit will contribute to the tax increment fund;
- Any proposed retention of a portion of its tax increment by a taxing unit;
- The exclusion of particular parcels of property from the zone;
- The board of directors for the zone; and
- Tax collection within the zone.

⁵⁶³ *Id.* § 311.003(b).

⁵⁶⁴ *Id.* § 311.003(e).

⁵⁶⁵ *Id.* § 311.003(f).

⁵⁶⁶ *Id.* § 311.003(g).

On the motion of the local government creating the zone, any other relevant matter may also be discussed. All such meetings must be conducted as open meetings as provided under the Open Meetings Act.⁵⁶⁷

Step Four:

In addition to meeting with the other taxing unit representatives, the local government creating the zone must provide a formal presentation to the governing body of each taxing unit that levies real property taxes within the proposed zone.⁵⁶⁸

The formal presentation must cover some of the items that were included in the earlier 60-day notice to the taxing units. Specifically, the presentation must indicate the proposed boundaries of the zone, the tentative plans for development of the zone, and an estimate of the general impact of the zone on property values and tax revenues. Notice of these presentations must be given to all taxing units that tax property within the zone. The presentations should be conducted as open meetings. The city or county creating the zone may hold a joint presentation for all of the affected taxing units with the consent of the involved taxing units.

The proposed plan for the zone may include expenditures for any of a number of costs as outlined in the definition of the term “project cost” in Tax Code Section 311.002(1). For example, potential expenditures could include the costs of acquisition, construction or improvement and other costs to enhance or develop new and existing public buildings and other public improvements. The statute indicates that the term “project costs” includes expenditures for acquisition, alteration or construction of:

- public improvements;
- new buildings, structures and fixtures;
- existing structures;
- utilities, water and sewer facilities, flood and drainage facilities;
- streets and street lights;
- pedestrian malls, walkways or parking facilities; or
- parks and educational facilities.

Project costs may also include the cost of professional services and administrative expenses in connection with implementation of a project plan.

Cities and counties are additionally permitted to take most actions that are necessary to carry out tax increment financing.⁵⁶⁹ They may acquire real property through purchase or condemnation, enter into necessary agreements, and construct or enhance public works facilities and other public improvements. They may also make needed improvements to blighted properties. Tax Code Section 311.008(c) provides that these powers prevail over any law or municipal charter to the contrary. The use of tax increment financing for improvements to certain educational

⁵⁶⁷ Tex. Gov’t Code Ann. ch. 551 (Vernon 2004 & Supp. 2008)

⁵⁶⁸ Tex. Tax Code Ann. § 311.003(f) (Vernon 2008).

⁵⁶⁹ *Id.* § 311.008.

facilities is prohibited unless those facilities are located in a reinvestment zone created on or before September 1, 1999.⁵⁷⁰

Step Five:

After the local government creating the zone has made its formal presentations to the other taxing units, it must hold a public hearing on the creation of the reinvestment zone.⁵⁷¹

The public hearing must be preceded by at least seven days' published notice in a newspaper of general circulation in the city or county creating the zone. At the hearing, the governing body of the city or county must evaluate the proposed benefits of the zone. Any interested person is permitted to speak at the hearing and voice objection to the inclusion of property within a proposed zone. Property within the zone that is owned or leased by a member of the governing body of the city or by a member of a zoning or planning board or commission of the city is not eligible for tax increment financing or tax abatement.⁵⁷² However, if the property owner's property is subject to a tax increment financing agreement when the owner becomes a member of the governing body or of the zoning or planning commission, the property owner would not lose the benefit of the tax increment financing agreement due to the person's new membership on the governing body, board or commission.⁵⁷³

Step Six:

After the public hearing, the governing body of the city or county may, by ordinance or order, designate a contiguous area as a reinvestment zone for tax increment financing purposes.⁵⁷⁴

The ordinance must be adopted by a simple majority vote of the governing body at an open meeting. Home rule cities may have a higher voting contingent required by the city charter. The adopted ordinance should include a finding that development of the area would not occur in the foreseeable future solely through private investment. Tax Code Section 311.004 also contains a number of other mandatory provisions for the reinvestment zone ordinance. These provisions include:⁵⁷⁵

- a description of the boundaries of the zone with sufficient detail to identify the territory within the zone. The ordinance, however, does not have to identify the specific parcels of real property;
- a designation of the board of directors for the zone and an indication of the number of directors of the board;⁵⁷⁶

⁵⁷⁰ *Id.* § 311.008(b)(4).

⁵⁷¹ *Id.* § 311.003(c).

⁵⁷² *Id.* § 312.204(d).

⁵⁷³ *Id.*

⁵⁷⁴ *Id.* § 311.003(a).

⁵⁷⁵ *Id.* § 311.004(a)(1)-(7).

⁵⁷⁶ *See id.* § 311.0091 (addresses cities with a population of 1.1 million or more that are located wholly or partially in a county with a population of less than 1.4 million).

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- a provision that the zone will take effect immediately on passage of the ordinance;
- an indication of the date for termination of the zone;
- a name for the zone as provided under Tax Code Section 311.004(5);
- a provision establishing a tax increment fund for the zone;
- findings that the improvements within the zone will significantly enhance the value of the taxable property within the zone and will be of general benefit to the city or county, and that the area meets the criteria for designation of a reinvestment zone under Tax Code Section 311.005; and
- if designating a reinvestment zone pursuant to a petition of the property owners, the city or county must specify in its ordinance that the reinvestment zone is designated pursuant to Tax Code Section 311.005(a)(5).⁵⁷⁷

The size, composition and qualifications of the board of directors depend on whether the reinvestment zone was initiated by the city or county or by petition of the property owners.

Zones Initiated by Governing Body

If the zone was created by the governing body on its own initiative, the board of directors consists of at least five and not more than 15 members, unless more than 15 members are required under Tax Code Section 311.009. The board is composed of one appointee from each taxing unit that levies taxes on real property in the zone. A taxing unit may waive its right to appoint a member. The remaining board members are appointed by the governing board of the city or county.⁵⁷⁸ The board members appointed by the governing board must be eligible to vote in the municipality or county, or be at least 18 years of age and own real property in the zone.⁵⁷⁹

Zones Initiated by Petition of Property Owners

If the reinvestment zone was created pursuant to a petition of the property owners, the board of directors must consist of nine members.⁵⁸⁰ The board is composed of one appointee from each school district or county that levies property taxes in the zone and has approved the payment of all or part of the tax increment. The remaining members are appointed by the governing body of the city or county. The members appointed by the governing board must be at least 18 years of age, and either own real property in the zone or be an employee or agent of a person who owns real property in the zone.⁵⁸¹ Further, the local state senator and representative in whose districts

⁵⁷⁷ *Id.* § 311.004(c).

⁵⁷⁸ *Id.* § 311.009(a).

⁵⁷⁹ *Id.* § 311.009(e)(1).

⁵⁸⁰ *Id.* § 311.009(b).

⁵⁸¹ *Id.* § 311.009(e)(2).

the zone is located are each members of the board, or they may appoint a substitute to serve for them.

Each year, the governing board of the city or county creating the zone appoints one member of the board to serve as chairman. The chairman serves for a term of one year that begins on January 1 of the following year. The board of directors may also elect a vice-chair to preside in the absence of the chairman. The board may elect other officers as it considers appropriate. A vacancy on the board is filled by appointment of the governing body of the taxing unit that appointed the director.

State law specifies that a member of the board of directors of a tax increment financing reinvestment zone is not considered a public official.⁵⁸² Because of this provision, the Attorney General has held that a city council member is not prohibited from simultaneously serving as a member of the board of directors of a tax increment reinvestment zone created by his or her municipality.⁵⁸³ In addition, state law clarifies that such a director may be appointed to serve on the board of directors of a local government corporation created under Subchapter D of Chapter 431 of the Texas Transportation Code.⁵⁸⁴

It should be noted that designation of an area as an enterprise zone under the Texas Enterprise Zone Act (Government Code Chapter 2303) would also constitute designation of the area as a reinvestment zone for tax increment financing purposes.⁵⁸⁵ Such a designation would eliminate further public hearing requirements other than those provided under the Enterprise Zone Act. Participants would still need to execute the tax increment “project” and “financing” plan according to the requirements contained in Chapter 311 of the Tax Code (outlined below).

Step Seven:

After the city or county has adopted the ordinance or order creating the zone, the board of directors of the zone must prepare both a “project plan” and a reinvestment zone “financing plan.”⁵⁸⁶

The plans must be as consistent as possible with the preliminary plans developed by the city for the zone before the board was created. Specifically, the project plan must include:

- a map showing existing uses of real property within the zone and any proposed improvements;
- any proposed changes to zoning ordinances, the master plan of the city, building codes or other municipal ordinances or subdivision rules and regulations of the county;

⁵⁸² *Id.* § 311.009(g).

⁵⁸³ Op. Tex. Att’y Gen. No. GA-169 (2004); *see also* Tex. H.B. 2684, § 15, 76th Leg., R.S. (1999) (“Nothing in this Act is intended to prohibit a member of a governing body of a taxing unit that levies taxes on real property in the reinvestment zone from serving as a member of the board of directors of a reinvestment zone under the Tax Increment Financing Act (Chapter 311, Tax Code).”)

⁵⁸⁴ Tex. Tax Code Ann. § 311.009(g)(2) (Vernon 2008).

⁵⁸⁵ *Id.* § 311.0031.

⁵⁸⁶ *Id.* § 311.011.

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- a list of estimated non-project costs; and
- a statement of the method for relocating persons who will be displaced as a result of implementation of the plan.

If a zone is created pursuant to petition in a county that has a population in excess of 3.3 million, there are certain special requirements of the project plan involving residential housing that must be observed.⁵⁸⁷

The reinvestment zone financing plan must contain the following nine items:

- a detailed list of the estimated project costs of the zone, including administrative expenses;
- a list of the kind, number and location of all proposed public works or public improvements within the zone;
- an economic feasibility study;
- the estimated amount of bonded indebtedness to be incurred;
- the timing for incurring costs or monetary obligations;
- the methods for financing all estimated project costs and the expected sources of revenues, including the percentage of tax increment to be derived from the property taxes of each taxing unit that levies taxes on real property within the zone;
- the current total appraised value of taxable real property in the zone;
- the estimated captured appraised value of the zone during each year of its existence; and
- the duration of the zone. As provided under Tax Code Section 311.017, a tax increment financing reinvestment zone terminates on the earlier of: 1) the termination date designated in the original or amended ordinance creating the zone; or 2) the date on which all project costs, tax increment bonds and interest on those bonds are paid in full. The Attorney General has ruled that a home-rule city may not extend a reinvestment zone's termination date beyond the date provided in the ordinance designating the zone.⁵⁸⁸

The financing plan may provide that the city or county will issue tax increment bonds or notes, the proceeds of which are used to pay project costs for the reinvestment zone. Any such bonds or notes are payable solely from the tax increment fund and must mature within 20 years of the date of issue. Tax increment bonds are issued by ordinance of the city or order of the county without any additional approval required, other than that of the Public Finance Section of the Attorney General's Office. The characteristics and treatment of these obligations is covered in detail in Tax Code Section 311.015.

After both the project plan and the reinvestment zone financing plan are approved by the board of directors of the zone, the plans must also be approved by ordinance or order of the governing

⁵⁸⁷ *Id.* § 311.011(f).

⁵⁸⁸ Op. Tex. Att'y Gen. No. GA-276 (2004).

body.⁵⁸⁹ The ordinance or order must be adopted at an open meeting by a simple majority vote of the taxing unit's governing body, unless the city is a home rule city and a higher voting contingent is required by the city charter. The ordinance or order must find that the plans are feasible and conform to the master plan, if any, of the city or county.

At any time after the zone is adopted, the board of directors may adopt an amendment to the project plan as provided under Section 311.011 of the Tax Code. The amendment takes effect on approval of the change by ordinance or order of the city or county and in certain cases may require an additional public hearing. There are two circumstances under which an amendment to the project plan or the reinvestment zone financing plan will not apply to a school district participating in the zone without official approval by the school district: 1) if the amendment has the effect of directly or indirectly increasing the percentage or amount of the tax increment to be contributed by the school district; or 2) if the amendment requires or authorizes the city or county creating the zone to issue additional tax increment bonds or notes.⁵⁹⁰

Finally, once a city or county designates a tax increment financing reinvestment zone or approves a project plan or reinvestment zone financing plan, the city or county must deliver to the State Comptroller's Office a report containing: a general description of each reinvestment zone, a copy of each project plan or reinvestment zone financing plan adopted, and "any other information required by the comptroller" that helps in the administration of the central registry and tax refund for economic development (Tax Code, Chapter 111, subchapter F).⁵⁹¹ The report must be submitted by April 1 of the year following the year the zone is designated or plan is approved.

Step Eight:

After the project plan and the reinvestment zone are approved by the board of directors and by the city or county's governing body, the other taxing units with property within the zone contract with the city or county regarding the percentage of their increased tax revenues that will be dedicated to the tax increment fund.⁵⁹²

The tax increment fund is made up of the contributions by the respective taxing units of a portion of their increased tax revenues that are collected each year under the plan.⁵⁹³ In practice, taxing units have generally committed in early negotiations with the city or county as to what portion of the tax increment they will contribute to the tax increment fund for the zone.

For example, consider a city that as part of its tax increment project plan has agreed to put in improved sidewalks throughout the zone at a cost of \$20,000. If the property values in the district are projected to increase by 2% after the sidewalk improvements, each of the affected taxing units may choose to dedicate all, a portion of, or none of the property taxes that are due to the 2%

⁵⁸⁹ Tex. Tax Code Ann. § 311.011(d) (Vernon 2008).

⁵⁹⁰ *Id.* § 311.011(g)(1)-(2).

⁵⁹¹ *Id.* § 311.019(b)(1)-(3).

⁵⁹² *Id.* § 311.013.

⁵⁹³ *Id.* § 311.012(a) (defining the amount of a taxing unit's tax increment for a year to be the amount of property taxes *levied and collected* by the unit for that year on the captured appraised value of real property taxable by the unit and located in the reinvestment zone [emphasis added]).

increase in property values within the zone. The decision as to what percentage of the increased tax revenues to contribute to the tax increment fund is entirely discretionary with the governing bodies of each of the taxing units. (The city itself has the flexibility to determine what portion of the increment produced by the city must be paid into the increment fund after recent legislation).⁵⁹⁴ Any agreement to contribute must indicate the portion of the tax increment to be paid into the fund and the years for which the tax increment will be paid. The agreement may also include other conditions for payment of the tax increment. Only property taxes attributable to real property within the zone are eligible for contribution to the tax increment fund.⁵⁹⁵ Property taxes on personal property are not eligible for contribution into the tax increment plan. In 2005, the Legislature allowed cities to deposit the amount of sales tax attributable to reinvestment zone into the zone increment fund⁵⁹⁶, in an increment above the base amount of sales tax attributable to the zone in the year the zone was created.

Payment of the taxing unit's increment to the fund must be made by the 90th day after the delinquency date for the unit's property taxes. A delinquent payment incurs a penalty of 5% of the amount delinquent and accrues interest at an annual rate of 10%. It is important to note, however, that a taxing unit is not required to pay into the tax increment fund the portion of a tax increment that is attributable to delinquent taxes until those taxes are actually collected.⁵⁹⁷

In lieu of permitting a portion of its tax increment to be paid into the tax increment fund, a taxing unit (other than a city) may elect to offer the owners of taxable real property in the zone an exemption from ad valorem taxation for any increase in the property value as provided under Tax Code Chapter 312.⁵⁹⁸ Alternatively, a taxing unit (other than a school district) may both offer a tax abatement to the property owners in the zone and enter into an agreement to contribute a tax increment into the fund.⁵⁹⁹ In either case, any agreement to abate taxes on real property within a tax increment reinvestment zone must be approved both by the board of directors of the zone and by the governing body of each taxing unit that agrees to deposit any of its tax increment into the tax increment fund.

In any contract entered into by the tax increment zone's board of directors with regard to bonds or other obligations, the board may promise not to approve any such tax abatement agreement. If a taxing unit enters into a tax abatement agreement within a tax increment reinvestment zone, the taxes that are abated will not be considered in calculating the tax increment of the abating taxing unit or that taxing unit's deposit into the tax increment fund.

The Governor's Office of Texas Economic Development and Tourism may recommend that a taxing unit enter into a tax abatement agreement. The board of directors of the zone and the

⁵⁹⁴ *Id.* §§ 311.013(b)(2), (1); *see also id.* § 311.013(m) (for special rules for such reduction in the increment in certain populous counties. These sections were amended or added by Tex. S.B. 771, 79th Leg., R.S. (2005)).

⁵⁹⁵ *See id.* § 311.012 ("tax increment," "captured appraised value," and "tax increment base" all defined with reference to the taxable real property within the reinvestment zone).

⁵⁹⁶ *Id.* § 311.0123 (added by Tex. S.B. 1199, 79th Leg., R.S. (2005)).

⁵⁹⁷ *Id.* § 311.013(i).

⁵⁹⁸ *Id.* § 311.013(g).

⁵⁹⁹ *Id.* § 311.0125.

taxing unit's governing body must consider any recommendations made by the Office of Texas Economic Development and Tourism.⁶⁰⁰

On the other hand, a taxing unit may decide to retain all of the tax increment for itself and not contribute to the tax increment fund. If such a decision is made and the reinvestment zone in question was created before June 19, 1999, the taxing unit must notify the board of directors of the zone in writing within 60 days of the city or county's approving the reinvestment zone financing plan. In any reinvestment zone created on or after June 19, 1999, there is no requirement that the taxing unit notify the board of directors of the zone that the unit does not wish to contribute.⁶⁰¹ In such a case, the taxing unit would simply not enter into any agreement to contribute to the tax increment fund. Further, in a tax increment reinvestment zone created on or after June 19, 1999, a taxing unit may enter into an agreement to contribute to the tax increment fund at any time after the zone is created or enlarged. This is also true for any tax increment reinvestment zone that was created at any time pursuant to a petition under the authority of Tax Code Section 311.005(a)(5) and for the portion of a zone added at any time pursuant to petition under Tax Code Section 311.007(b).

Step Nine:

Once the reinvestment zone is established, the board of directors must make recommendations to the governing body of the city or county on the implementation of the tax increment financing.⁶⁰²

By ordinance, resolution or order, the city or county may authorize the board of directors of the reinvestment zone to exercise any of the city or county's powers with respect to the administration, management or operation of the zone or the implementation of the project plan for the zone. However, the city or county may not authorize the board of directors to issue bonds, impose taxes or fees, exercise the power of eminent domain, or give final approval to the project plan. The board of directors may also exercise any of the powers granted to the city or county under Tax Code Section 311.008, except that the city or county must approve any acquisition of real property. Finally, the city or county, by ordinance or resolution or order, may choose to restrict any power granted to the board of directors by Chapter 311 of the Tax Code.

Either the board of directors or the city or county may enter into agreements that are necessary or convenient to implement the project plan and the reinvestment zone financing plan. Such agreements can pledge or provide for the use of revenue from the tax increment fund and/or provide for the regulation or restriction of land use. These agreements are not subject to the competitive bidding requirements in chapter 252 of the Local Government Code.⁶⁰³ The Legislature recently passed amendments that clarify that the board of directors has all the powers of a municipality under chapter 380 of the Local Government Code, including the power to make grants and loans from the increment fund for the purpose of developing the zone's economy, combating employment problems in the zone, and developing or expanding any zone business

⁶⁰⁰ *Id.* § 311.0125(e).

⁶⁰¹ *Id.* § 311.013.

⁶⁰² *Id.* § 311.010(a).

⁶⁰³ *Id.* § 311.010(g) (added by Tex. S.B. 771, 79th Leg., R.S. (2005)).

activity.⁶⁰⁴ The board may now also contract with the city to pay for city services in the zone out of the portion of the increment fund produced by the city, regardless of whether the services or their cost is identified in the project or financing plans.⁶⁰⁵

The board may use the increment fund for land and easement purchases outside the zone for rail or bus rapid transit projects under certain guidelines.⁶⁰⁶

Together, the city or county and the board of directors can also enter into a contract with a local government corporation (created under Texas Transportation Code Chapter 431) to manage the reinvestment zone or implement the project and financing plans.

In a tax increment reinvestment zone that was created pursuant to a petition under the authority of Tax Code Section 311.005(a)(5), the Tax Increment Financing (TIF) board may impose certain zoning restrictions over territory within the zone. Such restrictions are subject to the approval of the city council. See Section 311.010(c) of the Tax Code for further details on this issue.

The board must ensure that: 1) bonds have been issued for the zone, 2) the city or county has acquired property in the zone pursuant to the project plan, and/or 3) construction of improvements has begun in the zone. If at least one of the above three items is not accomplished within the first three years of the zone's existence, the other taxing units are not required to continue payments into the tax increment fund.⁶⁰⁷

The board is also required to implement a plan to enhance the participation of "disadvantaged businesses" in the zone procurement process, as provided under Tax Code Section 311.0101. Finally, the board has other enumerated powers as described in Section 311.010 of the Tax Code.

Step Ten:

The city or county must submit an annual report to the chief executive officer of each taxing unit that levies taxes on property within the zone.⁶⁰⁸

The report must be provided within 90 days of the end of the city's fiscal year. The report must include the following items:

- the amount and source of revenue in the tax increment fund established for the zone;
- the amount and purpose of expenditures from the fund;
- the amount of principal and interest due on outstanding bonded indebtedness;
- the tax increment base and current captured appraised value retained by the zone;
- the captured appraised value shared by the city or county and other taxing units;
- the total amount of tax increments received; and

⁶⁰⁴ *Id.* § 311.010(h) (added by Tex. S.B. 771, 79th Leg., R.S. (2005)).

⁶⁰⁵ *Id.* § 311.010(i) (added by Tex. S.B. 771, 79th Leg., R.S. (2005)).

⁶⁰⁶ *Id.* § 311.01005 (added by Tex. H.B. 2653, 79th Leg., R.S. (2005)).

⁶⁰⁷ *Id.* § 311.013(d).

⁶⁰⁸ *Id.* § 311.016(a).

- any additional information necessary to demonstrate compliance with the tax increment financing plan adopted by the city or county.

Annual Reporting and Central Registry

A copy of the above report must be sent to the Texas Comptroller's Office.⁶⁰⁹ Cities and counties are required also to submit certain information to the Comptroller's Office. Section 311.019 of the Tax Code requires the Comptroller to maintain a central registry of:⁶¹⁰

- reinvestment zones designated under chapter 311 of the Tax Code;
- project plans and reinvestment zone financing plans adopted pursuant to the Tax Increment Financing Act (chapter 311 of the Tax Code); and
- the annual reports submitted under section 311.016 of the Tax Code.

A city or county that designates a reinvestment zone or approves a project plan or reinvestment zone financing plan must deliver to the State Comptroller's Office a report containing the following information:⁶¹¹

- a general description of each reinvestment zone. This description must include the size of the zone, the types of property located in the zone, the duration of the zone, and the guidelines and criteria established for the zone under section 311.005 of the Tax Code;
- a copy of each project plan or reinvestment zone financing plan adopted; and
- "any other information required by the comptroller" that helps in the administration of the central registry and tax refund for economic development (Tax Code Chapter 111, subchapter F).

The plan must be delivered before April 1 of the year following the year the zone is designated or the plan is approved. A city or county that amends or modifies a project plan or reinvestment zone financing plan must deliver a copy of the amendment or modifications to the Comptroller before April 1 of the year following the year in which the plan was amended or modified.⁶¹²

State Assistance

Cities and counties with concerns about the tax increment financing laws can seek assistance from the state. The State Comptroller will provide assistance regarding the administration of the Tax Increment Financing Act upon request of the governing body or the presiding officer.⁶¹³

⁶⁰⁹ *Id.* § 311.016(b).

⁶¹⁰ *Id.* § 311.019(a).

⁶¹¹ *Id.* § 311.019(b)(1)-(3).

⁶¹² *Id.* § 311.019(c).

⁶¹³ *Id.* § 311.020(a).

Further, the Governor's Office of Texas Economic Development and Tourism⁶¹⁴ and the Comptroller's Office may provide technical assistance to a city or county regarding the designation of a tax increment financing reinvestment zone or the adoption and execution of project plans or reinvestment zone financing plans.⁶¹⁵

School Districts

Until September 1, 1999, local school districts were able to reduce the value of taxable property reported to the state to reflect any value that was effectively "lost" due to tax increment financing participation by the district.⁶¹⁶ The ability of the school district to deduct the value of the tax increment that it contributed prevented the school district from being negatively affected in terms of state school funding. However, the situation is different for tax increment reinvestment zones created after that date. It appears that the Comptroller will no longer reduce taxable property value for school districts to reflect tax increment financing losses for zones that are created on or after September 1, 1999. As a result, participation in tax increment financing by a school district in those zones will likely result in lower state aid to the school district, assuming all other factors are constant. However, there are certain exceptions that may apply. School districts should consult directly with the Comptroller's Office about how participation in a particular tax increment financing agreement would impact the district's funding from the State of Texas.⁶¹⁷

There is some debate about what the effect of the law will be in cases where a school district is involved in a tax increment financing agreement that was created before September 1, 1999, but that is still in effect after that date. Any school district that might be in this situation will want to visit with the Comptroller's Office about the possible effects of this law on the amount of state aid to be received by the district. Before a local government implements tax increment financing, it should also visit with its local financial advisor to determine the potential effect on the entity's state aid, and the effect on the entity's financial and bond rating.

Additionally, as of September 1, 2001, some cities may enter into tax increment financing agreements with school districts for certain limited purposes.⁶¹⁸ Cities with a population of less than 120,000 that have territory in three counties may enter into new tax increment financing agreements or may amend existing agreements with a school district located wholly or partially within the reinvestment zone. However, the agreement must be for the dedication of revenue from the tax increment fund to the school district for the purpose of acquiring, constructing or reconstructing an educational facility located inside or outside the tax increment financing reinvestment zone.⁶¹⁹

⁶¹⁴ Tex. Gov't Code Ann. § 481.002 (Vernon 2004).

⁶¹⁵ Tex. Tax Code Ann. § 311.020(b)(1)-(2) (Vernon 2008).

⁶¹⁶ In tax increment financing, value is not actually "lost." Rather, some of the land's increase in value is classified as "captured appraised value" so that an amount of taxes can be forwarded to the tax increment financing board. Such taxes are, in effect, lost to the school district because they must be contributed to the tax increment fund and cannot be used for school programs.

⁶¹⁷ See Tex. Gov't Code Ann. §§ 403.302 (d)-(g), 403.303(a) (Vernon Supp. 2008) (affected entities should consider the effects of these sections as they relate to school finance.) See also Tex. Att'y Gen. Op. GA-549 (2007).

⁶¹⁸ Tex. Tax Code Ann. § 311.0085 (Vernon 2008).

⁶¹⁹ *Id.* § 311.0085(c).

Texas Economic Development Act

The Texas Economic Development Act (the Act) is another economic development tool used to attract new industries and commercial enterprises. Chapter 313 of the Tax Code applies to school districts. The Act authorizes certain property tax incentives for economic development. School districts have the ability to provide property tax relief by limiting appraised property values and by providing tax credits to eligible corporations and limited liability companies. The Act requires an eligible entity to make large investments that create jobs within the state. Further, corporations and limited liability companies eligible for a limitation of appraised values must use the property for particular manufacturing, research and development, a clean coal project as defined by section 5.001 of the Water Code, a gasification project for a coal and biomass mixture, or renewable energy electric generation activities.⁶²⁰

This legislation was passed on the basis of several legislative findings: (1) many states had enacted aggressive economic development laws designed to attract large employers, create jobs and strengthen their economies; (2) the State of Texas had slipped in its national ranking each year between 1993 and 2000 in terms of attracting major new manufacturing facilities to this state; (3) a significant portion of the Texas economy continues to be based in the manufacturing industry, and the continued growth and overall health of the manufacturing sector serves the Texas economy well; (4) without a vibrant, strong manufacturing sector, other sectors of the economy, especially the state's service sector, will also suffer adverse consequences; and (5) the current property tax system of this state did not favor capital-intensive businesses such as manufacturers.⁶²¹

The purposes of the Act are to: (1) encourage large-scale capital investments in Texas, especially in school districts that have an ad valorem tax base that is less than the statewide average ad valorem tax base; (2) create new, high-paying jobs; (3) attract to Texas new, large-scale businesses that are exploring opportunities to locate in other states or other countries; (4) enable local government officials and economic development professionals to compete with other states by authorizing economic development incentives that meet or exceed incentives being offered to prospective employers by other states and to provide local officials with an effective means to attract large-scale investment; (5) strengthen and improve the overall performance of the Texas economy; (6) expand and enlarge the ad valorem property tax base; and (7) enhance Texas' economic development efforts by providing school districts with an effective local economic development option.⁶²²

The Act is currently set to expire on December 31, 2007.⁶²³ Efforts to extend or eliminate this deadline did not pass in the 2005 legislative session.

⁶²⁰ *Id.* § 313.024(b)(1)-(5).

⁶²¹ *Id.* § 313.002(1)-(5).

⁶²² *Id.* § 313.003(1)-(7).

⁶²³ *Id.* § 313.007. *See id.* § 313.171 (for the savings provision for existing tax limitations).

School District Versus Rural School District

The Act has created different investment requirements and minimum limitation requirements for owners of qualified property in rural school districts as opposed to the remaining school districts. Rural school districts can utilize subchapter C of the Act to determine applicability, categorization of rural school districts, minimum amounts of qualified investments, and minimum limitations on appraised values. The remaining school districts must use subchapter B to make such determinations.⁶²⁴

Rural School Districts

Subchapter C of the Act addresses limitations on appraised values of property located in rural school districts. A school district is considered a rural school district that can utilize subchapter C if:

- the school district has territory in a strategic investment area. Currently, a strategic investment area means an area determined by the State Comptroller that is (1) a county with above state average unemployment and below state average per capita income; (2) an area within the state that is a federally designated urban enterprise community or an urban enhanced enterprise community; or (3) a county that has a spaceport, as defined by Section 4D of the Development Corporation Act of 1979;⁶²⁵ or
- the school district is located in a county:⁶²⁶
 - with a population of less than 50,000;
 - that is not partially or wholly located within a metropolitan statistical area; and
 - in which, from 1990 to 2000, according to the federal decennial census, the population either remained the same, decreased, or increased at a rate not greater than three percent.⁶²⁷

⁶²⁴ See *id.* § 313.022(a) (“This [subchapter B] applies to each school district in this state other than a school district to which Subchapter C applies.”)

⁶²⁵ *Id.* § 171.721(2). (To view the State Comptroller’s map of Strategic Investment Areas, visit their web site at window.state.tx.us/news/si2007color.pdf).

⁶²⁶ *Id.* § 313.051(a)(1) - (3).

⁶²⁷ See http://census.tamu.edu/data/census/2000/redistrict/pl94-171/desctab/tot_tab21.txt. (The counties with a population of less than 50,000 whose population from 1990 to 2000 remained the same, decreased, or increased, but at a rate of not more than three percent, include: Andrews, Bailey, Baylor, Borden, Brewster, Briscoe, Brooks, Carson, Cass, Castro, Cochran, Coleman, Collingsworth, Cottle, Crane, Crockett, Crosby, Culberson, Deaf Smith, Dimmit, Duval, Eastland, Edwards, Fisher, Floyd, Foard, Gaines, Garza, Glasscock, Gray, Hall, Hansford, Hardeman, Haskell, Hemphill, Hockley, Hutchinson, Kenedy, Kent, King, Knox, Lamb, Lavaca, Lipscomb, Loving, Lynn, Martin, Matagorda, McCulloch, Morris, Motley, Nolan, Ochiltree, Oldham, Parmer, Reagan, Red River, Reeves, Refugio, Roberts, Runnels, Schleicher, Scurry, Shackelford, Sterling, Stonewall, Sutton, Terrell, Terry, Throckmorton, Upton, Ward, Wheeler, Wilbarger, Winkler, Yoakum, Young and Zavala).

The board of trustees in a rural school district may enter into a limitation agreement in the same manner as the remaining school districts. However, rural school districts are subject to differing amounts with regard to the categorization of rural school districts, minimum amounts of qualified investments, and minimum limitations on appraised values requirements. These differing amounts are found in sections 313.052, 313.053, and 313.054 of the Tax Code and are discussed below.⁶²⁸

Eligibility Requirements for Limitation on Appraised Values

The Act provides that only particular entities are eligible for limitations on appraised property values. Limitations on appraised values are available to property owned by a corporation or a limited liability company to which a franchise tax pursuant to section 171.001 of the Tax Code applies.⁶²⁹ Further, the corporation or limited liability company must use the property for either manufacturing, research and development, a clean coal project as defined by section 5.001 of the Water Code, a gasification project for a coal and biomass mixture, or renewable energy electric generation activities.⁶³⁰

Type of Entity

Eligible Manufacturing Entity

An eligible manufacturing entity means an establishment primarily engaged in activities described in categories 2011-3999 of the 1987 Standard Industrial Classification Manual published by the Federal Office of Management and Budget.⁶³¹ An eligible manufacturing entity described in categories 2011 to 3999 includes the following manufacturing activities: food and kindred products; tobacco manufactures; textile mill products; apparel and other textile products; lumber and wood products; furniture and fixtures; paper and allied products; printing and publishing; chemicals and allied products; petroleum and coal products; rubber and miscellaneous plastics products; leather and leather products; stone, clay, glass, and concrete products; primary metal industries; fabricated metal products; industrial machinery and equipment; electrical and electronic equipment; transportation equipment; instruments and related product; and other miscellaneous manufacturing industries. Please visit www.census.gov/epcd/www/naics.html for more information on categories 2011 to 3999 of the 1987 Standard Industrial Classification Manual.

Research and Development Entity

An eligible research and development facility means an establishment primarily engaged in commercial physical and biological research activities described in category 8731 of the 1987

⁶²⁸ Tex. Tax Code Ann. § 313.051(b) (Vernon 2008).

⁶²⁹ *Id.* § 313.024(a) (“This subchapter [subchapter B] and Subchapters C and D apply only to property owned by a corporation or limited liability company to which Section 171.001 applies.”)

⁶³⁰ *Id.* § 313.024(b)(1)-(5)

⁶³¹ *Id.* §§ 171.751(7), 313.024(e)(1).

Standard Industrial Classification Manual published by the Federal Office of Management and Budget.⁶³² Please visit www.census.gov/epcd/www/naics.html for more information on category 8731 of the 1987 Standard Industrial Classification Manual.

Renewable Energy Electric Generation Entity

An eligible renewable energy electric generation entity means an establishment primarily engaged in activities described in category 221119 of the 1997 North American Industry Classification System.⁶³³ A renewable energy electric generation entity is primarily engaged in operating electric power generation facilities (excluding hydroelectric, fossil fuel, nuclear facilities). These facilities convert other forms of energy, such as solar, wind or tidal power, into electrical energy. Please visit www.census.gov/epcd/www/naics.html for more information on category 221119, titled Other Electric Power Generation.

Creation of Qualifying Jobs

In order for an eligible manufacturing, research and development, or renewable energy electric generation entity to receive a limitation of appraised values, the recipient must make a commitment to create a specified number of jobs and “qualifying jobs.” The number of jobs and “qualifying jobs” required to be created depends upon whether the school district is considered a rural school district that can utilize subchapter C of the Act or whether the school district must use subchapter B.

School Districts

In school districts in which subchapter B is applicable, a property owner is required to create “at least 25 new jobs” on the owner’s qualified property.⁶³⁴ A property owner in a rural school district need only create 10 new jobs. At least 80% of all the new jobs created must be “qualifying jobs.”⁶³⁵ A “qualifying job” under either subchapter B or C has the same meaning and is defined to mean a permanent full-time job that:⁶³⁶

- requires at least 1,600 hours of work a year;
- is not transferred from one area in this state to another area in this state;
- is not created to replace a previous employee;
- is covered by a group health benefit plan, as defined by Section 481.151, Government Code, for which the business offers to pay at least 80% of the premiums or other charges assessed for employee-only coverage under the plan, regardless of whether an employee may voluntarily waive the coverage; and

⁶³² *Id.* §§ 171.751(10), 313.024(e)(1).

⁶³³ *Id.* § 313.024(e)(2).

⁶³⁴ *See id.* 313.021(2)(A)(iv)(b).

⁶³⁵ *Id.* § 313.024(d).

⁶³⁶ *Id.* § 313.021(3) (A) - (E).

- pays at least 110% of the county average weekly wage for manufacturing jobs in the county where the job is located, as computed by the Texas Workforce Commission.⁶³⁷

Rural School Districts

In rural school districts in which subchapter C applies, a property owner is required to create at least 10 new jobs on the owner's qualified property. In the other school districts the property owner is required to create at least 25. At least 80 percent of all the new jobs created must be "qualifying jobs."⁶³⁸ A "qualifying job" under subchapter B or C has the same meaning and is defined to mean a permanent full-time job that:⁶³⁹

- requires at least 1,600 hours of work a year;
- is not transferred from one area in this state to another area in this state;
- is not created to replace a previous employee;
- is covered by a group health benefit plan, as defined by Section 481.151, Government Code, for which the business offers to pay at least 80% of the premiums or other charges assessed for employee-only coverage under the plan, regardless of whether an employee may voluntarily waive the coverage; and
- pays at least 110% of the county average weekly wage for manufacturing jobs in the county where the job is located, as computed by the Texas Workforce Commission.⁶⁴⁰

Other Eligibility Considerations

In determining an applicant's eligibility for a property limitation under either subchapter B or C, other eligibility considerations include:

- the land on which a building or component of a building described by Section 313.021(1)(C) is located is not considered a qualified investment;
- property that is leased under a capitalized lease may be considered a qualified investment;
- property that is leased under an operating lease may not be considered a qualified investment; and
- property that is owned by a person other than the applicant and that is pooled or proposed to be pooled with property owned by the applicant may not be included in determining the amount of the applicant's qualifying investment.⁶⁴¹

Categorization of School Districts

The Act authorizes school districts to make limitations on appraised property values, provided the eligible entity makes qualified investments on the property. The Act distinguishes between

⁶³⁷ *Id.* § 313.021(5).

⁶³⁸ *Id.* § 313.051(b).

⁶³⁹ *Id.* § 313.021(3)(A) - (E).

⁶⁴⁰ *Id.* § 313.021(5).

⁶⁴¹ *Id.* § 313.024(c)(1) - (4).

larger school districts and rural school districts. Rural school districts use subchapter C of Chapter 313 of the Tax Code to determine limitations on appraised property values while the remaining school districts use subchapter B. Both subchapters B and C of Chapter 313 of the Tax Code sort school districts into five categories to determine the minimum amount of qualified investment the entity must make and the minimum amount of limitation the school district may provide on appraised property values.

Please visit the Comptroller's Web site at:

www.window.state.tx.us/taxinfo/proptax/hb1200/values.html for a complete listing of school district classifications, minimum amounts of qualified investments, and limitations on appraised values.

School Districts

Subchapter B of Chapter 313 of the Tax Code classifies schools districts as either I, II, III, IV or V according to the taxable value of property within the district in the preceding tax year, as determined by chapter 403 of the Government Code.⁶⁴² School districts subject to subchapter B are categorized as follows:⁶⁴³

- I \$10 billion or more of taxable property
- II \$1 billion or more but less than \$10 billion of taxable property
- III \$500 million or more but less than \$1 billion of taxable property
- IV \$100 million or more but less than \$500 million of taxable property
- V less than \$100 million of taxable property

Rural School Districts

Likewise, subchapter C classifies the schools districts as either I, II, III, IV or V according to the taxable value of property within the district in the preceding tax year, as determined by chapter 403 of the Government Code.⁶⁴⁴ Rural school districts subject to subchapter C are categorized as follows:

- I \$200 million or more of taxable property
- II \$90 million or more but less than \$200 million of taxable property
- III \$1 million or more but less than \$90 million of taxable property

⁶⁴² *Id.* § 313.022(b).

⁶⁴³ *Id.*

⁶⁴⁴ *Id.* § 313.052.

- IV \$100,000 or more but less than \$1 million of taxable property
- V less than \$100,000 of taxable property

Minimum Amount of a Qualified Investment and Limitation on Appraised Values

School Districts

The minimum amounts of qualified investment⁶⁴⁵ and the minimum amounts of limitation⁶⁴⁶ for each category of school districts subject to subchapter B are as follows:

Category	Minimum Amounts Of Qualified Investment	Minimum Amounts Of Limitation on Appraised Values
I	\$100 million	\$100 million
II	\$ 80 million	\$ 80 million
III	\$ 60 million	\$ 60 million
IV	\$ 40 million	\$ 40 million
V	\$ 20 million	\$ 20 million

A school district subject to subchapter B, regardless of category, may agree to limitations greater than the minimum amounts.⁶⁴⁷

Rural School Districts

The minimum amounts of qualified investment⁶⁴⁸ and minimum amounts of limitation on appraised values⁶⁴⁹ for each category of rural school districts subject to subchapter C are as follows:

Category	Minimum Amounts Of Qualified Investment	Minimum Amounts Of Limitation on Appraised Values
I	\$ 30 million	\$ 30 million
II	\$ 20 million	\$ 20 million
III	\$ 10 million	\$ 10 million
IV	\$ 5 million	\$ 5 million
V	\$ 1 million	\$ 1 million

Again, a rural school district subject to subchapter C, regardless of category, may agree to limitations greater than the minimum amounts.⁶⁵⁰

⁶⁴⁵ *Id.* § 313.023.
⁶⁴⁶ *Id.* § 313.027(b).
⁶⁴⁷ *Id.* § 313.027(c).
⁶⁴⁸ *Id.* § 313.053.
⁶⁴⁹ *Id.* § 313.054(a).
⁶⁵⁰ *Id.* § 313.054(b).

Limitation Agreement

Any limitation agreement between the school board and the property owner must be in writing.⁶⁵¹ The written agreement must describe with specificity the qualified investment that the person will make on or in connection with the person's qualified property that is subject to the limitation on appraised value. Other property of the person that is not specifically described in the agreement is not subject to the limitation agreement unless the school board, by official action, provides that the other property is subject to the limitation.⁶⁵² Additionally, the agreement:⁶⁵³

- must incorporate each relevant provision of subchapter B of Chapter 313 of the Tax Code and, to the extent necessary, include provisions for the protection of future school district revenues through the adjustment of the minimum valuations, the payment of revenue offsets, and other mechanisms agreed to by the property owner and the school district;
- must require the property owner to maintain a viable presence in the school district for at least three years after the expiration of the limitation agreement;
- must provide for the termination of the agreement, the recapture of ad valorem tax revenue lost as a result of the agreement if the owner of the property fails to comply with the terms of the agreement, and payment of penalty, interest or both on the recaptured ad valorem tax revenue;
- may specify any conditions that will require the district and the property owner to renegotiate all or any part of the agreement; and
- must specify the ad valorem tax years covered by the agreement.

Application for Property Limitation

The owner of qualified property may apply to the school board of the school district in which the property is located for a limitation on the appraised value for school district maintenance and operations ad valorem tax purposes of the person's qualified property. An application must be made on the form prescribed by the State Comptroller. A copy of this application may be obtained from the Comptroller's Web site at: www.window.state.tx.us/taxinfo/taxforms/50-296.pdf.

Additionally, the application must be accompanied by:

- the application fee established by the school board of trustees;

⁶⁵¹ *Id.* § 313.027(d).

⁶⁵² *Id.* § 313.027(e).

⁶⁵³ *Id.* § 313.027(f)(1) - (5).

III. Local Property Tax Incentives

- information sufficient to show that the real and personal property identified in the application meets the definition of “qualified property”; and
- information relating to each economic impact evaluation criterion discussed below.⁶⁵⁴

The school district board of trustees is not required to consider an application for a limitation on appraised value. Should the school board elect to consider the application, the school board must hire a third person to conduct an economic impact evaluation of the application.⁶⁵⁵ Further, the school board must approve or disapprove the application before the 121st day after the date the application is filed, unless an extension is agreed to by the school board and the applicant.⁶⁵⁶ In deciding whether to grant an application, the school board is entitled to request and receive assistance from: (1) the Comptroller; (2) the Governor’s Office of Texas Economic Development and Tourism; (3) the Texas Workforce Investment Council; and (4) the Texas Workforce Commission.⁶⁵⁷

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Property Tax Division**

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Austin, Texas 78711-3528
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**Governor’s Office of Texas Economic
Development and Tourism**

P.O. Box 12728
Austin, Texas 78711-2728
Phone: (512) 936-0223
Fax: (512) 936-0520

Texas Workforce Commission

825 E. Rundberg Lane
Austin, Texas 78753-4800
Phone: (512) 837-8636

Texas Workforce Investment Council

P.O. Box 2241
Austin, Texas 78768
Phone: (512) 936-8100
Fax: (512) 936-8118

On receipt of an application for limitation that the school board elects to consider, the school district must deliver one copy of the application to the Comptroller’s Office. The Comptroller, using the economic impact evaluation criteria listed in Section 313.026 (discussed below), shall submit a recommendation within 60 days to the school board as to whether the application should be approved or disapproved.⁶⁵⁸ If the school board elects to consider an application, it must make a written finding as to each economic impact evaluation criterion contained in Section 313.026 of the Tax Code before approving or disapproving the application. Further, the school board is required to deliver a copy of those findings to the applicant.⁶⁵⁹ The school board may approve an application only if the school board finds that the information in the application is true and correct; finds that the applicant is eligible for the limitation on the appraised value of the person’s qualified property; and determines that granting the application is in the best interest

⁶⁵⁴ *Id.* § 313.025(a).

⁶⁵⁵ *Id.* § 313.025(b).

⁶⁵⁶ *Id.*

⁶⁵⁷ *Id.* § 313.025(c).

⁶⁵⁸ *Id.* § 313.025(d).

⁶⁵⁹ *Id.* § 313.025(e).

of the school district and the State of Texas.⁶⁶⁰ The Governor's Office of Texas Economic Development and Tourism is authorized to recommend that a school district grant a person a limitation on appraised values. In determining whether to grant an application, the school board of trustees must consider any recommendations made by the Governor's Office of Texas Economic Development and Tourism.⁶⁶¹

Application Fee

An application for a property limitation must be accompanied by an application fee in an amount set by the school board of trustees.⁶⁶² The Texas Economic Development Act provides that the school board by official action shall establish a reasonable, nonrefundable application fee to be paid by property owners who apply to the district for a limitation on the appraised value of the person's property. The amount of an application fee must be reasonable and may not exceed the estimated cost to the district of processing and acting on an application, including the cost of the economic impact evaluation.⁶⁶³

Economic Impact Evaluation

As indicated earlier, a school district board of trustees is not required to consider an application for a limitation on appraised value that is filed with the school board. Should the school board decide to consider the application, the school board is required to hire a third person to conduct an economic impact evaluation of the application.⁶⁶⁴ An application must be made on the form prescribed by the Comptroller. The application must contain the following economic impact evaluation criteria:⁶⁶⁵

- the recommendations of the Comptroller;
- the relationship between the applicant's industry and the types of qualifying jobs to be created by the applicant to the long-term economic growth plans of this state as described in the strategic plan for economic development submitted by the Texas Strategic Economic Development Planning Commission under Section 481.033, Government Code, as that section existed before February 1, 1999;
- the relative level of the applicant's investment per qualifying job to be created by the applicant;
- the wages, salaries and benefits to be offered by the applicant to qualifying job holders;

⁶⁶⁰ *Id.* § 313.025(f).

⁶⁶¹ Tex. Tax Code Ann. § 313.025(g).

⁶⁶² *Id.* § 313.025(a)(1).

⁶⁶³ *Id.* § 313.031(b).

⁶⁶⁴ *Id.* § 313.025(b).

⁶⁶⁵ *Id.* §§ 313.025(a)(3), 313.026(1) - (9).

III. Local Property Tax Incentives

- the ability of the applicant to locate or relocate in another state or another region of this state;
- the impact the added infrastructure will have on the region, including:
- revenue gains that would be realized by the school district; and
- subsequent economic effects on the local and regional tax bases;
- the economic condition of the region of the state at the time the person's application is being considered;
- the number of new facilities built or expanded in the region during the two years preceding the date of the application that were eligible to apply for a limitation on appraised value; and
- the effect of the applicant's proposal, if approved, on the number or size of the school district's instructional facilities, as defined by Section 46.001, Education Code.

Qualified Property

In addition to the application fee and the economic impact evaluation criteria, an application for limitation of appraised value must contain information sufficient to show that the real and personal property identified in the application meets the definition of "qualified property" as established by section 313.021(2) of the Tax Code.⁶⁶⁶ "Qualified property" is defined to mean:⁶⁶⁷

- **land:**
 - that is located in an area designated as a tax increment financing reinvestment zone under Chapter 311 of the Tax Code, a tax abatement reinvestment zone under Chapter 312 of the Tax Code, or an enterprise zone under Chapter 2303 of the Government Code;
 - on which a person proposes to construct a new building or erect or affix a new improvement that does not exist before the date the owner applies for a limitation on appraised value;
 - that is not subject to a tax abatement agreement entered into by a school district under Chapter 312 of the Tax Code; and
 - on which, in connection with the new building or new improvement described by Subparagraph (ii), the owner of the land proposes to:

⁶⁶⁶ *Id.* § 313.025(a)(2).

⁶⁶⁷ *Id.* § 313.021(2).

III. Local Property Tax Incentives

- make a qualified investment in an amount equal to at least the minimum amount required by Section 313.023; and
- create at least 25 new jobs;⁶⁶⁸
- **a new building or other new improvement** that a person proposes to construct or affix that does not exist before the date the owner applies for a limitation on appraised value;⁶⁶⁹ or
- **tangible personal property** that:
 - is not subject to a tax abatement agreement entered into by a school district under Chapter 312 of the Tax Code;⁶⁷⁰ and
 - except for new equipment described in Tax Code sections 151.318(q) (semiconductor fabrication cleanrooms and equipment) or 151.318(q-1)⁶⁷¹ (pharmaceutical biotechnology cleanrooms and equipment), is first placed in service in the new building or in or on the new improvement described by Paragraph (A)(ii), or on the land on which that new building or new improvement is located, if the personal property is ancillary and necessary to the business conducted in the new building or in or on the new improvement.

Limitation on Appraised Values

If a person's application is approved by the school board, for each of the first eight tax years that begin after the applicable qualifying time period, the appraised value of the person's qualified property, as described in the agreement may not exceed the lesser of:⁶⁷²

- the market value of the property; or
- an amount agreed to by the school board of trustees, in accordance with the following:

⁶⁶⁸ *Id.* § 313.021(2)(A)(iv)(B). *But see id.* § 313.051(b) (property owner located in rural schools subject to Subchapter C is "required to create only at least 10 new jobs on the owner's qualified property.")

⁶⁶⁹ *Id.* §§ 313.021(2)(A)(ii), 313.021(2)(B).

⁶⁷⁰ *Id.* § 313.021(2)(C)(i). *See also id.* § 312.002 (f).

⁶⁷¹ *Id.* § 313.021(2)(C)(ii).

⁶⁷² *Id.* § 313.027(a)(1)-(2).

III. Local Property Tax Incentives

Category	School Districts Minimum Amount Of Limitation ⁶⁷³	Rural School Districts Minimum Amount Of Limitation ⁶⁷⁴
I	\$100 million	\$ 30 million
II	\$ 80 million	\$ 20 million
III	\$ 60 million	\$ 10 million
IV	\$ 40 million	\$5 million
V	\$ 20 million	\$ 1 million

“Qualifying time period” is defined to mean the first two tax years that begin on or after the date a person’s application for a limitation on appraised value is approved.⁶⁷⁵

When appraising a person’s qualified property that is subject to a limitation on appraised value, the chief appraiser shall determine the market value of the property and include in the appraisal records both the market value and the appropriate value agreed to by the school board subject to the minimum limitation amounts listed above.⁶⁷⁶

Confidentiality of Business Information

Information provided to a school district in connection with an application for a limitation on appraised value that describes the specific processes or business activities to be conducted or the specific tangible personal property to be located on real property covered by the application is confidential and is not subject to public disclosure unless the school board approves the application. Information in the custody of a school district is public once the school board approves the application.⁶⁷⁷

Tax Rate Limitation

For each of the first two tax years that begin after the date the application is approved, the school board may not adopt a tax rate that exceeds the school district’s rollback tax rate under Section 26.08 of the Tax Code for that year. If, in any tax year in which a restriction on the school district’s tax rate under this section is in effect, the school board approves a subsequent application for a limitation on appraised value under this section, the restriction on the school district’s tax rate is extended until the first tax year that begins after the second anniversary of the date the subsequent application is approved.⁶⁷⁸

⁶⁷³ *Id.* § 313.027(b).

⁶⁷⁴ *Id.* § 313.054(a).

⁶⁷⁵ *Id.* § 313.021(4).

⁶⁷⁶ *Id.* § 313.027(g).

⁶⁷⁷ *Id.* § 313.028.

⁶⁷⁸ *Id.* § 313.029.

Tax Abatement Agreements

Section 313.030 of the Tax Code provides that if property receives a limitation on appraised value in a particular tax year then the property is not eligible for a tax abatement agreement by the school district under Chapter 312 of the Tax Code in the same tax year.⁶⁷⁹ Pursuant to Section 312.002 (f) of the Tax Code, school districts are no longer authorized to enter into tax abatement agreements.⁶⁸⁰

Impact Fees

A city or county may impose and collect from the owner of a qualified property a reasonable impact fee to pay for the cost of providing improvements associated with or attributable to property that receives a property tax limitation.⁶⁸¹

Tax Credits

In addition to the limitation on appraised values under either subchapter B or C of the Act, a person is entitled to receive a tax credit from the school district that approved the limitation. The amount of the tax credit is an amount equal to the amount of ad valorem taxes paid to that school district that were imposed on the portion of the appraised value of the qualified property that exceeds the amount of the limitation agreed to by the school board in each year of the applicable qualifying time period.⁶⁸² Should the person relocate the business outside the school district, the person would not be entitled to the tax credit in or after the year in which the person relocated the business.⁶⁸³

Application for Tax Credit

An application for the tax credit must be made to the school board to which the ad valorem taxes were paid. The application for the tax credit must be:⁶⁸⁴

- made on the form prescribed for that purpose by the State Comptroller and verified by the applicant. A copy of the application for tax credit may be obtained at the Comptroller's Web site at: www.window.state.tx.us/taxinfo/taxforms/50-300.pdf;
- accompanied by:
 - a tax receipt from the collector of taxes for the school district showing full payment of school district ad valorem taxes on the qualified property for the applicable qualifying time period; and

⁶⁷⁹ *Id.* § 313.030. *See also id.* § 312.002(f).

⁶⁸⁰ *Id.* § 312.002(f).

⁶⁸¹ *Id.* § 313.006(b).

⁶⁸² *Id.* § 313.102(a).

⁶⁸³ *Id.* § 313.102(b).

⁶⁸⁴ *Id.* § 313.103(1)-(3).

- any other document or information that the State Comptroller or the school board considers necessary for a determination of the applicant's eligibility for the credit or the amount of the credit; and
- filed before September 1 of the year immediately following the applicable qualifying time period.

Action on Application and Grant of Tax Credit

The school board is required to take action before the 90th day after the date the application for a tax credit is filed.⁶⁸⁵ The school board must:

- determine the person's eligibility for a tax credit; and
- if the person's application is approved, by order or resolution direct the collector of taxes for the school district:
 - in the second and subsequent six tax years that begin after the date the application is approved, to credit against the taxes imposed on the qualified property by the district in that year an amount equal to one-seventh of the total amount of tax credit to which the person is entitled under Section 313.102, except that the amount of a credit granted in any of those tax years may not exceed 50% of the total amount of ad valorem school taxes imposed on the qualified property by the school district in that tax year; and
 - in the first tax year that begins on or after the date the person's eligibility for the limitation under Subchapter B or C expires, to credit against the taxes imposed on the qualified property by the district an amount equal to the portion of the total amount of tax credit to which the person is entitled under Section 313.102 that was not credited against the person's taxes under paragraph (A) in a tax year covered by paragraph (A), except that the amount of a tax credit granted under this paragraph in any tax year may not exceed the total amount of ad valorem school taxes imposed on the qualified property by the school district in that tax year.

Remedy for Erroneous Tax Credit

If the State Comptroller and the school board determine that a person who received a tax credit was not entitled to the credit or was entitled to a lesser amount of credit, an additional tax will be imposed on the qualified property equal to the full credit or the amount of the credit to which the person was not entitled, as applicable, plus interest at an annual rate of 7%. The interest rate is

⁶⁸⁵ *Id.* § 313.104(1)-(2).

calculated from the date the credit was issued.⁶⁸⁶ Further, a tax lien can be attached to the property to secure payment of the additional tax and interest imposed and any penalties incurred. A person delinquent in the payment of an additional tax cannot submit a subsequent application or receive a tax credit in a subsequent year.⁶⁸⁷

Adopting the Freeport and Super Freeport Exemptions

Introduction

A constitutional amendment adopted in 1989 authorizes a type of property tax exemption for items classified as “Freeport property.”⁶⁸⁸ Freeport property includes various types of goods that are detained in Texas for a short period of time (175 days or less). The goods must be in Texas only for a limited purpose, such as storage or factory processing. This exemption was proposed to enhance the ability of certain areas to attract warehouse and distribution center facilities by offering a special property tax exemption for the goods they typically handle.

A 2001 constitutional amendment authorizes an additional type of property tax exemption for items classified as “Super Freeport property,” also known as “Goods-in-transit.”⁶⁸⁹ For purposes of this discussion, the term Super Freeport will be used.

The Super Freeport exemption is similar to the Freeport exemption with two key differences: (1) the Super Freeport exemption may apply to goods traveling outside the state; and (2) the Super Freeport exemption is only available for goods stored at locations, typically warehouses, owned by someone other than the owner of the goods themselves.

Freeport Exemption

The constitutional amendment was unusual from the standpoint that no action was necessary by taxing units that wanted to exempt Freeport property from taxation. The exemption was self-enacting unless the taxing units took specific action to continue to tax the property. If a city decided to override the Freeport exemption and continue taxing the property, the governing body of the city had to take official action to tax the property by April 1, 1990. The official action that was required was not defined under the law. It would likely have been in the form of a resolution, order or ordinance of the taxing unit to retain its right to tax Freeport property. Most cities and other taxing units took the necessary action at that time to continue to be able to tax the Freeport property.

⁶⁸⁶ *Id.* §313.105(a).

⁶⁸⁷ *Id.* §313.105(b).

⁶⁸⁸ Tex. Const. art. VIII § 1-j (amended 2005).

⁶⁸⁹ Tex. Const. art. VIII § 1-n.

A taxing unit is free to change its decision and choose to exempt Freeport property in order to promote economic development. Such a decision would be made by the governing body of the taxing unit by repealing the original resolution or ordinance to tax Freeport property. It must be emphasized, however, that if a taxing unit such as a city now chooses to exempt Freeport property, the exemption may not be repealed later. In other words, once the taxing unit chooses to exempt Freeport property, this type of property remains exempt from property taxation by that taxing unit forever.

The Freeport exemption, if adopted, applies throughout the local taxing entity's jurisdiction. For example, if a city adopts the Freeport exemption, it applies throughout the entire city. Similarly, if a county or school district adopts the Freeport exemption, it applies throughout the entire taxing jurisdiction of that county or school district. A local government may not choose to exempt Freeport property in only a portion of its territory.

Freeport property, by definition, includes goods, wares, merchandise, ores, and certain aircraft and aircraft parts as defined under Article VIII, Section 1-j of the Texas Constitution. It does not include oil, natural gas and other petroleum products. Petroleum products are defined as "liquid and gaseous materials that are the immediate derivatives of the refining of oil or natural gas."⁶⁹⁰ Freeport property qualifies for an exemption from ad valorem taxation only if it has been detained in the state for 175 days or less for the purpose of assembly, storage, manufacturing, processing or fabricating, as provided under Tax Code Section 11.251 and the Texas Constitution. Some types of companies currently receiving Freeport tax exemptions include auto makers, computer manufacturers, beverage producers, iron works, warehousing and distribution facilities, and medical supply companies.

Even when goods are sold to an in-state purchaser rather than shipped directly out of state, they may qualify for the Freeport exemption. To receive the exemption in such a case, the property must qualify under the above requirements as Freeport property and must be transported out of the state within 175 days after it was first acquired in or imported into the state.⁶⁹¹

It is sometimes difficult to convince school districts to grant the Freeport exemption because of its potential effect on state aid to school districts. In certain cases, a school district that grants the Freeport exemption will not only lose the value of the Freeport property from its tax rolls, but may also risk certain Tier 1 or Tier 2 funding that the state would otherwise provide to the local school district. However, it is important to note that in certain cases, granting the Freeport exemption has had little or no effect on state funding to a school district. Accordingly, school

⁶⁹⁰ Tex. Tax Code Ann. §11.251(j) (Vernon 2008).

⁶⁹¹ Op. Tex. Att'y Gen. No. DM-463 (1997) (Article VIII, section 1-j of the Texas Constitution establishes an exemption from ad valorem tax for "freeport" goods, that is, certain property destined for shipment out-of-state within 175 days after the date the property was acquired in or imported into the state. The freeport exemption is available to property where it is acquired or imported in this state by a person who detains it in the state "for assembling, storing, manufacturing, processing, or fabricating purposes," even though the property is not sold or transported out of the state by that person, but is instead sold to an in-state purchaser who uses the property in manufacturing other items which are then transported out of state within 175 days of the time the first owner acquired it).

districts that are considering granting the Freeport exemption should first consult with the Texas Education Agency (TEA) on the effect that such a decision would have on state aid to that district. The staff of the TEA can conduct an impact analysis using information provided by the district regarding the current school district tax rate, the total school district tax collections, and the estimated value of the Freeport property. With this assistance from the TEA, the school district can assess the likely impact of granting the Freeport exemption. To contact the Texas Education Agency, call (512) 463-8994.

Super Freeport Exemption

Like the Freeport Exemption, the Super Freeport exemption is self-enacting unless taxing units hold a hearing and then take official action to tax the goods prior to January 1 of the first tax year in which the unit wishes to tax the goods. Unlike the Freeport exemption, however, taxing units are free to postpone their decision to tax Super Freeport goods until any future tax year. For example, if a taxing unit failed to act to tax Super Freeport goods prior to January 1, 2008 (the first tax year the exemption went into effect), they could act again prior to January 1, 2009, to tax goods in that tax year, or likewise in any future year.

Also unlike the Freeport exemption, taxing units that repeal the decision to continue taxing Super Freeport goods (reinstating the exemption, in other words) apparently may choose to again tax the goods at some time in the future, provided they do so prior to January 1 of the first tax year they intend to again tax the goods.

The Super Freeport exemption, if applicable, applies throughout the local taxing entity's jurisdiction. For example, if the Super Freeport exemption applies to a city, it applies throughout the entire city. Similarly, if a Super Freeport exemption applies to a county or school district, it applies throughout the entire taxing jurisdiction of that county or school district. A local government may not choose to exempt Freeport property in only a portion of its territory.

Super Freeport property, by definition, includes goods, wares, merchandise, ores and certain aircraft and aircraft parts as defined under Article VIII, Section 1-n of the Texas Constitution. It does not include oil, natural gas and other petroleum products. Freeport property qualifies for an exemption from ad valorem taxation only if it has been detained in the state to be forwarded to another location in the state or outside the state for a period of 175 days or less at a location in the state that is not owned or under the control of the property owner for assembling, storing, manufacturing, processing or fabricating purposes by the person who acquired or imported the goods. The amendment to the Texas Constitution that authorized the Super Freeport exemption would have permitted legislation allowing the goods to remain at a location for up to 270 days tax-free, but the enabling legislation adopted a narrower, 175-day window that mirrors the Freeport exemption.

It is somewhat confusing to ascertain exactly how the Super Freeport exemption is intended to overlap with the Freeport exemption. Four different scenarios appear possible for a taxing unit:

1. Taxing unit granted the Freeport exemption, and grants the Super Freeport exemption.

Because the Super Freeport exemption is in most cases a broader application of the Freeport exemption, Section 1-n(c) of the Super Freeport constitutional amendment states that “[a] property owner who receives the exemption authorized by the legislature under this section is not entitled to receive the exemption authorized by Section 1-j [Freeport] of this article for the same property.”⁶⁹²

At first glance, this passage would appear to deny the recipient of a Super Freeport exemption from getting the benefit of the Freeport exemption. In practice, this is not the case, however. The Super Freeport exemption already encompasses goods traveling out of state (Freeport), and adds to it goods traveling to locations within the state. The language above thus seems simply to provide that a warehouse owner may not receive double the tax benefit, perhaps by arguing that they are entitled to an affirmative credit.

Thus, a taxing entity in this category would not typically tax affected warehoused goods traveling in state or out of state.

2. Taxing unit granted the Freeport exemption, but opts-out of the Super Freeport exemption.

The decision to opt-out of Super Freeport will have no effect on goods already exempt under Freeport—they remain tax exempt. Section 1-n(d) of the Super Freeport constitutional amendment states that the decision to tax Super Freeport goods may only apply to goods “not exempt from ad valorem taxation by any other law,” thus leaving any existing Freeport exemption intact.⁶⁹³

A taxing entity in this category would thus tax affected warehoused goods traveling to other locations in Texas, but would not tax warehoused goods traveling out of the state.

3. Taxing unit opted-out of the Freeport exemption, but grants the Super Freeport exemption.

It appears from the language of the Super Freeport constitutional amendment that the Super Freeport exemption has no effect in taxing jurisdictions that opted out of Freeport (which they had to do prior to April 1, 1990.) The amendment contains the following sentence: “A property owner who is eligible to receive the exemption authorized by Section 1-j [Freeport] of this article may apply for the exemption authorized by the legislature under this section...”⁶⁹⁴ In other words, only property owners that are in taxing entities that did not opt out of Freeport may receive the Super Freeport exemption.

⁶⁹² Tex. Const. art. VIII § 1-n(c), information in brackets added by editor.

⁶⁹³ Tex. Const. art. VIII § 1-n(d).

⁶⁹⁴ Tex. Const. art. VIII § 1-n(c).

Of course, taxing entities that opted-out of Freeport can change their mind and grant Freeport (see above). After doing so, they would then have the option of opting-out or granting Super Freeport.

Taxing entities in this category tax affected warehouse goods traveling both out of state and within the state (at least until they repeal the Super Freeport exemption).

4. Taxing unit opted-out of Freeport exemption, and opts-out of Super Freeport exemption.

This combination is fairly straightforward. Such taxing units would tax affected warehouse goods traveling both out of state and within the state.

For more information on the Freeport Exemption, go to Texas Comptroller of Public Accounts, Annual Property Tax Report: Tax year 20064 (Issued Jan. 2008 www.window.state.tx.us/taxinfo/proptax/annual06/).

Super Freeport data is not yet available.

IV. Economic Development Through Tourism

The Local Hotel Occupancy Tax

Economic development for many Texas cities is a matter of tourism. Texas consistently ranks, along with California and Florida, as a top destination for U.S. travelers. To fund the promotion of tourism, more than 500 Texas cities levy a local hotel occupancy tax generating millions in revenue for these cities. It is clear that the amount of money spent on tourism in Texas is growing and communities are increasingly looking to tourism for much needed revenue. The local hotel occupancy tax can provide an important source of funding for maintenance of a city's tourism program and can translate into economic development for the entire area.

Authorized Entities and Procedures

Both general law cities and home rule cities are authorized to adopt a hotel occupancy tax within the city boundaries.⁶⁹⁵ Implementing such a tax is optional. A city may implement a hotel occupancy tax by adopting an ordinance calling for the levy of the tax. The ordinance needs to be approved by a simple majority of the members of the governing body at an open meeting. Unlike a local sales tax, the adoption of a local hotel occupancy tax does not require voter approval. Although not mandated by state statute, a city may hold a public hearing to give the public an opportunity to express its views regarding the implementation and potential uses of the tax. Home rule cities (cities over 5,000 population that have adopted a home rule charter) should check their city charter for any additional requirements that the charter may impose.

Most cities are eligible to adopt a hotel occupancy tax rate of up to seven percent of the consideration paid for the use of a hotel room.⁶⁹⁶ There is considerable variation among Texas cities in the hotel occupancy tax rates levied and in the allocation of the revenues from the tax.

A city with a population of under 35,000 may also adopt the hotel occupancy tax within that city's extraterritorial jurisdiction (ETJ).⁶⁹⁷ If a city adopts the hotel occupancy tax within its ETJ, the combined state, county and municipal hotel occupancy tax rate may not exceed 15%. Except for within a city's ETJ, there is no maximum combined rate of the state, county and municipal hotel occupancy tax.

As of the 2007 Legislative Session, 62 counties have received legislative approval to adopt a county hotel occupancy tax.⁶⁹⁸ The counties include: Aransas, Bandera, Borden, Bosque, Brazoria, Brazos, Brewster, Burleson, Burnet, Calhoun, Cameron, Camp, Chambers, Crockett, El Paso, Franklin, Galveston, Gillespie, Glasscock, Harris, Hidalgo, Hill, Jack, Jackson, Jeff Davis,

⁶⁹⁵ Tex. Tax Code Ann. §§ 351.001 (definition of "municipality") and 351.002 (municipal hotel occupancy tax authorized) (Vernon 2008).

⁶⁹⁶ *Id.* § 351.003(a).

⁶⁹⁷ *Id.* § 351.0025.

⁶⁹⁸ *Id.* § 352.002(a) (as amended by Tex. H.B. 1669, H.B. 1820, and S.B. 213, 80th Leg., R.S. (2007)).

Jefferson, Jim Hogg, Kenedy, King, Kleberg, Llano, Leon, Loving, Madison, Matagorda, Maverick, McCullough, McMullen, Midland, Nueces, Orange, Palo Pinto, Polk, Rains, Real, Refugio, Robertson, Sabine, San Jacinto, San Patricio, Somervell, Starr, Stephens, Terrell, Trinity, Tyler, Uvalde, Val Verde, Victoria, Webb, Willacy, Wood, Young and Zapata. Generally, counties are authorized to adopt a rate not to exceed seven percent of the consideration paid for a hotel room.⁶⁹⁹ The State of Texas also imposes a six percent hotel occupancy tax rate.⁷⁰⁰ Therefore, in locales with both a city and a county hotel occupancy tax, the combined hotel occupancy tax rate can theoretically be up to 20% of the cost of the hotel room.

Issues to Consider before Adopting the Tax

A local government will want to consider a number of issues before it implements a local hotel occupancy tax. These concerns include:

- Would the expenditure of hotel occupancy tax revenues on local facilities and programs be likely to attract out-of-town tourists that would stay overnight or otherwise conduct business at area lodging facilities? Hotel occupancy tax revenues may not be used to establish or enhance facilities or programs that would not attract out-of-town visitors and directly promote the hotel and convention industry.⁷⁰¹
- What would be the increase in cost for a typical hotel room in the community if the hotel occupancy tax were imposed? Is it likely the increased charge will discourage hotel customers or convention organizers from using hotels and motels in the city?
- How does the proposed hotel occupancy tax rate compare to the hotel occupancy tax rates of neighboring communities? Will the proposed rate be above, in line with, or below nearby areas that compete for available tourism business?
- What revenues can be expected by the imposition of a hotel occupancy tax? Projected revenues can be roughly estimated by applying the proposed local hotel occupancy tax rate against the taxable revenues of the hotels in the locale during prior years. Hotels report their taxable revenues each year to the State Comptroller when they submit the state hotel occupancy tax. The information from this report to the Comptroller can be adjusted to get a basic estimate of the amount of revenue a city could anticipate if it adopted a local hotel occupancy tax. Cities can call the Comptroller at (800) 252-1385 to request a copy of the income reported to the state from area hotels. Alternatively, a city may obtain information and make special requests by logging onto the Comptroller's Web site at www.window.state.tx.us and clicking on the topic, "The Texas Economy." Once on The Texas Economy screen, the user can then scroll down to the heading "For and About Business" and click on the topic, "Hotel Occupancy Tax." The user will be able to search the quarterly or

⁶⁹⁹ *Id.* § 352.003.

⁷⁰⁰ *Id.* § 156.052.

⁷⁰¹ *Id.* §§ 351.101(a) and (b).

monthly hotel occupancy receipts by city or download the hotel occupancy tax receipts.

- How would the proposed tax fit into the city’s future plans and goals? What types of programs and improvements will be possible with the anticipated revenues? Would the proposed programs and expenditures be possible without the imposition of a hotel occupancy tax and how soon would they be possible? What existing or new facilities and programs would qualify for funding? To qualify for funding, each of the facilities or programs must fit into one of the eight statutory categories for expenditures (convention centers, registration of convention delegates, advertising and promotion of the city, promotion of the arts, historical preservation, certain sporting events or facilities in eligible cities, or transportation systems for tourists).⁷⁰² Each expenditure also must be likely to result in increased tourism by out-of-town visitors to the city and must have some impact of hotel and/or convention activity.
- How will the city measure the benefits of expenditures of the hotel occupancy tax? For example, a city could ask recipients of hotel occupancy tax proceeds to keep a log of out-of-town visitors or business transactions that took place after the enhancement of their program or facility with hotel occupancy tax money. Many visitor centers and tourist attractions have a guest book that out-of-town visitors are encouraged to sign. The city could use this information later to estimate the effectiveness of the various expenditures at promoting increased tourism.
- What local entities would be encouraged to participate in the decisions regarding administration of a local hotel occupancy tax? Will the city involve local citizens, the chamber of commerce or representatives of the local hotels to review potential uses of the hotel occupancy tax proceeds? Involving area hotel representatives in the allocation decisions has helped many communities avoid opposition to the types of programs that are ultimately funded.

Who Charges the Tax

The following businesses are considered “hotels” and are required to charge the tax:⁷⁰³ a hotel, motel, tourist home, tourist court, lodging house, inn, rooming house, or bed and breakfast. Hospitals, sanitariums, nursing homes, and dormitories and other non-hotel housing facilities owned by institutions of higher education may not charge the tax. While recreational vehicles (RVs) and RV rental spaces are not expressly listed in the statute, the State Comptroller’s Office has interpreted the statute to exclude RVs and RV lots from taxation.⁷⁰⁴

⁷⁰² *Id.* §§ 351.101(a)(1)-(7) and 351.110.

⁷⁰³ *Id.* § 351.001(4) (the term “hotel” has the meaning assigned by Tax Code Section 156.001).

⁷⁰⁴ However, RV’s may become taxable if they become fixed in place and lose their mobile nature.

The hotel occupancy tax may be imposed against any “person” (including corporations and other legal entities) who pays for the use of a room in a hotel.⁷⁰⁵ The price of the room does not include the cost of food served by the hotel or the cost of other personal services.⁷⁰⁶ Unlike the state hotel occupancy tax, the local hotel occupancy tax may be assessed only against the use of a room that is ordinarily used for sleeping. The local hotel occupancy tax does not apply to the cost of renting meeting, banquet or event space within a hotel since these rooms are not considered “sleeping rooms.”

Exemptions From the Tax

State law exempts the following individuals from payment of the local hotel occupancy tax, if they are traveling on official business: 1) federal employees⁷⁰⁷; 2) foreign diplomats with a tax exempt card issued by the U.S. Department of State⁷⁰⁸; 3) a very limited number of state officials with a hotel tax exemption card (heads of state agencies, state legislators and legislative staff, members of state boards and commissions, and state judges)⁷⁰⁹; and 4) persons or businesses who have the right to use or possess a hotel room at least 30 consecutive days.⁷¹⁰ All individuals claiming one of the above exemptions are required to show appropriate identification and to fill out a Hotel Occupancy Tax Exemption Certificate. A certificate form that can be used for this purpose is available on the State Comptroller’s Web site at www.window.state.tx.us/taxinfo/taxforms/12-forms.html. Lodging operators and other interested parties can also access an internet searchable list of all of the entities that have been granted a letter of exemption from the state hotel occupancy tax. This site can be accessed at www.window.state.tx.us/taxinfo/hotel/index.html.

Officers or employees of a state agency, institution, board or commission who are traveling on official business are also exempt from the tax.⁷¹¹ However, such state employees must still pay the hotel occupancy tax when paying their bill. The state and the local government then refund the hotel occupancy tax to the exempt employer through a separate process. For information on how the state handles refunds of the state hotel occupancy tax, contact the Comptroller’s Office at (800) 531-5441, extension 33849. A city may want to request a copy of the Comptroller’s refund application form for the state hotel occupancy tax and adapt that form for handling refunds of the municipal hotel occupancy tax.

City and county officers and employees are not exempt from the state or local hotel occupancy tax even if the officers or employees are traveling on official business. However, employees of institutions of higher education are exempt from the state hotel occupancy tax.⁷¹² Further, cities

⁷⁰⁵ *Id.* § 351.002 and Tex. Gov’t Code Ann. § 311.005 (2) (Vernon 2005) (definition of “person” as used in any Texas code).

⁷⁰⁶ Tex. Tax Code Ann. § 351.002(b) (Vernon 2008).

⁷⁰⁷ *Id.* §§ 156.103(a) and 351.006(a).

⁷⁰⁸ 34 Tex. Admin. Code § 3.161.

⁷⁰⁹ *Id.*

⁷¹⁰ Tex. Tax Code Ann. §§ 156.101 and 351.002(c) (Vernon 2008).

⁷¹¹ *Id.* § 351.006 (b).

⁷¹² *Id.* § 156.102 (b)(2).

may not authorize additional exemptions from the hotel occupancy tax. For example, the attorney general ruled in JM-865 (1988) that cities cannot grant an exception to the hotel occupancy tax for religious, charitable or educational organizations without new constitutional or statutory authority to do so.

Treatment of Exempt Entities With/Without Letter of Exemption

As noted earlier, the Comptroller provides on the Internet a list of the entities that have been granted a Letter of Exemption from the state hotel occupancy tax. This list can be accessed at www.window.state.tx.us/taxinfo/hotel/index.html and searched by the name of the entity.

Distinction Among Various Taxes

It is important to note that many entities are exempt from the state sales tax but are not exempt from the state or local hotel occupancy tax. Similarly, there are entities such as educational, charitable, and religious entities that are exempt from the state hotel occupancy tax but that must pay the city and county hotel occupancy tax (if applicable).

How the City Receives the Tax

The local hotel occupancy tax is paid by the hotel customer to the hotel. The tax is then remitted by the hotel to the city on a regular basis, to be established by the city. The State Comptroller's Office is not involved in the collection of the local hotel occupancy tax. For the convenience of hotel operators, many cities use the same reporting and collection schedule used by the state for collection of the state hotel occupancy tax. The state requires hotels to turn over collected hotel occupancy taxes on a monthly basis. Some hotels in smaller communities, however, petition the State Comptroller for permission to turn over the tax proceeds on a quarterly basis.

Cities that levy the hotel occupancy tax should send a tax return form to each hotel operator two to four weeks before the taxes are due. Regardless of the reporting period used, cities should require hotels to include as part of their report a copy of the hotel's tax report done for the State Comptroller. The state report data can be used to check the completeness of the local report provided by the hotel to the city. Cities should be aware that, in certain cases, the state and local tax are subject to different exemptions and, as a result, the revenues may not proportionally coincide.

A city may request hotel occupancy tax audit information from the Comptroller.⁷¹³ However, the city must keep such information confidential and use the information only for enforcement or administration of the city's hotel tax. To obtain such information, a city must make a written request to the Comptroller's Office, Open Records Section, P.O. Box 13528, Austin, Texas 78711. The request must be on city letterhead and be signed by a high-level city official, preferably the mayor. A city may also fax a written request for this information to the Comptroller's Office, Open Records Section, at (512) 475-1610.

Cities can also obtain from the Comptroller's Office a copy of the latest quarterly state report listing all of the hotels that currently remit state hotel occupancy taxes. The easiest and fastest

⁷¹³ *Id.* § 111.006.

way to get this report is to log onto the Comptroller's Web site at www.window.state.tx.us and click on the topic, "Texas Economy." Once on the Texas Economy screen, the user can then scroll down to the heading, "For and About Business" and click on the topic, "Hotel Occupancy Tax." The user will be able to search the quarterly or monthly hotel occupancy receipts by city or download the hotel occupancy tax receipts. Alternatively, a city may request a copy of the report by calling the Comptroller's Office at (800) 252-1385 or sending an e-mail to open.records@cpa.state.tx.us.

Reimbursement of Hotel Operator for Collection Expenses

Cities by ordinance may allow hotel operators to retain up to one percent of the amount of hotel occupancy taxes collected as reimbursement for the costs of collecting the tax.⁷¹⁴ Cities are not themselves permitted to retain any of the collected tax to cover the cost of imposing or collecting the tax. However, cities that undertake responsibility for administering a facility or event funded by the local hotel occupancy tax may be reimbursed from the tax revenues for actual expenses incurred in operating the facility or event, if the expenditure directly promotes tourism and local convention and hotel activity.

Penalties for Failure to Report or Collect the Tax

The local hotel occupancy tax statutes provide for specific penalties that may be assessed against hotel operators who file late or false tax returns.⁷¹⁵ A city may include a provision in its hotel occupancy tax ordinance that imposes a 15 percent penalty and a provision allowing the collection of attorneys fees against any hotel operator who is late or fraudulent in remittances. The hotel occupancy tax ordinance may also include a provision that makes it a misdemeanor offense to fail to collect the tax, fail to file a return, file a false return, or fail to timely make the remittances.⁷¹⁶ If the hotel owner does not file a tax report as required by the city, the city can conduct an audit of each hotel for which a tax report was not filed to determine the amount of taxes that are due.⁷¹⁷ The city can charge for the cost of the audit but only if the tax has been delinquent for at least two complete municipal fiscal quarters at the time that the audit was conducted.⁷¹⁸

Enforcement Authority of a City

Cities are also given the authority to take the following actions against a hotel operator who fails to report or collect the local hotel occupancy tax:⁷¹⁹

- require the forfeiture of any revenue the city allowed the hotel operator to retain for its cost of collecting the tax;

⁷¹⁴ *Id.* § 351.005(a).

⁷¹⁵ *Id.* § 351.004(a).

⁷¹⁶ *Id.* § 351.004(c).

⁷¹⁷ *Id.* § 351.004(a-1).

⁷¹⁸ *Id.* § 351.004(a)(2).

⁷¹⁹ *Id.* §§ 351.004.

- bring a civil suit against the hotel operator for noncompliance;
- ask the district court to enjoin operation of the hotel until the report is filed and/or the tax is paid; and
- any other remedies provided under Texas law.

The most noteworthy of these remedies is the ability of the city to request that the district court close down the hotel if the hotel occupancy taxes are not paid. Often, a city can gain compliance simply by informing the hotel operator of the possibility of such a closure.

A city may also require in its hotel occupancy tax ordinance that persons buying a hotel retain out of the purchase price an amount sufficient to cover any delinquent hotel occupancy taxes that are due to the city.⁷²⁰ If the buyer does not remit such amount to the city or show proof that the hotel is current in remitting its hotel occupancy taxes, the buyer becomes liable for any delinquent hotel occupancy taxes due on the purchased hotel.

The purchaser of a hotel may request that the city provide a receipt showing that no hotel occupancy tax is due (“Letter of No Tax Due”) on the property to be purchased. The city is required to issue the statement not later than the 60th day after the request. If the city fails to issue the statement within the deadline, the purchaser is released from the obligation to withhold the amount due from the purchase price.

Use of Local Hotel Occupancy Tax Revenues

There is a two-part test that every expenditure of local hotel occupancy tax revenue must pass to be valid.⁷²¹ First, the expenditure must directly enhance and promote tourism and the convention and hotel industry. In other words, the expenditure must be likely to attract visitors from outside the city into the city or its vicinity and must have some impact on convention and hotel activity. If the expenditure is not reasonably likely to accomplish this result, it should not be funded by hotel occupancy tax revenues. The hotel occupancy tax may not be used for general revenue purposes or to pay for governmental expenses not directly related to increasing tourism.⁷²²

Second, every expenditure must clearly fit into one of the eight statutory categories for the expenditure of local hotel occupancy tax revenues. These eight categories are as follows:⁷²³

1. Funding the establishment, improvement or maintenance of a convention center or visitor information center.

Simply naming a facility a convention center or visitor information center does not bring it under this section. State law specifies that the facility must be one that is primarily used to host conventions and meetings.⁷²⁴

⁷²⁰ *Id.* § 351.0041.

⁷²¹ *Id.* § 351.101(a).

⁷²² *Id.* § 351.101(b).

⁷²³ *Id.* §§ 351.101(a)(1)-(7) and 351.110.

⁷²⁴ *Id.* § 351.001(2).

The term “convention center” is defined to include civic centers, auditoriums, exhibition halls and coliseums that are owned by the city or another governmental entity or that are managed in whole or in part by the city. It also includes parking areas in the immediate vicinity of other convention center facilities. It does not include facilities that are not of the same general characteristics as the structures listed above. The attorney general has specifically ruled against the expenditure of local hotel occupancy taxes for a city recreational facility such as a golf course or a tennis court.⁷²⁵ However, the Legislature has provided additional statutory authority that now allows the use of local hotel occupancy tax for certain sporting related expenses if they meet certain criteria discussed below. It is possible that facilities that are not considered convention centers may still be able to receive funding if the expenditure can be justified under the categories described below for promotion of the arts or for historical preservation or restoration projects. A city may pledge the hotel occupancy tax revenue for the payment of bonds that are issued under Chapter 1504 of the Government Code for convention center facilities, as authorized under the hotel occupancy tax law.

2. Paying the administrative costs for facilitating convention registration.

This provision applies only to administrative costs that are actually incurred for assisting in the registration of convention delegates or attendees. It may include covering the facility costs, personnel costs, and costs of materials for the registration of convention delegates or attendees.

3. Paying for tourism-related advertising and promotion of the city or its vicinity.

This section is frequently the source of considerable debate regarding the appropriateness of a particular expenditure. This provision is strictly limited to expenditures for a solicitation or promotional program or advertising which is directly related to attracting conventions or tourism. In certain cases, a city may not be able to find a statutory category that allows expending hotel tax proceeds for a particular facility or event. However, the city may arguably be able to fund advertisements for that event if such an expenditure would promote tourism in the city or its vicinity. The attorney general has ruled that this provision does not authorize advertising to attract new businesses or permanent residents to a city.⁷²⁶ Again, the purpose of the expenditure must be directly related to increasing tourism and the convention and hotel industry.

4. Funding programs that enhance the arts.

This section authorizes the expenditure of hotel occupancy tax revenues for a variety of arts-related programs. It allows funding for the encouragement, promotion, improvement and application of the arts including 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

⁷²⁵ See Op. Tex. Att’y Gen. Nos. JM-184 (1984), JM-965(1988).

⁷²⁶ See Op. Tex. Att’y Gen. No. JM-690 (1987) (concluding [Chapter 351 of the Tax Code] does not authorize the use of hotel/motel occupancy tax funds for advertising which is not related to attracting conventions, visitors or tourists).

presentation, performance, execution and exhibition of these major art forms. However, it is not enough for a facility or event to promote the arts; state law requires that the arts-related expenditure also must be likely to directly promote tourism and the hotel and convention industry. Section 351.101 (a) of the Tax Code specifically states that “the municipal hotel occupancy tax may be used only to promote tourism and the convention and hotel industry.”⁷²⁷

5. Funding historical restoration or preservation programs.

This section anticipates that a city may want to spend its hotel occupancy tax revenues to enhance historical restoration and preservation projects that would likely bring tourists and hotel guests to the city or to its immediate vicinity. This funding can include the costs for rehabilitation or preservation of existing historic structures. State law does not limit such funding to structures that are owned by a public or nonprofit entity, but the city may choose to impose such a limitation. This category could also include the costs of advertising and conducting solicitations and promotional programs to encourage tourists and convention delegates to visit such preserved historic structures or museums. However, it is not enough for a facility or event to promote historical restoration and preservation. Again, state law requires that the expenditure also must be likely to directly promote tourism and the hotel and convention industry.⁷²⁸

6. Funding costs to hold sporting events in certain municipalities.

Cities located in a county with a population of one million or less may use hotel occupancy tax proceeds for expenses, including promotional expenses, directly related to sporting events in which the majority of participants are tourists. Such funding is permissible provided the sporting event substantially increases economic activity at hotels and motels within the city or its vicinity.⁷²⁹ This provision is intended to allow communities to fund the event costs for sporting tournaments that result in substantial hotel activity. For example, if a city had to pay an application fee to seek a particular sporting event or tournament, it could use this authority if the event would substantially increase economic activity at hotels and the city was within a county of one million or less. The requirement that a majority of the participants must be “tourists” is included to prohibit the use of local hotel tax for sporting related facilities or events that are purely local (e.g., local recreation centers, local little league and parks events, etc.).

7. Enhancing and upgrading existing sport facilities or fields for certain municipalities

This expenditure authorizes certain cities to use hotel occupancy tax revenue to upgrade certain existing sports facilities. Existing sports facilities or fields for baseball, softball, soccer, and flag football may be upgraded with hotel occupancy tax revenue if the facility is: 1) owned by the city; and 2) the sports facility or field has been used, in preceding calendar year, a combined total of more than 10 times for district, state, regional, or national sports tournaments. The cities that are authorized to use hotel occupancy tax revenue for this expenditure are: 1) those with a population of 80,000 or more that are located in a county with a population of 350,00 or less; 2)

⁷²⁷ See Op. Tex. Att’y Gen. No. GA-0124 (2003).

⁷²⁸ *Id.*

⁷²⁹ Tex. Tax Code Ann. § 351.101(a)(6) (Vernon 2008).

those with a population of between 65,000 and 70,000 that are located in a county with a population of 155,000 or less; and 3) those with a population of between 34,000 and 36,000 that are located in a county with a population of 90,000 or less.⁷³⁰

If hotel tax revenues are spent on enhancing or upgrading a sports facility, the municipality must determine the amount of “area hotel revenue” that was generated by hotel activity from sports events that were held at the hotel tax funded facility for five years after the upgrades to the sport facility are complete.⁷³¹ The area hotel revenues that were generated from sports events at the hotel tax-funded facility over that five year period must at least equal the amount of hotel tax that was spent to upgrade the sports facility.⁷³² If the amount of hotel tax that was spent on the facility upgrades exceeds hotel revenue attributable to the enhancements over that five-year period, the municipality must reimburse the hotel occupancy tax revenue fund any such difference from the municipality’s general fund.⁷³³ For example, if a city spent \$400,000 on improvements to its soccer fields, it would have to show at least \$400,000 in hotel night or other area hotel revenue (hotel banquet revenue) directly attributable to events held at that soccer field over the five year period after the soccer field improvements were completed. If the city could only show \$300,000 in hotel industry revenue due to events held at that soccer field, the city would have to reimburse the city hotel tax for the \$100,000 difference from the city’s general fund.

8. Funding transportation systems for tourists

With conventions and large meetings, there is often a need to transport the attendees to different tourism venues. In 2007, the Legislature authorized the use of city hotel tax for any size city to cover the costs for transporting tourists from hotels in and near the city to any of the following destinations:

- the commercial center of the city;
- a convention center in the city;
- other hotels in or near the city; and
- tourist attractions in or near the city.

The reimbursed transportation system must be owned and operated by the city, or financed in part by the city. The law specifically prohibits the use of the local hotel tax to cover the costs for transporting the general public by any such system.⁷³⁴

⁷³⁰ *Id.* § 351.101(a)(7).

⁷³¹ *Id.* § 351.1076(a).

⁷³² *Id.*

⁷³³ *Id.* § 351.1076(b).

⁷³⁴ *Id.* § 351.110.

Summary of the Eight Uses

In summary, local hotel occupancy tax revenues may be spent only to establish or to enhance a convention center; cover the administrative expenses for registering convention delegates; pay for tourism-related advertising and promotions; fund programs that enhance the arts that will enhance tourism and hotel activity; pay for historic restoration or preservation projects that will enhance tourism and hotel activity; fund sporting events in which the majority of participants are tourists in cities located in a county with a population of one million or less; enhance and upgrade certain cities' existing sports facilities or fields; or pay certain transportation costs for taking tourists from hotels to various locations. If the city cannot fit an expenditure within one of these eight categories and make a finding that the expenditure will directly promote tourism and hotel activity, hotel occupancy tax revenues should not be used for the expenditure.

There is no time limit under which a city must expend all of its hotel occupancy tax funds. Since September 1, 1999, cities have been required to keep track of hotel occupancy tax collections and expenditures.⁷³⁵ This information can be used to ensure that funds are expended in accordance with the law in place at the time the money is collected. Further, the hotel occupancy tax statute was amended to clarify that interest earned on hotel tax funds is considered to be hotel tax revenue.⁷³⁶ Thus, the required records of hotel tax expenditures and receipts must also cover the receipt or expenditure of any interest earned on hotel tax funds. Additionally, it should be noted that such interest must be spent in accordance with the requirements of the hotel occupancy tax statute.

Use of Tax Proceeds to Cover Administrative Expenses

The implementation of programs or improvements under the above eight categories may involve certain administrative costs. State law allows proceeds of the tax to be used to cover the portion of administrative costs that are directly attributable to work on facilities or events that may be funded by the tax.⁷³⁷ For example, efforts to promote the city as a tourist and convention locale often involve some travel expenses. There are two circumstances under which cities may spend hotel occupancy tax revenues for travel-related expenditures.⁷³⁸

- First, tax revenues may be spent to pay for travel to attend an event or to conduct an activity that is directly related to the promotion of tourism and the convention and hotel industry. "Tourism" is defined in the Tax Code as promoting the travel of individuals from their residence to a different city or county for pleasure, recreation, education or culture.⁷³⁹
- Second, local hotel occupancy tax revenues may be spent on travel that is directly related to the performance of the person's job in an efficient and professional manner.

⁷³⁵ *Id.* § 351.108.

⁷³⁶ *Id.* §§ 351.001(9) and (10).

⁷³⁷ *Id.* §§ 351.101(e) and (f).

⁷³⁸ *Id.*

⁷³⁹ *Id.* § 351.001(6).

This travel should facilitate the acquisition of skills and knowledge which will promote tourism and the convention and hotel industry.

Entities that manage activities funded by the hotel occupancy tax may spend some of the tax for certain day-to-day operational expenses. These expenses may include supplies, salaries, office rental, travel expenses and other administrative costs. These costs can be reimbursed if they are incurred directly in the promotion and servicing of expenditures authorized under the hotel occupancy tax laws. The portion of the administrative costs that are covered may not exceed the percentage of the cost that is attributable to the activity funded by the hotel occupancy tax. In other words, administrators who spend 33 percent of their time overseeing hotel occupancy tax funded programs could seek funding for no more than 33 percent of their salary or 33 percent of other related overhead costs.⁷⁴⁰

Additional Limits on Expenditures

Texas statutes provide certain additional rules regarding the percentage of hotel occupancy tax revenues that may be spent on each of the eight categories of expenditures discussed above (convention centers, convention registration, advertising and promotion, promotion of the arts, historical restoration and preservation, eligible sporting events, enhancing and upgrading sport facilities or fields, and transportation systems for tourists). The rules differ according to the population of the city.

This review does not itemize city-specific limitations applicable to the cities of Houston, Dallas, Fort Worth, and San Antonio and to certain coastal cities such as Alpine,⁷⁴¹ Aransas Pass, Corpus Christi, Freeport, Galveston, Jamaica Beach,⁷⁴² Port Arthur, and Rockport. There are special legislative provisions that apply only to these municipalities. City officials interested in the special rules applicable to these cities are encouraged to contact the Municipal Affairs Section at the Office of the Attorney General at (512) 475-4683 or the Texas Municipal League Legal Department at (512) 231-7400 for more information about these limitations.

Cities with Populations In Excess of 200,000

Minimum Expenditure That Must be Spent on Advertising and Promotion

A city with a population of over 200,000 is required to spend at least 50 percent of the hotel occupancy tax collected by the city on advertising and conducting solicitations and promotional programs to attract tourists to the city or its vicinity.⁷⁴³ However, it should be noted that if a city takes in over \$2 million annually in hotel taxes, it is not subject to this 50 percent requirement.⁷⁴⁴

⁷⁴⁰ *Id.* § 351.101(e).

⁷⁴¹ *Id.* § 351.1035.

⁷⁴² *Id.* § 351.1055(c).

⁷⁴³ *Id.* § 351.103(a).

⁷⁴⁴ *Id.* § 351.103(b). *See also* Op. Tex. Att’y Gen. No. JC-105 (1999) (concluding, pursuant to section 351.103(b) of the Texas Tax Code, that the allocation restriction of section 351.103(a) of the Tax Code does not apply to a municipality which has collected in excess of \$2 million in hotel occupancy tax revenue in the most recent calendar year).

Fifteen Percent Maximum Expenditure for the Arts and 15 Percent Maximum Expenditure for Historical Restoration and Preservation

Generally, cities with populations of more than 200,000 are limited to a set percentage of the hotel occupancy taxes received that may be spent for certain categories of expenditures.⁷⁴⁵ For example, with regard to arts programs, such cities may not spend more than 15 percent of their hotel occupancy tax revenues or no more than the amount of tax generated by the city at the tax rate of one percent of the cost of a room, whichever is greater. Also, such cities may spend no more than 15 percent of their hotel occupancy tax on historical restoration and preservation programs.⁷⁴⁶

Cities with Populations Between 125,000 and 200,000

Minimum Expenditure That Must be Spent on Advertising and Promotion

The rules for allocation of the hotel occupancy tax revenues for cities with populations between 125,000 and 200,000 depend on the hotel occupancy tax rate adopted by the city. If the city adopted a hotel occupancy tax rate of not more than three percent, at least one-half of one percent of the rate must be spent on advertising and promotion of the city and its vicinity. If the city adopted a hotel occupancy tax rate that exceeds three percent, at least one percent of the rate must be spent on advertising and promotion of the city and its vicinity.⁷⁴⁷ For example, if a city has a seven percent hotel occupancy tax rate, at least one seventh of the hotel occupancy tax proceeds must be spent on advertising and promoting the city and its vicinity to attract tourists and hotel and convention activity.⁷⁴⁸

Fifteen Percent Maximum Expenditure for the Arts and 15 Percent Maximum Expenditure For Historical Restoration and Preservation

Cities with populations between 125,000 and 200,000 are also limited to a set percentage of the hotel occupancy tax that may be spent for certain categories of expenditures. For example, with regard to arts programs, such cities may spend no more than 15 percent of their hotel occupancy tax revenues or no more than the amount of tax generated by the city at the tax rate of one percent of the cost of a room, whichever is greater. Also, such cities may spend no more than 15 percent of their hotel occupancy tax on historical restoration and preservation programs.⁷⁴⁹

⁷⁴⁵ *Id.* § 351.103.

⁷⁴⁶ *Id.* § 351.103(c).

⁷⁴⁷ *Id.* § 351.103(a).

⁷⁴⁸ *Id.* § 351.103(a)(2).

⁷⁴⁹ *Id.* § 351.103(c).

Cities With Populations of Less than 125,000

Minimum Expenditure That Must be Spent on Advertising and Promotion

The rules for allocation of the hotel occupancy tax revenues for cities with populations of less than 125,000 similarly depend on the hotel occupancy tax rate adopted by the city.⁷⁵⁰ If the city adopted a hotel occupancy tax rate of not more than three percent, at least one-half of one percent of the rate must be spent on advertising and promotion of the city and its vicinity. If the city adopted a hotel occupancy tax rate that exceeds three percent, at least one percent of the rate must be spent on advertising and promotion of the city and its vicinity. For example, if a city has a seven percent hotel occupancy tax rate, at least one-seventh of the hotel occupancy tax proceeds must be spent on advertising and promoting the city and its vicinity to attract tourists and hotel and convention activity.⁷⁵¹

Fifteen Percent Maximum Expenditure for the Arts and 50 Percent Maximum Expenditure For Historical Restoration and Preservation

Cities with a population under 125,000 are also limited to a set percentage of the hotel occupancy tax that may be spent for arts programs: a maximum of 15 percent of the total revenue produced by the tax or the amount of tax generated by the city that is equal to one percent of the cost of a room, whichever is greater. Additionally, a city of under 125,000 may, in certain cases, need to allocate at least some of its hotel tax money for acquiring, constructing, improving, maintaining or operating a convention center or visitor information center. If a city fails to allocate money for this purpose, the Tax Code prohibits that city from allocating more than 50 percent of its hotel occupancy tax for historical restoration or preservation projects.⁷⁵² If the city does spend some of its hotel occupancy tax on a convention center, there is no statutory limitation on expenditures for historic preservation and restoration.

Delegating the Management of Funded Activities

The governing body of a city may, by written contract, delegate the management or supervision of programs and activities funded with revenue from the hotel occupancy tax.⁷⁵³ This delegation may be made to a person, another governmental entity or to a private organization.⁷⁵⁴ The delegation of this authority is often made to the local chamber of commerce or to the convention and visitor bureau. A sample contract for this delegation and a sample hotel occupancy tax ordinance are available upon request from the Texas Municipal League (TML). Requests for this packet should be made to the TML legal department at (512) 231-7400.

⁷⁵⁰ *Id.* § 351.103.

⁷⁵¹ *Id.* § 351.103(a)(2).

⁷⁵² *Id.* § 351.103(d).

⁷⁵³ *Id.* § 351.101(c).

⁷⁵⁴ Please note that a legislative body such as a city council is limited in the degree to which it may delegate its authority to another entity. See, for example, *Texas Boll Weevil Eradication Foundation, Inc. v. Lewellen*, 952 S.W.2d 454 (Tex. 1997). See also *Andrews v. Wilson*, 959 S.W.2d 686 (Tex. App. -- Amarillo, 1998).

There are a number of procedural requirements that the Legislature has imposed on entities that undertake management of these funds. For example, a city is required to approve in writing the portion of an entity's annual budget that involves expenditure of hotel occupancy tax funds. This approval must be sought in advance of the expenditures. Funded entities also must submit at least quarterly reports to the city council on their expenditures of the tax revenues. The reports must list all expenditures made by the entity from the hotel occupancy taxes provided by the city. The entity also is required to keep complete and accurate financial records of each expenditure of hotel occupancy tax revenue. These records must be made available for inspection and review upon the request of the governing body or upon a request from any other person.⁷⁵⁵

The entity delegated authority to manage these funded programs undertakes a fiduciary duty with respect to this revenue. Such entities are required to maintain the city hotel occupancy tax revenue in a separate bank account established for that purpose. This account may not be commingled with any other account. It does not appear that these requirements apply to individual organizations, such as an arts group that receives funding for its own programs but does not distribute the funding to other entities.

Documenting Activities Funded by the Hotel Occupancy Tax

Before making a hotel occupancy tax expenditure, a city or entity must specify each scheduled activity, program or event that is directly funded by hotel occupancy tax proceeds or has its administrative costs funded in whole or in part by the tax. The activity or program must directly relate to enhancing and promoting tourism and the convention and hotel industry.⁷⁵⁶

If the city delegates to another entity the management or supervision of an activity or event funded by the local hotel occupancy tax, each entity that is funded by the tax shall, before making an expenditure, specify each scheduled activity, program or event that is directly funded by the tax or has its administrative costs funded in whole or in part by the tax. Further, the list must indicate the activities and programs that are directly enhancing and promoting tourism and the convention and hotel industry.⁷⁵⁷ This list of expenditures should be provided to the city secretary or the city secretary's designee.⁷⁵⁸

Documentation of activities and expenditures is not required if the funded entity already provides written information to the city to indicate which scheduled activities, programs or events directly enhance and promote tourism and the convention and hotel industry.⁷⁵⁹

⁷⁵⁵ Tex. Tax Code Ann. § 351.101(d) (Vernon 2008).

⁷⁵⁶ *Id.* §§ 351.108(b)(2) and (c)(2).

⁷⁵⁷ *Id.* § 351.108(c).

⁷⁵⁸ *Id.* § 351.108(d).

⁷⁵⁹ *Id.* § 351.108(g).

County Development District Tax

The Texas Legislature has recognized that it is sometimes advantageous to pursue economic development at the county level. The County Development District Act provides counties that have a population of 400,000 or less with a means to generate sales tax funds for local economic development and tourism-related projects. Such districts are initiated by a petition of landowners in the proposed district. Upon approval of the petition by the county, an election is called to gain the voters' consent to the creation of the district and to the levy of a sales tax to fund district projects. A county development district may acquire or dispose of the same sorts of projects and pay the same sorts of costs as a Section 4B economic development corporation. However, a county development district project must promote and develop tourism within the county.⁷⁶⁰ To date, six counties have formed county development districts (Cherokee, Denton, Erath, Hood, Jasper and Kaufmann).

The statutes governing the creation and administration of county development districts are found in Chapter 383 of the Texas Local Government Code.⁷⁶¹

Powers and Duties of a County Development District

A county development district has broad authority to establish projects related to economic development and promotion of tourism in the district. Unlike economic development corporations, which are ultimately overseen by the city or county's governing body, Texas law does not require a county development district to get approval from the county before it commits to various projects or expenditures.

The district has the following general powers and duties:

Expenditure of Tax Proceeds. If a sales and use tax was approved by the voters in the district and is being collected, the district can use the tax for projects that promote and develop tourism within the county and to pay bonds issued by the district.⁷⁶²

⁷⁶⁰ See Tex. Loc. Gov't Code Ann. §§ 383.002 (Vernon 2005)("[t]his chapter furthers the public purpose of developing and diversifying the economy of this state by providing incentives for the location and development of projects in certain counties to **attract visitors and tourists**."); 383.003 (a) ("[s]mall and medium-sized counties in this state need incentives for the development of public improvements to **attract visitors and tourists** to those counties..."); 383.003 (b) ("[t]he means and measures authorized by this chapter are in the public interest and serve a public purpose of this state ... by providing incentives for the location and development in certain counties of this state of projects that **attract visitors and tourists** ..."); 383.023 (5) (a petition proposing a county development corporation must state that the district "will serve the public purpose of **attracting visitors and tourists** to the county.")(emphasis added). See also, Op. Tex. Att'y Gen. No. JC-291 (2000) at 7 - 10 (Concluding a county development district was not authorized to undertake a project which did not promote tourism in the county. County development district was not authorized to construct infrastructure for a residential subdivision unless the project would promote and develop tourism in the county).

⁷⁶¹ Tex. Loc. Gov't Code Ann. §§ 383.001 *et seq.* (Vernon 2005).

⁷⁶² *Id.* §§ 383.002 & 383.105. See also, Op. Tex. Att'y Gen. No. JC-291 (2000).

Power of the County to Adopt a Hotel Occupancy Tax and of the District to Expend Hotel Occupancy Tax Revenue. A county commissioners court may impose a hotel occupancy tax of up to seven percent within the boundaries of a county development district.⁷⁶³ The tax can only be imposed outside of the city limits. Such a tax would be collected by the hotel operators and remitted to the county. Within 10 days of its receipt of such tax proceeds, the county must remit the proceeds to the development district. Such hotel tax money may be used by a county development district for any purpose for which the district may use its sales tax proceeds. The county is not authorized to retain a portion of the tax revenues. This tax is in addition to the state hotel occupancy tax.

Ability to Pursue Section 4B Projects that Promote Tourism. The district may acquire and dispose of projects consistent with the purpose of the district. The definition of “project” in this chapter refers to the same types of projects available to Section 4B economic development corporations under the Development Corporation Act of 1979.⁷⁶⁴ Such projects could include athletic facilities, tourism and entertainment facilities, parks and certain public facility and public space improvements, improvements related to commercial businesses, and related transportation and infrastructure improvements that promote tourism.

Limited Application of Competitive Bidding Laws. Competitive bidding provisions apply to county development district contracts,⁷⁶⁵ unless the contract is with a governmental entity or a nonprofit corporation created under the Development Corporation Act of 1979 (Section 4A and Section 4B economic development corporations.)⁷⁶⁶

Ability to Exercise Powers of Municipal Management District. The district has and may exercise all powers and rights of a municipal management district under Chapter 375 of the Texas Local Government Code⁷⁶⁷ except the power to impose ad valorem taxes, unless such a power or right would be inconsistent with Chapter 383 of the Local Government Code.⁷⁶⁸

Limited Eminent Domain Power. A district located outside of a municipality may exercise the power of eminent domain to acquire land or interests in land for water or sewer purposes.⁷⁶⁹

Financial Transaction Powers. The district may disburse money by check, draft, order or other instrument. Disbursement requires the signature of three board directors unless the board has adopted an agreement that the signature of a specific employee or other officer is sufficient.⁷⁷⁰

⁷⁶³ Tex. Tax Code Ann. § 352.107 (Vernon 2002).

⁷⁶⁴ Tex. Loc. Gov’t Code Ann. § 383.004 (8) (Vernon 2005 & Supp. 2008) (stating that “project” has the meaning assigned by Section 4B (a) (2) of Texas Civil Statutes Article 5190.6) (effective April 1, 2009 to be codified at Tex. Loc. Gov’t Code Ann. §§ 505.151-505.156.)

⁷⁶⁵ *Id.* § 383.111.

⁷⁶⁶ *Id.* § 383.112.

⁷⁶⁷ *Id.* § 383.061(b).

⁷⁶⁸ See Op. Tex. Att’y Gen. No. JC-291 (2000) (concluding county development districts do not have the power to levy ad valorem taxes).

⁷⁶⁹ Tex. Loc. Gov’t Code Ann. § 383.063(a) (Vernon 2005).

⁷⁷⁰ *Id.* § 383.064.

Ability to Sue or be Sued. The district may sue or be sued in the name of the district in any court in the state.⁷⁷¹

Application of reporting, disclosure, and ethics requirements. Chapter 49 of the Water Code applies in part to county development districts. A district must adopt an ethics policy, must conduct an annual audit, must file certain reports at the Texas Commission on Environmental Quality, and appoint an investment officer.

Ability to Borrow. The district can borrow money for purposes related to the district's functions.⁷⁷²

The directors may pay all necessary costs and expenses that were incurred in the creation and organization of the district. The district can also pay the cost related to the district's investigation of and planning for district projects, the cost of an engineer's report, project design fees, legal fees and other necessary expenses.⁷⁷³ Pursuant to Local Government Code Section 383.004 (4), the district can use the same definition of what is a permissible "cost" that is used by Section 4B development corporations.

If a district decides to issue bonds, the bonds can be used to defray all or part of the costs of the district's projects.⁷⁷⁴ To pay the principal and interest on the bonds, the district may use its sales tax revenue, designated project revenues, or any grants, donations or other funds.⁷⁷⁵ Bond proceeds can be used by the district to pay interest on the bonds during the acquisition or construction of a project, to pay administrative and operating expenses of a project, to create a reserve to repay the bonds, and to pay all expenses that were incurred during the issuance, sale and delivery of the bonds.⁷⁷⁶

Eligibility and Procedure to Create a County Development District

A county development district can be created only in a county with a population of 400,000 or less.⁷⁷⁷ Also, a county development district sales tax can not be imposed if the combined sales tax rate in any part of the proposed district would exceed the two percent statutory cap for local sales tax.⁷⁷⁸

A county cannot initiate a county development district on its own motion. Rather, establishment of a district must be requested by a petition filed with the county commissioners court of the county in which all of the land in the proposed district is located. The petition must include a

⁷⁷¹ *Id.* § 383.062.

⁷⁷² *Id.* § 383.065.

⁷⁷³ *Id.* § 383.066.

⁷⁷⁴ *Id.* § 383.081.

⁷⁷⁵ *Id.* § 383.082.

⁷⁷⁶ *Id.* § 383.083.

⁷⁷⁷ *Id.* § 383.021(a).

⁷⁷⁸ *Id.* § 383.106(a).

sworn statement by all of the landowners indicating consent to the creation of the proposed district.⁷⁷⁹ The petition must also meet the following requirements:

- describe the boundaries of the proposed district by metes and bounds or by lot and block number if there is a recorded map or plat survey of the area;
- include the name of the district, which must include the name of the county followed by “Development District No. _____”;
- name five persons who will serve on a temporary board of directors;
- state the general nature of work to be done and provide a current estimate of the cost of the project; and
- state the necessity and feasibility of the proposed district and indicate whether the district will take actions that will attract visitors and tourists to the county and the district.⁷⁸⁰

Once a petition requesting the creation of the district is submitted to the county commissioners court, a public hearing must be scheduled to allow testimony for or against the proposed district.⁷⁸¹ The date, time and place of this hearing must be set by the county within 60 days of the county’s receipt of the petition.⁷⁸² The county also must publish notice of the hearing in a newspaper of general circulation in the county no later than 30 days before the hearing.⁷⁸³ Additionally, notice of the hearing must be mailed to all of the landowners in the proposed district and to the developer of the project.⁷⁸⁴ Finally, notice of the meeting must be properly posted at the county courthouse 72 hours in advance in compliance with the Texas Open Meetings Act.⁷⁸⁵

At the required public hearing, the commissioners court must examine the sufficiency of the petition requesting creation of the development district.⁷⁸⁶ Also, any interested person who wishes to speak about the sufficiency of the petition or about whether the district should be created must be allowed to do so. Lastly, in conducting the required public hearing, the commissioners court should comply with all the requirements of the Texas Open Meetings Act.⁷⁸⁷

After the required public hearing, the commissioners court must make two findings regarding the petition. First, it must determine whether the petition meets statutory requirements. Second, the

⁷⁷⁹ *Id.* § 383.022.

⁷⁸⁰ *Id.* § 383.023.

⁷⁸¹ *Id.* § 383.024.

⁷⁸² *Id.*

⁷⁸³ *Id.* § 383.025.

⁷⁸⁴ *Id.*

⁷⁸⁵ Tex. Gov’t Code Ann. §§ 551.041, 551.043 and 551.049 (Vernon 2004 & Supp. 2008).

⁷⁸⁶ Tex. Loc. Gov’t Code Ann. § 383.026 (Vernon 2005).

⁷⁸⁷ Tex. Gov’t Code Ann. §§ 551.001 et seq. (Vernon 2004 & Supp. 2007).

commissioners court must find that the district and its proposed projects would be feasible, necessary, and serve the public purpose of attracting visitors or tourists to the county.⁷⁸⁸ If the county commissioners court grants the petition, the order creating the district may specify that the cost to the county of publishing notice, conducting the hearings for the creation of the district, and conducting the sales and use tax election are to be borne by the district. Further, the county may require the petitioner to pay to the county the amounts specified in the order creating the district at the time the order becomes final.⁷⁸⁹

If the commissioners court finds that the petition does not meet statutory requirements, it must enter an order denying the petition. The petition must also be denied if the commissioners court finds that the creation of the district and the proposed project is not feasible and necessary and would not serve the purpose of attracting visitors and tourists to the county.

Initiating an Election to Adopt a County Development District

If the commissioners court finds that the petition meets statutory requirements and that the district would promote the required public purposes, it must approve the petition and appoint five temporary directors to the board for the proposed district.⁷⁹⁰ This temporary board then must call an election on the creation of the district and the adoption of a sales tax to fund district projects.⁷⁹¹ The permissible rates for a local sales tax under this authority are one-fourth of one percent, three-eighths of one percent, or one-half of one percent.⁷⁹² In no case may the sales tax be imposed if the combined local sales tax rate in any part of the district would exceed the two percent statutory cap for local sales tax.⁷⁹³ The order calling for an election on the district and on the imposition of a sales tax to fund district projects (a combined proposition) must include the following information:

- the nature of the election, including the proposition that is to appear on the ballot;
- the date of the election;
- the hours during which the polls will be open;
- the location of the polling places; and
- the proposed rate of the sales and use tax for the district.⁷⁹⁴

The temporary directors of the development district must publish a substantial copy of the election order for two consecutive weeks in a newspaper with general circulation in the county. The first notice must be published prior to the 14th day before the election.⁷⁹⁵ The notice must also include the wording of all the ballot propositions. The entire notice must generally be provided both in English and in Spanish.⁷⁹⁶

⁷⁸⁸ Tex. Loc. Gov't Code Ann. § 383.027(a) (Vernon 2005).

⁷⁸⁹ Id. § 383.027(b).

⁷⁹⁰ Id. §§ 383.027(a) and 383.028(a).

⁷⁹¹ Id. § 383.030.

⁷⁹² Id. § 383.103.

⁷⁹³ Id. § 383.106(a).

⁷⁹⁴ Id. § 383.031.

⁷⁹⁵ Id. § 383.032.

⁷⁹⁶ See Tex. Elec. Code Ann. §§ 272.001 et. seq. (Vernon 2003 & Supp. 2008).

The election ballot must give the voters the opportunity to approve or reject the proposed development district. The ballot must use the following wording:

“The creation of _____ County Development District No. _____ and the adoption of a proposed local sales and use tax rate of _____ (the rate specified in the election order) to be used for the promotion and development of tourism.”⁷⁹⁷

Conducting an Election to Approve a County Development District

When the board of a county development district orders an election for the levy of a sales tax, it must follow all applicable requirements for special elections contained in the Texas Election Code, the County Sales and Use Tax Act (Chapter 323 of the Texas Tax Code), and any other Texas statutes regarding elections. Specifically, the following requirements must be met:

Potential Dates for the Election. The election must be held on a uniform election date as provided by Chapter 41 of the Election Code. In the 2005 Legislative Session, the Texas Legislature changed the May election date and reduced the number of uniform election dates from 4 to 2. The current uniform election dates are:

- the second Saturday in May; or
- the first Tuesday after the first Monday in November.⁷⁹⁸

Time Frame for Ordering the Election. The district should order the election at least 62 days prior to the date of the election, unless the election is the general election for state and county officers.⁷⁹⁹ If the election is the general election for state and county officers, then the district should order the election at least 70 days prior to the date of the election.⁸⁰⁰ Section 383 of the Local Government Code does not address how far in advance the election must be ordered by the board.⁸⁰¹ Nonetheless, it is advisable to provide at least 62 or 70 days’ notice, since this is the requirement applicable to most other special elections in Texas, and it allows time to comply with other Election Code requirements, such as early voting. Additionally, the special election must be submitted for “preclearance” to the U.S. Department of Justice. The Legislature provided that this Election Code requirement **“supersedes a law outside this code to the extent of any conflict.”⁸⁰²**

Prohibition Against Electioneering. The board is prohibited from expending public funds or public resources to influence the results of an election, commonly referred to as “electioneering.”⁸⁰³ A board may publish fact sheets to inform the public of the applicable

⁷⁹⁷ Tex. Loc. Gov’t Code Ann. § 383.033(b) (Vernon 2005).

⁷⁹⁸ Tex. Elec. Code Ann. § 41.001(a) (Vernon 2003 & Supp. 2008).

⁷⁹⁹ *Id.* § 3.005.

⁸⁰⁰ *Id.* § 3.005(c).

⁸⁰¹ Tex. Loc. Gov’t Code Ann. § 383.031 (Vernon 2005).

⁸⁰² Tex. Elec. Code Ann. § 3.005 (b) (Vernon 2003 & Supp. 2008).

⁸⁰³ *Id.* § 255.003 (Vernon 2003).

statistics and proposed plans for the use of the tax. However, board stationery, funds and staff (during the work day) may not be used to urge the public to vote one way or the other.

Additionally, in certain cases a court may find that a county has “made a contract” with the voters to use money for a specific purpose if the county has indicated to the voters, through informational materials or by other means, that the money would be used for that purpose.⁸⁰⁴ Therefore, a county will want to be careful not to represent that money from the development district sales tax will be used for a particular project unless the county intends to be legally limited by that representation.

Joint Elections. Chapter 271, Texas Election Code, allows two or more or more political subdivisions to enter into an agreement to hold the elections jointly in the election precincts that can be served by common polling places, subject to certain other provisions in the Election Code. This provision allows small governmental units, including county development districts, to share the costs of conducting elections, which can otherwise be a fiscal burden. For example, a county development district can pay a fee to the county in which it is located to pay for the use of the election personnel at the polling place closest to the district.

Other Procedural Requirements. The board must follow all other procedural requirements under the Election Code for special elections. For further information about the requirements contained in the Election Code, contact the Secretary of State’s Office, Elections Division, at (800) 252-8683. For more information about the prohibition against expenditure of public funds to influence the results of an election, contact the Texas Ethics Commission at (800) 325-8506.

Reporting Results of a County Development District Election

The Election Code requires that, no earlier than the eighth⁸⁰⁵ day and no later than the eleventh day⁸⁰⁶ after an election, the board of the county development district must canvass the ballots and enter the resolution declaring the results of the election into the minutes of a meeting. The resolution must include the following:⁸⁰⁷

- the date of the election;
- the proposition on which the vote was held;
- the total number of votes cast for and against the proposition; and
- the number of votes by which the proposition was approved.

⁸⁰⁴ See *Black v. Strength*, 246 S.W. 79 (Tex. 1922); *Robbins v. Limestone County*, 268 S.W. 915 (Tex. 1925); *Devorsky v. La Vega I.S.D.*, 635 S.W.2d 904 (Tex. App. -- Waco 1982, no writ); *Wright v. Allen*, 257 S.W. 980 (Tex. Civ. App. -- Dallas 1923, writ ref’d); and *San Antonio I.S.D. v. Hudson*, 92 S.W.2d 527 (Tex. Civ. App. -- San Antonio 1936), aff’d, 95 S.W.2d 673 (Tex. 1936).

⁸⁰⁵ Tex. Elec. Code Ann. § 67.003 (Vernon 2003 & Supp. 2008).

⁸⁰⁶ In contrast to the Election Code, Section 383.034 of the Texas Local Government Code does not address the time limit the development district’s temporary board has to canvass an election to confirm the district and to adopt the sales tax. It is recommended that district boards follow the provisions of the Election Code and canvass the election between 8 and 11 days after it has taken place.

⁸⁰⁷ Tex. Loc. Gov’t Code Ann. § 383.034(c) (Vernon 2005).

If a majority of the votes cast are in favor of the district, the temporary board enters in its minutes an order canvassing the election and declaring the district and the sales tax approved by the voters.⁸⁰⁸ The board must send a certified copy of the order by certified or registered mail to the commissioners court, to the State Comptroller, and to any other taxing entity with jurisdiction over the property within the district.⁸⁰⁹ The order must also contain certain information about the election as required by Section 383.034 of the Texas Local Government Code. If adopted, the sales tax would apply to the retail sale of all sales taxable items within the district after the effective date of the tax.⁸¹⁰

As noted above, the board must, by certified or registered mail, send the State Comptroller a certified copy of the order creating the district and approving the sales tax.⁸¹¹ With that certified copy of the order, the board must also send the Comptroller a map of the district clearly showing the district's boundaries. After receiving the documents, the Comptroller has 30 days to notify the board that the Comptroller's Office will administer the tax.

If, on the other hand, the voters reject creation of the district and adoption of the sales tax, the board must declare the proposition defeated and enter the result in its minutes.⁸¹² The board must then send a certified copy of the order by certified or registered mail to the commissioners court, to the State Comptroller, and to any other taxing entity with jurisdiction over the property within the district. The minute order must also contain certain information about the election as required by Section 383.034 of the Texas Local Government Code. Unlike economic development corporations, which must wait one year between holding certain elections, the board of a county development district may call for another election at any time if the sales tax election should fail.⁸¹³

Effective Date of County Development District Sales Tax

The change in the sales tax rate becomes effective on the October 1 that falls one full calendar quarter after notice of the election has been provided to the State Comptroller.⁸¹⁴ If the board has the election in May, the Comptroller must be notified no later than June for the new tax rate to take effect October 1 of the same year. If the Comptroller is notified after June for a May election or the election is held in November, the new tax rate will take effect October 1 of the next year. The new tax rate applies to purchases on or after the effective date as provided under Section 323.102 (a) of the Tax Code.

⁸⁰⁸ *Id.* § 383.034(b).

⁸⁰⁹ *Id.* § 383.034(c).

⁸¹⁰ *Id.* § 383.101(b).

⁸¹¹ *Id.* § 383.034.

⁸¹² *Id.* § 383.034(c).

⁸¹³ *Id.* § 383.102(a) (excluding Texas Tax Code Section 323.406 which imposed a one year waiting period between elections).

⁸¹⁴ Tex. Tax Code Ann. § 323.102(a) (Vernon 2002 & Supp. 2008).

Allocation of the Sales Tax Proceeds by the Comptroller

Once the sales tax is effective, retailers collect it along with any other applicable sales taxes including the state sales tax, and remit the revenues to the Comptroller. The Comptroller remits the proceeds to the district. The County Sales and Use Tax Act (Chapter 323 of the Tax Code) governs the imposition, computation, administration and use of the tax, except where it is inconsistent with the County Development District Act.⁸¹⁵

Limitations on District Sales Tax Rates

A county development district may levy a sales tax only if the combined sales tax rate in any part of the proposed district would not exceed the two percent statutory cap for local sales tax.⁸¹⁶ Other factors also may influence the rate at which a development district can impose a sales tax. For example, if the city in which a district is located imposes or increases its sales tax rate, the county development district's tax rate is automatically reduced to stay below the two percent cap.⁸¹⁷ If a city annexes a district and this results in the combined local sales tax climbing over two percent, the district's tax rate is also reduced to stay under the local sales tax limit.⁸¹⁸ In either circumstance, the city must reimburse the development district the difference in the amount of taxes the district would have collected before the tax rate was reduced and the amount the district is able to charge after the reduction.⁸¹⁹ The city has 10 days to reimburse the development district after the city receives its funds from the State Comptroller, and the city must reimburse the district as long as the district has outstanding bonds to pay.⁸²⁰

Power of the District to Increase, Decrease or Abolish the County Development District Sales Tax

In addition to the automatic sales tax reductions discussed above, a county development district may increase, decrease or abolish its sales tax in two ways. First, the district's board, on its own motion, may vote to decrease or abolish the tax.⁸²¹ Alternatively, the board may call for an election to increase, decrease or abolish the tax.⁸²² The election must be conducted using the same procedures that were followed for the creation of the tax.⁸²³ The ballots must read as follows:

⁸¹⁵ Tex. Loc. Gov't Code Ann. § 383.102(a) (Vernon 2005).

⁸¹⁶ *Id.* § 383.106(a).

⁸¹⁷ *Id.* § 383.106(b).

⁸¹⁸ *Id.*

⁸¹⁹ *Id.* § 383.106(c).

⁸²⁰ *Id.*

⁸²¹ *Id.* § 383.104(a).

⁸²² *Id.*

⁸²³ *Id.* § 383.104(b).

To Increase or Decrease the Tax: “The increase (decrease) in the local sales and use tax rate of (*name of district*) to (*percentage*) to be used for the promotion and development of tourism;” or

To Abolish the Tax: “The abolition of the district sales and use tax used for the promotion and development of tourism.”⁸²⁴

There is no statutory authorization for a voter-initiated petition to decrease or abolish the tax. An election on these issues is called at the discretion of the county development district board of directors.

Additionally, the county development district’s sales and use tax will automatically discontinue by operation of law if no sales tax revenue is collected within the district before the first anniversary of the date the sales tax took effect.⁸²⁵

Board of Directors of a County Development District

The operation of the county development district is managed by its board of directors. Upon voter approval of the district, the temporary board of directors automatically becomes the district’s permanent board of directors.⁸²⁶

To be qualified to serve on the board, a director must be at least 21 years of age, a resident and citizen of Texas, and a registered voter in the county in which the district is located.⁸²⁷ Additionally, a developer of property within the district, as well as certain relatives, employees and independent contractors of that developer, may also be disqualified from serving on the board.⁸²⁸

The directors of a county development district serve staggered terms of four years, with two or three board position terms expiring on September 1 of every other year.⁸²⁹ Each director, whether temporary or permanent, must execute a bond in the amount of \$10,000 and take the oath of office required for public officers under the Texas Constitution.⁸³⁰ Temporary and permanent board members are not entitled to compensation for their service. The board members, however, are entitled to be reimbursed by the district for their actual expenses.⁸³¹

⁸²⁴ *Id.*

⁸²⁵ *Id.* § 383.104(c).

⁸²⁶ *Id.* § 383.041(a).

⁸²⁷ *Id.* § 383.042.

⁸²⁸ *See Id.* § 383.043, making Tex. Water Code Ann. § 50.026 applicable to the directors of a county development district. Section 50.026 of the Water Code was repealed by Act of May 25, 1995, 74th Leg., R.S., ch. 715, § 39, 1995Tex, Sess. Law. Serv. 3802. Currently, it appears that neither a court nor the Attorney General’s Office has considered what effect the repeal of Tex. Water Code Ann. § 50.026 would have on Section 383.043 of the Local Government Code.

⁸²⁹ Tex. Loc. Gov’t Code Ann. § 383.041(b) (Vernon 2005).

⁸³⁰ *Id.* § 383.029(a) (referring to Tex. Loc. Gov’t Code Ann. § 383.046).

⁸³¹ *Id.* § 383.046 (referring to Tex. Loc. Gov’t Code Ann. § 375.070).

A quorum of the board consists of three members.⁸³² Once the directors have taken their oaths of office, the board votes to elect a president, a vice president, a secretary and any other officer the board considers necessary.⁸³³ The board president presides at all meetings, with the vice president fulfilling this duty in the absence of the president.⁸³⁴ Regular meetings are held to conduct the business of the district,⁸³⁵ with notice of the meetings posted in accordance with the Texas Open Meetings Act at an accessible place in the district.⁸³⁶ The county clerk also must post a copy of the notice in the county courthouse. The board is required to establish a district office in the county in which the district is located.⁸³⁷ The board has control over the management of the district and has the authority to employ any person or any company that the board deems necessary to conduct district business,⁸³⁸ so long as that employment or appointment does not violate other provisions of law.⁸³⁹

The board of directors may vote to adopt bylaws to govern the affairs of the board.⁸⁴⁰ Any director who has an interest in a contract with the district, or who is employed by a company that has a financial interest must disclose this interest to the board. An interested board member can neither discuss nor vote on acceptance of such a contract.⁸⁴¹ A contract entered into without disclosure of a director's financial interest is invalid.⁸⁴² The County Development District Act does not specify whether a contract would be invalidated if a board member with an interest in the contract disclosed that interest to the board but then proceeded to discuss or vote on the contract. Board members must comply with Chapter 176 of the Local Government Code, and must receive Open Meetings law training because they are local government officials.

Replacements to the board are made by appointment of the county commissioners court.⁸⁴³ If a majority of the other board directors petition the court for removal of a board member, the commissioners court may remove a director after notice and a hearing.⁸⁴⁴ There is no statutory authority for the commissioners court to remove a director except pursuant to a request by a majority of the existing board members.

⁸³² *Id.* § 383.048(a).

⁸³³ *Id.* § 383.047.

⁸³⁴ *Id.* § 383.048(b).

⁸³⁵ *Id.* § 383.053(a).

⁸³⁶ *Id.* § 383.053(b) - (c).

⁸³⁷ *Id.* § 383.052.

⁸³⁸ *Id.* § 383.050.

⁸³⁹ See, for example, Ch. 573 of the Tex. Gov't Code Ann. (Nepotism) and Ch. 171 of the Tex. Loc. Gov't Code Ann. (Conflict of Interest).

⁸⁴⁰ Tex. Loc. Gov't Code Ann. § 383.049 (Vernon 2005).

⁸⁴¹ *Id.* § 383.051(a) - (b).

⁸⁴² *Id.* § 383.051(c).

⁸⁴³ *Id.* § 383.045.

⁸⁴⁴ *Id.* § 383.044.

Approval of an Expansion or Decrease in the Area of the District

The board of directors for the district can ask the county commissioners court to add or exclude land from the district.⁸⁴⁵ An interested landowner may also ask the commissioners court to approve such a change.⁸⁴⁶ It is then within the discretion of the county commissioners court whether to approve the proposed expansion or decrease in the area. Any such approval must be by a unanimous vote of approval by the commissioners court.⁸⁴⁷ There is no statutory requirement for a public vote to either increase or decrease the size of the district. The size of the district, however, can only be expanded or reduced prior to the issuance of any bonds.⁸⁴⁸

Dissolution of a County Development District

There are three ways in which a county development district can be dissolved. First, if a majority of the district directors determines that the proposed project cannot be accomplished, the board can ask the commissioners court to dissolve the district.⁸⁴⁹ The dissolution of the district can then be accomplished only by a unanimous vote of the commissioners court after notice and a public hearing is provided as required under Section 383.024 of the Local Government Code.⁸⁵⁰ At the public hearing, the commissioners court must determine whether it is in the best interests of the county and the district landowners to dissolve the district. If the commissioners court unanimously finds dissolution is in the best interest of the county, the finding is entered in the court records, and all funds and property of the district are transferred to the commissioners court.⁸⁵¹ This method for dissolution is only available if the district has not yet issued any bonds.⁸⁵²

Second, if a majority of the board finds that all issued bonds and debts have been paid and the purposes of the district have been completed, the board may ask the commissioners court to dissolve the district.⁸⁵³ Again, the commissioners court may only dissolve the district by unanimous vote after notice and a public hearing as required under Section 383.024 of the Local Government Code.⁸⁵⁴ At the public hearing, the commissioners court must determine whether it is in the best interests of the county and the district landowners to dissolve the district. If the commissioners court unanimously finds dissolution is in the best interest of the county, the finding is entered in the court records, and all funds and property of the district are transferred to the commissioners court.⁸⁵⁵

⁸⁴⁵ *Id.* § 383.084(a).

⁸⁴⁶ *Id.* § 383.084(a).

⁸⁴⁷ *Id.* § 383.084(b).

⁸⁴⁸ *Id.* § 383.084(a).

⁸⁴⁹ *Id.* § 383.122(a).

⁸⁵⁰ *Id.* § 383.122(a) - (b).

⁸⁵¹ *Id.* § 383.122(c).

⁸⁵² *Id.* § 383.122(a)(1).

⁸⁵³ *Id.* § 383.122(a)(2).

⁸⁵⁴ *Id.* § 383.122(a) - (b).

⁸⁵⁵ *Id.* § 383.122(c).

Finally, a district can be dissolved by agreement with the governing body of a municipality if the district is located wholly within or is wholly annexed by the city. This form of dissolution requires the district to turn over to the city all money, property and other assets of the district. In turn, the city is required to assume all contracts, debts, bonds and other obligations of the district.⁸⁵⁶ If such an agreement is made to dissolve the district, the taxes levied by the district end at the same time the district is dissolved.

There is no provision for dissolution of the district pursuant to a petition and/or election of the landowners. However, the district board of directors, as discussed earlier, can order an election to be held on the abolition or reduction of the sales tax that funds district projects. If the voters approve a reduction or abolition of the sales tax for the district, the district could conceivably continue, but it would have to operate with reduced or no sales tax revenue.

⁸⁵⁶ *Id.* § 383.123.

V. City, County, Cooperative and Regional Efforts

A City's Authority to Make Grants and Loans

Chapter 380 of the Local Government Code provides significant legislative authority for Texas municipalities in the area of economic development. When a city wants to provide a grant or a loan of city funds or services in order to promote economic development, it generally cites its powers under Chapter 380. Cities have utilized provisions under this law to provide myriad incentives that have drawn businesses and industries to locales throughout Texas. Unfortunately, there is very little written to date that clarifies the legal parameters for providing such loans or grants. This section will attempt to provide some guidance in this area. The text of Chapter 380 is very short, but its importance to economic development cannot be overstated. Provided below, in pertinent part, is the wording of Chapter 380 of the Local Government Code.

Section 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 and local economic development and to stimulate business and commercial activity in the municipality. For purposes of this subsection, a municipality includes as 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 the 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 colocated with or near local, state, or federal facilities and facilities of Mexico in order to fulfill its purpose.

What this statute allows is the provision of loans and grants of city funds, as well as the use of city staff, city facilities or city services, at minimal or no charge. Whether a city provides any such incentive is completely discretionary. The provision of grants and loans should be used with caution and with attention to necessary safeguards.

A home rule city may grant public money from authorized sources to a Section 4A or Section 4B economic development corporation under a contract authorized by Section 380.002 of the Local Government Code. The Section 4A or Section 4B economic development corporation is required to use the 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.”⁸⁵⁷

To establish a loan or grant, or to offer discounted or free city services, the city must meet the requirements contained in the Texas Constitution and in applicable Texas statutes. Additionally, cities must review their city charters and any other local provisions that may limit the city’s ability to provide such a grant or loan. A discussion of these issues follows.

Ensuring that a Public Purpose Is Served by the Incentive

First, any expenditure in the form of a grant, loan or provision of city services at less than fair market value involves a donation of public property. Article 3, Section 52-a of the Texas Constitution sets up the constitutional framework for public funding of economic development efforts. It provides that economic development is a public purpose. However, a city may not simply write out checks to interested businesses in order to promote economic development. The city must ensure that the public purpose of economic development will be pursued by the business. For example, if a city provides a grant or a loan to an industry, the city should enter into a binding contract with the funded industry that outlines what steps the business will take that justify the provision of public funding (creation of jobs, expansion of the tax base by construction or enhancement of the physical facilities, etc.). The city should include a recapture provision in the agreement, so that if the business does not fulfill its promises, the city will have a right to seek reimbursement of the incentives that were provided. Any such agreement should also include tangible means for measuring whether the industry has met its obligations under the contract. Without these safeguards and a demonstrable benefit to the municipality, such incentives may not pass constitutional muster for serving a public purpose.⁸⁵⁸

⁸⁵⁷ Tex. Loc. Gov’t Code Ann. § 380.002(b) (Vernon Supp. 2008).

⁸⁵⁸ See Tex. Att’y Gen. Op. GA-529 (2007) (city may fund housing project if it finds the project will promote economic development). See also Op. Tex. Att’y Gen. Nos. LO 94-037 (1994) at 3, LO 97-061 (1997) at 4. (These two opinions do not concern the establishment of economic development programs under the authority of Local Government Code Chapter 380. However, their reasoning arguably applies to any grant or loan of public money for economic development, regardless of the authority under which such a grant or loan is made.)

Requirements Under the Local Government Code

Any grant or loan must also meet certain statutory requirements. Chapter 380 of the Local Government Code requires that in order for a city to provide a grant or a loan, it must “establish a program” to implement the incentive. The program may be administered by city personnel, by contract with the federal government, the state, or a political subdivision or by contract with any other entity. The applicable statutes do not indicate specifically how such a program is to be administered. It is safe to expect that the program should be planned and outlined in a written document that includes, at a minimum, the safeguards discussed above.

Additionally, any such grant or loan must meet the requirements under the budget law contained in Chapter 102 of the Local Government Code. Specifically, any economic development-related expenditure of city funds must be made pursuant to consideration and approval of the item at an open meeting of the city council. If the expenditure was not included within the original budget, the city council would need to pursue a budget amendment.⁸⁵⁹

Compliance with Applicable City Charter Provisions and Local Policies

Home rule cities (cities with a population of over 5,000 that have adopted a city charter) generally may take any actions that are authorized by their city charter and that are not inconsistent with the Texas Constitution, Texas statutes or federal law.⁸⁶⁰ Home rule cities must always review the city charter to determine whether it contains any limitations on the ability of the city to make various expenditures. Sometimes a city charter will be more restrictive than state law or will require a super-majority vote for the approval of certain types of expenditures.

Cities with a population of under 5,000 are usually general law cities. General law cities do not have a city charter and are limited by state law in terms of what expenditures may be made and how to approve them. Accordingly, general law cities must be able to cite a statute that authorizes the type of expenditure or action they are contemplating as part of their economic development program. Often, Chapter 380 of the Local Government Code will provide that authority. If a general law city cannot find any statutory authority for the action it wants to take,

⁸⁵⁹ Tex. Loc. Gov't. Code Ann. § 102.009 (Vernon 2008) (authorizes an amendment to the original city budget only in the case of “grave public necessity.” Accordingly, a budget amendment must meet an unusual and unforeseeable condition that could not have been included in the original budget through the use of reasonably diligent thought and attention. However, Section 102.010 provides that “this chapter does not prevent the governing body of the municipality from making changes in the budget for municipal purposes.” Harmonizing these two sections leads to the conclusion that an amendment to authorize a new or additional expenditure must be justified by a finding of “grave public necessity.” Other budget amendments (for instance, to reduce an expenditure or to transfer money for a similar purpose from one city department to another) would require only a showing of a “municipal purpose.” See *Rains v. Mercantile National Bank of Dallas*, 188 S.W.2d 798, 803 (Tex. Civ. App. - El Paso 1945), aff'd on other grounds, 191 S.W.2d 850 (Tex. 1946). A court generally disturbs the city council's determination of “grave public necessity” only if there is no evidence to support the finding. See *Bexar County v. Hatley*, 150 S.W.2d 980 (Tex. 1941). When grave public necessity is required to be found, the ordinance should recite the existence of such and should note the facts that give rise to the grave public necessity. After the budget amendment is adopted, the amendment must be filed with the city secretary and with the county clerk).

⁸⁶⁰ See generally, *Dallas Merchant's and Concessionaire's Ass'n v. City of Dallas*, 852 S.W.2d 489, 491 (Tex.1993), and *City of Richardson v. Responsible Dog Owners*, 794 S.W.2d 17, 19 (Tex.1990).

it does not have authority to take the action. Of course, the city council of a general law city may impose additional local restrictions on the ability of the city to expend money for certain purposes. The city would have to comply with any such self-imposed limitations or rights.

Review for Conflict With City Bond and Grant Documents

If a city endeavors to offer its city services on a reduced or no-cost basis, the city must review any bond documents that may have been executed with regard to those services. The bond documents must be analyzed to ensure that providing reduced or no-cost service is permitted. For example, if a city has issued bonds to fund a municipal utility system or to fund some other type of public facility, the bond documents may prohibit the city from giving away its utility services or otherwise limiting any other revenue stream until the bonds are fully repaid.⁸⁶¹ Before the city agrees to any type of incentive that involves a gift of public services or funds, it should have its bond counsel and local city attorney review any existing bond and other debt instruments in this regard. This type of limitation may also be part of the conditions placed on a city if it is a recipient of a state or federal grant. Accordingly, the city should review any grant documents it has in its possession to determine if there is any such limitation.

With regard to utility service in particular, Texas Government Code Chapter 1502 generally prohibits city-owned utilities from providing free utility services, except to city public schools or to buildings and institutions operated by the city. That statute also requires that the rates charged for utility services be equal and uniform.⁸⁶²

Executing Debt Versus Using Current Funds

It is clear from Chapter 380 of the Local Government Code that a city may provide “loans and grants of public money” from the city’s current funds. However, Chapter 380 does not provide any express authorization for the city to finance such a program through the issuance of debt or bonds. Texas courts have long required a city to cite specific legal authority for the issuance of any debt instrument. Debt is defined as any obligation that is not completely paid within the current fiscal year from budgeted revenue.⁸⁶³

If the city is a home rule city, it can look to the provisions of its city charter for authority to issue debt, as long as those provisions are not inconsistent with state law. A home rule city has the power to issue bonds to the extent provided in the city charter, assuming that the bonds have first been authorized by voters at an election held on the issue.⁸⁶⁴ Often, however, a city charter is silent as to the authority of the city to issue bonds or other debt instruments to promote economic

⁸⁶¹ See, e.g., Tex. Gov’t Code Ann. § 1502.057(b) (Vernon 2000) (which prohibits a city from providing free electric, water, sewer or other utility system services except for municipal public buildings, or buildings and institutions operated by the city).

⁸⁶² *Id.*

⁸⁶³ See *McNeill v. City of Waco*, 89 Tex. 83, 33 S.W. 322 (1895) (long term debt is any contractual obligation that creates a liability that can not be paid out of current budget year revenues).

⁸⁶⁴ See Tex. Gov’t Code Ann. § 1331.052 (Vernon 2000); Op. Tex. Att’y Gen. No. DM-185 (1992).

development. If this is the case, the city will need to find other authority within Texas state statutes that allows for the issuance of bonds or debt to finance economic development.

If the city is a general law city, it may not issue debt except when there is specific statutory authority that permits the issuance of debt for that purpose. A general law city is limited to taking only those actions that are specifically authorized under the general statutes of Texas. Accordingly, a general law city could fund economic development programs with current city funds under Local Government Code Chapter 380. However, such cities cannot issue debt or bonds without finding specific legislative authority for that type of transaction. For further discussion on the ability of general law cities and home rule cities to issue debt, see the section in this handbook on Issuing Debt To Finance Economic Development.

Use of Dedicated Tax Funds for Economic Development

A home rule city may grant public money to a Section 4A or Section 4B economic development corporation under a contract authorized by Section 380.002 of the Local Government Code. However, the funds granted by the city to the Section 4A or Section 4B corporation must 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.”⁸⁶⁵

Because of a Travis County District Court case, Article 3, Section 52-a of the Texas Constitution was amended.⁸⁶⁶ This amendment made it clear that if a city creates a program or makes a loan or grant through Chapter 380 that is not secured by a pledge of ad valorem taxes or financed by the issuance of bonds or other obligations payable from ad valorem taxes, it does not constitute or create a debt for the purpose of any provision of the constitution.⁸⁶⁷ If a city is using funds other than the property tax, care must be taken to ensure that the city is complying with any limitations imposed on the use of such funds by statute (e.g., statutory provisions relating to dedicated funds, such as the economic development sales tax, hotel occupancy tax, etc., that limit the purposes for which those funds may be used). For this reason, there is a section in this handbook on the local hotel occupancy tax and the purposes for which its revenues may be used. There is also a chapter on the sales tax for economic development and the purposes for which that dedicated tax may be used. A city should consult these portions of the publication and the applicable law to be certain the revenues are used as permitted by law.

Providing Land to Promote Economic Development

Often, cities try to obtain sites that they can show to businesses that may relocate to the area. Such a site may be a tract of land that is ready for development. In certain cases, a city may find it beneficial to construct a basic structure that can be altered or developed to meet the new

⁸⁶⁵ Tex. Loc. Gov’t Code Ann. § 380.002(c) (Vernon Supp. 2008).

⁸⁶⁶ *Save Our Springs Alliance, Inc. v. Village of Bee Cave, et al.*, No. GN400441 (250th Dist. Ct., Travis County, Tex. Feb. 18, 2005) (The court found the Chapter 380 agreement to be an unconstitutional debt).

⁸⁶⁷ Tex. Const. art.III, §52-a. (as amended by Acts 2005, 79th Leg. H.J.R. No. 80, § 1, at Nov. 8, 2005 election).

business' needs. There are certain legal requirements regarding the procedure for a city to acquire such real property and limitations on the city's ability to sell or grant the land to a business entity.

Procedures for Acquiring Real Property

Chapter 273 of the Texas Local Government Code provides a list of purposes for which a city may purchase property.⁸⁶⁸ A local government could certainly facilitate economic development by purchasing property for one of the uses set forth in Chapter 273. Some of the permissible purposes for the purchase of property under that statute include purchases for municipal water systems, sewage plants and systems, municipal airports, city streets, etc. If the roads leading to the industrial park needed to be widened, for instance, a city could purchase the necessary right-of-way for such an improvement. However, there is no authority in Chapter 273 for a city to purchase land for use by a private entity. Economic development itself is not one of the listed purposes.

On the other hand, Chapter 251 of the Local Government Code appears to provide independent authority for a city to use its powers of eminent domain. Under that chapter, a city may use eminent domain to purchase land when "the governing body... considers it necessary... for any... municipal purpose the governing body considers advisable."⁸⁶⁹ A strong argument can be made that the use of land for economic development would constitute a municipal purpose since both the Texas Constitution and state statutory law have been amended to make economic development a permissible public purpose.⁸⁷⁰ Additionally, Texas Civil Statutes Article 5190.6, Sections 4A (g) and 4B (j) provide economic development corporations organized under Sections 4A or 4B with the power of eminent domain if approved by the involved city. Since the overriding purpose of Section 4A and Section 4B corporations is to promote economic development, it appears that the Legislature interpreted a city's power of eminent domain to include the authority to condemn land for purposes of economic development. Nonetheless, some legal analysts argue that the eminent domain laws predate the constitutional amendment on economic development, and therefore could not be considered implementing legislation for the use of eminent domain to acquire property for economic development purposes.

The United States Supreme Court in 2005 took up the issue of cities using their power of eminent domain to condemn property for economic development.⁸⁷¹ The City of New London, Connecticut, used its power of eminent domain to condemn private property to sell to private developers. The city said developing the land would create jobs and increase tax revenues. Owners of the condemned property sued New London stating that the city violated the Fifth Amendment of the United States Constitution takings clause, which guaranteed the government will not take private property for public use without just compensation. Specifically the property owners argued taking private property to sell to private developers was not public use. The

⁸⁶⁸ Tex. Loc. Gov't Code Ann. § 273.001 (Vernon 2005).

⁸⁶⁹ *Id.* § 251.001.

⁸⁷⁰ See Tex. Const. art. III, § 52-a (as amended by Acts 2005, 79th Leg. H.J.R. No. 80, § 1, at Nov. 8, 2005 election) and Tex. Loc. Gov't Code Ann. § 380.001 (Vernon 2005).

⁸⁷¹ *Kelo v. City of New London*, 125 S. Ct. 2655 (2005).

Supreme Court held that the city's taking of private property to sell for private development qualified as a "public use" within the meaning of the takings clause. The city was not taking the land simply to benefit a certain group of private individuals, but was following an economic development plan.

In reaction to that decision, the 79th Texas Legislature passed Chapter 2206 of the Texas Government Code. This chapter makes it clear that a governmental or private entity may not take private property through the use of eminent domain if the taking:

- confers a private benefit on a particular private party through the use of the property;
- is for a public use that is merely a pretext to confer a private benefit on a particular private party; or
- is for economic development purposes, unless the economic development is a secondary purpose resulting from municipal community development or municipal urban renewal activities to eliminate an existing affirmative harm on society from slum or blighted area under Chapter 373 or 374 of the Texas Local Government Code or Section 311.005(a)(1)(I) of the Texas Tax Code.⁸⁷²

This section does not affect the authority of an entity authorized by law to take private property through the use of eminent domain for projects such as transportation projects, water supply projects or waste disposal projects, just to name a few.⁸⁷³ But a determination by the governmental or private entity proposing to take the property that the taking does not involve an act or circumstance as described above does not create a presumption with respect to whether the taking involves that act or circumstance.⁸⁷⁴

It is important to note that whenever a city takes land by eminent domain, the city must ensure that a proper public purpose is being served.⁸⁷⁵ Thus, in return for any land that was condemned for use by a private entity, a city would arguably need to receive from that entity some sort of legally enforceable promise to accomplish a permissible economic development purpose. Because of the many legal issues involved in the use of eminent domain for purposes of economic development, a city will want to consult with its local legal counsel before pursuing such a course of action.

If a city does decide to use eminent domain to provide land for economic development, the city must follow the requirements of state and federal law in exercising its condemnation authority. For instance, Chapter 21 of the Texas Property Code generally governs the exercise of eminent domain by local government entities in this state. That chapter sets forth the procedural

⁸⁷² Tex. Gov't Code Ann. §2206.001(b) (Vernon Supp. 2008). See Tex. Loc. Gov't Code Ann. § 373.002(b)(5) (Vernon 2005) (this activity is not protected from the limitations of eminent domain under Section 2206.001(b)(3)(A)).

⁸⁷³ Tex. Gov't Code Ann. §§ 2206.001(c)-(d) (Vernon Supp. 2008).

⁸⁷⁴ *Id.* § 2206.001(e).

⁸⁷⁵ See, e.g., *City of Arlington v. Golddust Twins Realty Corp.*, 41 F.3d 960 (5th Cir. 1994). See also Op. Tex. Att'y Gen. No. GA-0004 (2002).

requirements for condemnation and for determining the price to be paid by the city for condemned land. Additionally, that chapter requires that a city pay relocation expenses for a property owner who is forced to move his or her business or residence as a result of eminent domain proceedings by the city.⁸⁷⁶ Also, if a city is exercising its power of eminent domain in connection with a project funded by federal funds, the city will want to consult with the agency providing those funds about the applicability of the Federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970.⁸⁷⁷ That act also contains provisions requiring entities using eminent domain to pay relocation expenses for property owners under certain circumstances.

While Texas statutes address the authority of a city to purchase real property, they do not specifically address the procedure by which a city would make such a purchase, unless the city is exercising its power of eminent domain. Accordingly, unless it is using eminent domain to acquire the property, a city may offer to purchase real property in the same manner as any other interested party, assuming the expenditure has been authorized by the governing body of the city and is allocated in the city budget.

If a city decides to purchase real property, it must follow the applicable budgetary laws contained in Chapter 102 of the Local Government Code. A home rule city must also comply with any further requirements contained in the city charter. Unlike the purchase of personal property or the purchase of certain services, expenditures by a city for real property are not required to be competitively bid.

Procedure for the Sale of Real Property By a City

Once a city has obtained a piece of real property, Local Government Code Chapter 272 controls how that property may be sold or transferred. Chapter 272 states that the sale of real property owned by a city generally must be accomplished through advertisement of the property and acceptance of competitive bids. Accordingly, if a city wants to sell or transfer a property to a business to promote economic development, the city needs to comply with the requirements of Chapter 272. Specifically, Section 272.001 states:

Before land owned by a political subdivision of the state may be sold or exchanged for other land, notice to the general public of the offer of the land for sale or exchange must be published in a newspaper of general circulation in either the county in which the land is located or, if there is no such newspaper, in an adjoining county. The notice must include a description of the land, including its location, and the procedure by which the sealed bids to purchase the land or offers to exchange the land may be submitted. The notice must be published on two separate dates and the sale or exchange may not be made until after the 14th day after the date of the second publication.

⁸⁷⁶ Tex. Prop. Code Ann. § 21.043 (Vernon 2000).

⁸⁷⁷ 2 U.S.C.A. § 4601, *et seq.*

There are certain exceptions to the sale-by-bid requirement. Sale of real property by bid is not required if the real property fits into any of the following seven categories:

- 1) land that could not be used independently under its current zoning because of its size, shape or lack of access to public roads;
- 2) streets or alleys owned in fee or used by easement or acquired for such purposes;
- 3) land or a real property interest originally acquired for streets' right-of-way, or easements that the political subdivision chooses to exchange for other land to be used for streets, right-of-ways, easements, or other public purposes, including transactions partly for cash;
- 4) land that the city wants to have developed by contract with an independent foundation;
- 5) a real property interest conveyed to a governmental entity that has the power of eminent domain;
- 6) land that is located in a reinvestment zone that has been designated as provided by law and that the city desires to have developed under a project plan adopted by the city for the zone;⁸⁷⁸ or
- 7) land that is owned by a municipally owned utility (under certain circumstances).⁸⁷⁹

If property fits into one of the above seven categories, it does not have to be sold pursuant to notice and competitive bids. These parcels may be sold through a private sale agreement between the city and an interested buyer. Additionally, property under either of the first two categories may be sold to the abutting property owners only as provided under Local Government Code Section 272.001(c), and the city is not required to receive fair market value for the property.

An economic development professional who wanted to be sure that a parcel of city-owned property was conveyed to a particular business entity could possibly use Category 4 to accomplish a private sale to that entity.⁸⁸⁰ If the city used Category 4, it would sell the property by contract to an independent industrial foundation, which would, in turn, sell the land to the business entity. For property in Category 4, the city may sell the parcel to any interested party

⁸⁷⁸ Tex. Loc. Gov't Code Ann. § 272.001(b) (Vernon 2005). (Category 6 is most likely intended to apply to transactions involving property subject to tax increment financing. This conclusion is supported by the use of the term "project plan" which is a reference to a term used in the tax increment financing statutes).

⁸⁷⁹ *Id.* § 272.001(k).

⁸⁸⁰ *Id.* § 272.001(b)(4). (Currently, there does not appear to be a court case or Attorney General opinion which construes the meaning of this provision. Further, state statutes do not contain any specific authorization for a city to purchase or sell land for purposes of economic development. Thus, a city will want to consult closely with its legal counsel if it wishes to rely on this or any other statutory provision as authority for buying or selling land in the name of economic development.)

through a private agreement. The agreement must provide that the city will receive fair market value for the property, as determined by an independent appraisal.⁸⁸¹

Additionally, there is a special statutory exception allowing a private sale of city-owned property if the real property is acquired by the city with economic development funds from the community development block grant nonentitlement program. Land acquired with these funds may be leased or conveyed without the solicitation of bids. To convey the land in this manner, the city must adopt a resolution stating the conditions for the conveyance and the public purpose that will be achieved.

If the city exercises this option, the land may be leased or sold to a private for-profit entity or to a nonprofit entity that is a party to a contract with the political subdivision. The land must be used by the receiving entity to carry out the purpose of the entity's grant or contract as provided under Local Government Code Section 272.001(i).

Texas law allows a political subdivision of the state, including a city, to convey an interest in real property to an institution of higher education to promote a public purpose related to higher education.⁸⁸² Under this statutory provision, a city may donate, exchange, sell or lease land or improvements to an institution of higher education, as that term is defined by Section 61.003 of the Texas Education Code. The city conveying the land must determine the conditions and terms of the conveyance so as to ensure that the desired public purpose is served and that it otherwise meets the constitutional requirements of article III, sections 51 and 52, of the Texas Constitution. The conveyance of the land is not required to comply with the normal competitive bidding and notice requirements of Chapter 272 of the Local Government Code. In addition, the city (or other political subdivision) is not required to receive fair market value for the land. Also, an economic development corporation may convey property to an institution of higher education.⁸⁸³

Under certain circumstances, a city may convey land to an economic development corporation created by the city without complying with the notice or bidding requirements of Chapter 272.⁸⁸⁴ Under this provision of the law, city land may be sold to a city-created economic development corporation for fair market value if the land meets both of the following criteria: 1) the land was a gift to the city or was received by the city as part of a legal settlement; and 2) the land is adjacent to an area designated for development by the economic development corporation. In order to sell land under this provision, the city must adopt an ordinance describing the property to be conveyed, and must require that the conveyance comply with Section 5.022 of the Texas Property Code (except that a covenant of general warranty is not required), and must state the consideration paid by the corporation for the land.

Finally, for cities under 1.9 million, a transfer of title or interest in land to a federally-exempt nonprofit organization is also exempt from the notice and bidding requirements of chapter 272.

⁸⁸¹ *Id.* § 272.001(f).

⁸⁸² *Id.* § 272.001(j).

⁸⁸³ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 23(a)(5) (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov't Code Ann. § 501.214 (Vernon Supp. 2008), effective April 1, 2009).

⁸⁸⁴ Tex. Loc. Gov't Code Ann. § 253.009 (Vernon Supp. 2008).

An agreement with the nonprofit organization must require use of the land in a manner that primarily promotes a public purpose of the city. Failure to use the property in this manner results in reversion of the property to the city. These two provisions of public use and reversion must be included in the legal instrument of transfer.

Conveying Real Property at a Reduced Price

There is no specific legislative authority that allows a city to convey a piece of real property at a reduced price or to grant real property to promote economic development. If a city needs to facilitate the acquisition of a piece of real property by a business entity, it may look to its powers under Chapter 380 of the Local Government Code. For example, under Chapter 380, a city arguably may provide the business entity with a grant to provide funding towards the business' acquisition of the property. The entity would still need to pay market value for the property, but the city's grant may be used to offset the actual cost to the business entity. Any such grant must be pursuant to an adopted economic development program of the city. It also must be consistent with the city budget procedures contained in Local Government Code Chapter 102. Finally, a home rule city must review whether such a grant is prohibited under the city charter. It should be noted that some legal analysts question the ability of a city to provide a grant to the business to offset the cost of the land; they argue it would be tantamount to selling the land at less than fair market value. There are no cases or Attorney General opinions that address this specific issue. Accordingly, cities should visit with their local legal counsel regarding any such practice.

Municipal Agreements Not to Annex

To attract a business into an area, a city may choose to encourage the business to locate in the city's extraterritorial jurisdiction. If the business locates in the city's extraterritorial jurisdiction, the city may enter into an agreement not to annex the business property for a set period of time. In this way, the city gets the benefit of having the business locate in the area and the creation of additional jobs. The business in turn is freed from ad valorem taxation of its property by the city for the designated period of time. This approach is termed an "agreement not to annex" and is authorized under Section 42.044 of the Local Government Code.

Section 42.044 allows the governing body of any city to designate a portion of its extraterritorial jurisdiction as an industrial district. The statute does not define the phrase "industrial district" except to indicate that the term has the "customary meaning" and to specify that it includes an area where tourist-related businesses and facilities are located. Within an industrial district, the city may enter into written contracts to guarantee a business that its property will not be annexed by the city for a period of up to 15 years. Any such agreement may also contain other lawful terms and considerations that the parties agree to be reasonable, appropriate and not unduly restrictive of business activities. Currently, there do not appear to be any court cases or attorney general opinions that discuss what terms would or would not be reasonable, appropriate and not unduly restrictive of business activities.

The parties to such a contract may renew or extend the agreement not to annex for successive periods not to exceed 15 years for each extension. In the event any owner of land in an industrial

district is offered an opportunity to renew or extend a contract, then all owners of land within the district must be offered the same opportunity to renew or extend the agreement.

A city is also permitted to provide fire-fighting services within an industrial district that is subject to an agreement not to annex the area. The services can be performed directly by the city and paid for by the property owners of the district. Alternatively, the city may contract for the provision of the fire-fighting services by an outside source. However, if certain property owners contract to provide their own fire-fighting services, they may not be required to pay any part of the cost of the fire-fighting services provided by the city within the district.

The law provides several other protections to the city and to the business during the time a property is subject to an agreement not to annex. It provides that a political subdivision may not be created within an industrial district designated under Section 42.044, unless the city gives its written consent by ordinance or resolution.⁸⁸⁵ The city is required to give or deny its consent within 60 days of receiving such a written request. Failure to give or deny consent within the allotted time constitutes the city's consent to the initiation of that political subdivision's creation proceedings. If the city gives its consent or its consent is presumed by the city's failure to act, the political subdivision must initiate its creation within six months and must be finally completed within 18 months. Failure of the proposed political subdivision to comply with these time requirements terminates the consent for the proceedings.

Use of Interlocal Agreements

All levels of local government are interested in securing a stable tax base and sound economic growth for their residents. The ability of local governments to participate in economic development varies according to the statutes that control their operations. Currently, cities and counties are the only types of local governments that are authorized to undertake economic development programs. Accordingly, city and county leaders have often used their respective powers to work together to try to attract and retain business development within their regions.

This regional approach is prevalent in both the rural areas of Texas, where communities may not have the funds to do a great deal of individual marketing of their locales, and the most populous areas of Texas, where a regional approach can maximize the efforts to recruit larger businesses to an urban area. In certain cases, this cooperation is formalized into a written agreement that outlines each of the governmental entities' respective duties. This type of agreement is termed an "interlocal agreement" and is authorized under the Interlocal Cooperation Act contained in Chapter 791 of the Government Code.

The purpose of the Interlocal Cooperation Act is to increase the efficiency and effectiveness of local governments by authorizing them to be able to contract with one another to accomplish their mutual goals. The Act also allows local governments to contract with the State or with other corporate entities organized under state law, such as development corporations, councils of government (also known as COGs or regional councils), or industrial commissions, to

⁸⁸⁵ Tex. Loc. Gov't Code Ann. § 42.045 (Vernon 2008).

accomplish shared goals. The subject of an interlocal contract must be to perform a “governmental function” as outlined under the Act. Within the Act, there is a category allowing the joint pursuit of “other governmental functions in which the contracting parties are mutually interested.” It is this category that is usually cited as authority for interlocal agreements regarding economic development. However, any contract that is executed by a governmental entity may only require the performance of functions or services that each of the entities would be authorized to perform individually under state law.⁸⁸⁶

If a city and a county enter into an interlocal agreement regarding economic development efforts, the agreement must meet the applicable requirements under the Interlocal Cooperation Act and any requirements under other laws or restrictions that apply to that type of governmental entity. For example, each entity would need to follow the applicable budget laws for that type of governmental entity. Additionally, home rule cities would need to be sure that any agreement that is adopted is consistent with the city’s charter.

The Interlocal Cooperation Act contains a number of requirements for any agreement. It states that any contract under this Act must:

- be authorized by the governing body of each party to the contract;⁸⁸⁷
- state the purpose, terms, rights and duties of the contracting parties;⁸⁸⁸
- fairly compensate the performing party for the services or functions performed under the contract;⁸⁸⁹
- specify that each party paying for the performance of governmental functions or services must make those payments from current revenues available to the paying party;⁸⁹⁰ and
- have a term of no longer than one year, although such a contract may be renewable annually.⁸⁹¹

The parties to an interlocal contract may create an administrative agency or designate an existing local government to supervise the performance of the contract. The agency or designated local government may employ personnel, perform administrative activities, and provide services necessary to perform the interlocal contract. Additionally, local governments may provide in an interlocal contract for the submission of disputes to alternative dispute resolution.⁸⁹²

If the contract involves construction or other public works-type activities by a county, it must be given specific written approval of the commissioners court of the county, as provided under Government Code Section 791.014. Any property that is held and used for a public purpose under an interlocal agreement is exempt from taxation in the same manner as if the property were held and used by the participating political subdivisions. An interlocal agreement, like any

⁸⁸⁶ Tex. Gov’t Code Ann. § 791.011(c)(2) (Vernon Supp. 2008).

⁸⁸⁷ *Id.*

⁸⁸⁸ *Id.* § 791.011(d)(2).

⁸⁸⁹ *Id.* § 791.011(e).

⁸⁹⁰ *Id.* § 791.011(d)(3).

⁸⁹¹ *Id.* § 791.011(f).

⁸⁹² *Id.* § 791.015 (Vernon 2004).

contract, should be produced in consultation with the local legal counsels for each of the governmental entities.

Economic Development Activities by Councils of Government

A council of governments is a voluntary association of local governments formed under Chapter 391 of the Texas Local Government Code and constitutes a political subdivision of the state.⁸⁹³ These associations are also known as COGs, regional councils or regional planning commissions. Currently, Texas is divided into 24 State Planning Regions, and each region has a corresponding COG. All 254 Texas counties and most Texas cities are members of their local COG.

Technical Assistance and Obtaining Designation as a Metropolitan Planning Organization

COGs are authorized by statute to undertake a number of functions, including assisting local governments in their planning efforts so that the needs of agriculture, business and industry are recognized.⁸⁹⁴ Because of the myriad functions that COGs are authorized to undertake, they can be indirectly and directly helpful in economic development efforts. For instance, COGs can provide technical assistance to local governments by training officials on economic development issues and providing help in the preparation of related grant applications. COGs may also help local government with funding for certain infrastructure needs that would certainly impact economic development. For example, at least seven COGs have received designation as Metropolitan Planning Organizations under the Federal Aid Highway Act of 1973.⁸⁹⁵ This designation allows the COG to receive federal funds to help in planning and implementing responses to local transportation needs.

Obtaining Designation as an Economic Development District

COGs have also undertaken other types of economic development initiatives. Perhaps the most common of such initiatives involves gaining designation of the local COG region as an “economic development district” (EDD) under federal law.⁸⁹⁶ Such districts help local governments combine their resources in planning and developing programs to improve the region’s economic conditions. Upon designation as an EDD, certain federal funds become available to aid these districts. Additionally, an EDD is eligible for technical assistance from the regional office of the federal Economic Development Administration. Of the 24 COGs in Texas, 18 have gained designation as EDDs.

⁸⁹³ The information in this article is taken from *The Governor’s Annual Report and Directory for Regional Councils in Texas* (1999-2000), as well as information from the Texas Association of Regional Councils.

⁸⁹⁴ Tex. Loc. Gov’t. Code Ann. § 391.001 (Vernon 2005).

⁸⁹⁵ 23 U.S.C.A. § 101, *et seq.*

⁸⁹⁶ 42 U.S.C.A. § 3121, *et seq.* (Public Works and Economic Development Act of 1965).

Job Training Funds and Community Development Grants

Besides seeking designation as economic development districts, Texas COGs also apply for federal funds that are administered by the Texas Workforce Commission. These funds are used primarily for employment and training programs through participation in the Workforce Investment Act of 1998. Several COGs have also formed Small Business Administration Section 53 Certified Development Corporations. These corporations are authorized to make long-term financing available for job training for small businesses that meet certain eligibility requirements. Additionally, in 2001, COGs helped local governments obtain more than \$88 million in funds from the Texas Community Development Program administered by the Office of Rural Community Affairs (ORCA).

To obtain more information about COGs and their role in economic development, contact your local COG or contact the Texas Association of Regional Councils (TARC) at (512) 478-4715. You may also want to visit the TARC website at www.txregionalcouncil.org.

County Economic Development Powers

County governments are limited to the statutory powers given to them by the Texas Legislature. In order for a county to take an action, it must be able to cite a statute that authorizes the type of initiative that is being pursued. There are several statutes that provide counties with methods for facilitating economic development initiatives.

County Industrial Commissions

Section 381.001 of the Local Government Code specifically authorizes counties to promote economic development through county industrial commissions. The commission's aims are to "investigate and undertake ways of promoting the prosperous development of business, industry, and commerce in the county."⁸⁹⁷ It may assist in the location, development and expansion of business enterprises, and is required to cooperate with the Governor's Office of Texas Economic Development and Tourism.⁸⁹⁸

A county industrial commission consists of at least seven county residents, appointed by the county judge.⁸⁹⁹ Members serve two-year terms without pay, although the county may pay for "necessary expenses."⁹⁰⁰

⁸⁹⁷ Tex. Loc. Gov't Code Ann. § 381.001(f) (Vernon 2005).

⁸⁹⁸ *Id.* § 381.001(g).

⁸⁹⁹ *Id.* § 381.001(a) - (b)

⁹⁰⁰ *Id.* § 381.001(d) - (e).

County Boards of Development

Local Government Code Section 381.002 authorizes counties to create county boards of development to promote the growth and development of the county. These boards are created only if county residents have voted at an election to dedicate a portion of the property tax for this purpose. If a majority of the voters approve such a dedication at an election on the issue, the commissioners court may set aside part of the county's ad valorem tax revenue (a maximum of five cents per \$100 assessed valuation) as a board of development fund. This money is to be used to "advertise and promote the growth and development of the county."⁹⁰¹

The fund is administered by a county board of development consisting of five members appointed to two-year terms by the commissioners court.⁹⁰² As with the county industrial commission, the members are unpaid. The board is responsible for preparing and submitting a budget for the ensuing year to the county commissioners court in the same manner that county budgets are administered. Although a county may operate under another law authorizing the appropriation of money or the levy of a tax for advertising and promotion purposes, the county may not appropriate more funds for those purposes than the five cent per \$100 assessed valuation permitted under Chapter 381 of the Local Government Code.⁹⁰³

Direct County Economic Development Efforts

Another provision in Local Government Code Chapter 381 authorizes counties to contract with a broad range of entities, including state and federal agencies, cities, school districts, nonprofit organizations and even "any other person," to stimulate business and commercial activity. Under Section 381.004, a commissioners court may develop and administer programs in several areas:

- state or local economic development;⁹⁰⁴
- small or disadvantaged business development;⁹⁰⁵
- development of business locations within the county;⁹⁰⁶
- encouragement of county contract awards to businesses owned by women and minorities;⁹⁰⁷
- promotion or advertisement of the county and its vicinity to attract conventions, visitors and businesses;⁹⁰⁸
- support comprehensive literacy programs for the benefit of county residents;⁹⁰⁹ and
- encouragement and promotion of the arts.⁹¹⁰

⁹⁰¹ *Id.* § 381.002(a).

⁹⁰² *Id.* § 381.002(c).

⁹⁰³ *Id.* § 381.002(g).

⁹⁰⁴ *Id.* § 381.004(b)(1).

⁹⁰⁵ *Id.* § 381.004(b)(2).

⁹⁰⁶ *Id.* § 381.004(b)(3).

⁹⁰⁷ *Id.* § 381.004(b)(5).

⁹⁰⁸ *Id.* § 381.004(b)(5).

⁹⁰⁹ *Id.* § 381.004(b)(6).

⁹¹⁰ *Id.* § 381.004(b)(7).

Section 381.004 allows the county to use county employees or funds to pursue the above programs.⁹¹¹ Additionally, the law allows counties to accept contributions, gifts or other resources.⁹¹² It should be noted that a provision of the County Purchasing Act allows the county to exempt these program contracts from competitive bidding requirements.

The attorney general has concluded that Section 381.004 does not authorize a county to simply provide funds to existing non-county programs, even if those programs are directed at economic development. Rather, any program funded under this section must be initiated by the county and must be administered either by the county or by an entity under contract with the county.⁹¹³ The county commissioners court is authorized to make loans, grant public money, or provide county personnel and services to permissible Chapter 381 economic development programs.⁹¹⁴

Counties are also among the political subdivisions that may form industrial development corporations under V.T.C.S. Art. 5190.6 (the Development Corporation Act of 1979). An industrial development corporation is simply a nonprofit corporation formed by a taxing unit such as a city or a county to pursue economic development. The corporation is governed by a board of directors who are appointed by and serve at the pleasure of the taxing unit that created the corporation. Cities use industrial development corporations to administer the Section 4A or Section 4B sales tax for economic development. Counties may create industrial development corporations even though they do not have the authority to levy a sales tax for economic development for the corporation's use.

Municipal and County Ability to Provide Loans or Grants

Article III, Section 52-a, of the Texas Constitution allows the Legislature to provide for loans and grants of public money for several purposes: development and diversification of the state's economy, elimination of unemployment, stimulation of agricultural innovation, and development of transportation or commerce. The Legislature may authorize a local government to undertake such programs. Chapter 380 of the Local Government Code specifically allows cities to make "loans and grants of public money" to promote economic development.

Further, the city must ensure that the public purpose of economic development will be pursued by the business. For example, if a city provides a grant or a loan to an industry, the city should enter into a binding contract with the funded industry that outlines what steps the business will take that justify the provision of public funding (creation of jobs, expansion of the tax base by construction or enhancement of the physical facilities, etc.). The city should provide in the agreement a recapture provision so that if the business does not fulfill its promises, the city will have a right to seek reimbursement of the incentives that were provided. Any such agreement should also include tangible means for measuring whether the industry has met its obligations

⁹¹¹ *Id.* § 381.004(c)(3).

⁹¹² *Id.* § 381.004(c)(4).

⁹¹³ Op. Tex. Att'y Gen. No. LO 98-007 (1998).

⁹¹⁴ Tex. Loc. Gov't Code Ann. § 381.004(h) (Vernon 2005).

under the contract. Without these safeguards and a demonstrable benefit to the municipality, such incentives may not pass constitutional muster for serving a public purpose.⁹¹⁵

Counties are constitutionally prohibited from granting “public money or any thing of value in aid of, or to any individual, association or corporation whatsoever.” The attorney general has concluded on several occasions, however, that counties may use tax revenues to promote various legitimate interests of the county. If the county determines that funding an economic development program promotes a legitimate county interest and that such funding is authorized by applicable statutory authority, the county arguably could pursue such a program. Further, Chapter 381 of the Local Government Code allows counties to make loans or grant public monies for permissible Chapter 381 economic development programs.⁹¹⁶ In any case, like cities, counties must maintain sufficient control over the way these funds are spent. To ensure such control, a county would be well advised to execute a formal contract between the county and the entity that spends the funds, outlining the respective rights and duties under the agreement. Additionally, the county would want to include a recapture provision outlining how the county would be reimbursed for any incentives it provided if the funded entity is ultimately unable to meet its commitments.

⁹¹⁵ See Op. Tex. Att’y Gen. No. LO 94-037 (1994) at 3 and LO 97-061 (1997) at 4. (These two opinions do not concern the establishment of economic development programs under the authority of Local Government Code Chapter 380. However, their reasoning arguably applies to any grant or loan of public money for economic development, regardless of the authority under which such a grant or loan is made.)

⁹¹⁶ Tex. Loc. Gov’t Code Ann. § 381.004(h) (Vernon 2005).

VI. Issuing Debt to Finance Economic Development

Legal Authority to Issue Bonds

Cities occasionally may not have sufficient current funds to pay for certain economic development incentives. Consequently, the city may look to its ability to issue debt to finance such incentives. The power to issue debt, however, is quite different for home rule cities than it is for general law cities. Either type of city will want to be certain that it has the authority to issue bonds or other forms of indebtedness before it commits itself to such an incentive. Provided below is a discussion of the basic authority for both home rule and general law cities to issue debt to finance economic development.

Legal Authority to Issue Bonds for Economic Development

Even though a city has the power to generally manage its own financial affairs, Texas courts have held that cities do not have an inherent right to issue bonds. In order to issue bonds, a city must be able to point to a statutory or city charter provision that specifically authorizes the issuance of bonds for the proposed purpose. A statutory or charter provision that gives the city the power to borrow does not in itself provide the city with the power to issue bonds.⁹¹⁷

Presently, there are several sources of statutory authority for the issuance of bonds for economic development. Chapters 334 and 335 of the Local Government Code authorize bonds to be issued under certain circumstances for venue projects.⁹¹⁸ Chapter 311 of the Tax Code allows the issuance of tax increment bonds to finance a tax increment project.⁹¹⁹ Chapter 1509 of the Government Code allows cities to finance certain manufacturing and commercial facilities, and Article 5190.6 (the Development Corporation Act) authorizes development corporations to issue bonds, payable from a sales tax for economic development.

Bonds for Certain Commercial Projects

Under Chapter 1509 of the Government Code, a municipality may issue revenue or general obligation bonds to finance the construction or purchase of a facility to house manufacturing or other commercial activity. The city may lease the facility to a private entity.⁹²⁰ A city may also issue these bonds to obtain a building or other facility that subsequently will be leased to a political subdivision of the state or to a state agency.⁹²¹ For example, a city could issue bonds to finance the construction of a facility to house a regional state office in order to bring government jobs to a particular area. In this circumstance, the bonds would be payable from the lease

⁹¹⁷ *City of Brenham v. German-American Bank*, 144 U.S. 173, 12 S. Ct. 559 (1892) (The city charter of Brenham, which allowed the city to borrow money for general purposes on the credit of the city, only included authority to borrow money for ordinary governmental purposes; this did not include the power to issue bonds).

⁹¹⁸ Tex. Loc. Gov't Code Ann. § 334.043 (Vernon 2005).

⁹¹⁹ Tex. Tax Code Ann. § 311.015 (Vernon Supp. 2008).

⁹²⁰ Tex. Gov't Code Ann. § 1509.001(a)(2) (Vernon Supp. 2008).

⁹²¹ *Id.* § 1509.001(a)(1). (In addition, in 2005 the Legislature added (a)(3) allowing leases to the federal government to enhance the military value of a military facility located in or near a municipality that is a defense community under Section 397.001 of the Local Government Code).

revenue; additionally, a city could provide that such bonds are payable from ad valorem taxes if the bond issuance is approved by a majority of the voters at an election held for that purpose.⁹²² A city that utilizes this authority will want to visit with its local bond counsel to determine the applicable legal requirements.

Article 5190.6 Bonds by Industrial Development Corporations

Under Texas Civil Statutes Article 5190.6, bonds can be issued to finance projects authorized by that statute (the Development Corporation Act of 1979).⁹²³ These bonds are issued by the industrial development corporation (not by the city) and are payable from the economic development sales tax proceeds and any other revenues that flow directly to the industrial development corporation. The city is not the issuer of the debt and cannot be held liable for any obligations of this corporation.⁹²⁴ The types of projects that may be funded by the economic development sales tax are covered in detail in chapter I of this handbook addressing Section 4A and Section 4B sales tax.⁹²⁵

Which Obligations Must Receive Attorney General Approval

Texas Government Code Section 1202.003 (a) requires that public securities and the “record of proceedings” relating to authorization of public securities must be submitted to the attorney general for review and approval.⁹²⁶ If public securities are not approved by the attorney general, they cannot be issued.

Public securities are broadly defined to include any bonds, notes, certificates of obligation, certificates of participation, and other obligations that represent the issuer’s use of its borrowing power and are in the appropriate form.⁹²⁷ Exempted from the approval requirement are time warrants, leases, most lease-purchase agreements, installment sale contracts, and bonds that are payable only from current revenues or taxes collected in the year of issuance.⁹²⁸ However, it is important to note that each of these obligations may be required to receive attorney general approval under other law. Notes given to banks to evidence a commercial bank loan are not generally considered securities that have to be approved by the attorney general and, in most instances, cannot be approved by the attorney general even if such approval is desired. As discussed later in this handbook, however, there is no clear general authorization to issue such notes.

⁹²² *Id.* § 1509.005.

⁹²³ Tex. Rev. Civ. Stat. Ann. art. 5190.6 §§ 4B(g)(2), 4B(h), 21 (Vernon Supp. 2008) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 505.301, 505.104, and 501.006 (Vernon Supp. 2008), effective April 1, 2009).

⁹²⁴ *Id.* § 22 (to be codified at Tex. Loc. Gov’t Code Ann. § 501.207 (Vernon Supp. 2008), effective April 1, 2009).

⁹²⁵ *See id.* §§ 2(11) (defines “project”), 4B(a)(2)-(4) (further define “project” for 4B corporations) (to be codified at Tex. Loc. Gov’t Code Ann. §§ 501.101, 505.155, 505.158, and 505.157 (Vernon Supp. 2008), effective April 1, 2009).

⁹²⁶ In addition to the requirements for Attorney General approval contained in Chapter 1202 of the Texas Government Code (Vernon 2000 & Supp. 2007), a number of statutes contain their own requirements for Attorney General approval. A local government should always consult the specific statute which it cites as authorization to issue debt for any restrictions or requirements relating to that debt.

⁹²⁷ Tex. Gov’t Code Ann. § 1202.001(3) (Vernon Supp. 2008).

⁹²⁸ *Id.* §1202.007.

Home Rule Cities General Bond Authority

The general statutory authority for home rule cities to issue bonds is found in Section 1331.052 of the Government Code. This section allows home rule cities to issue bonds for the purpose of making permanent public improvements and for other public purposes authorized by the city charter and consistent with the Texas Constitution. If a home rule city cites this authority for issuing bonds for certain permanent improvements, it must show that the bonds are permitted under the city's home rule charter.

Additionally, home rule cities have statutory authority to issue bonds for items such as hospital sites;⁹²⁹ park purposes;⁹³⁰ airports;⁹³¹ utility systems; parks or swimming pools;⁹³² civic centers, auditoriums, museums, libraries, golf courses, tennis courts, and other municipal buildings;⁹³³ municipal parking and transportation facilities;⁹³⁴ municipal parks; airports; and recreational facilities such as swimming pools, golf courses, ballparks and fairgrounds.⁹³⁵

If ad valorem taxes are to be pledged to support bonds, the bond issuance generally must be approved also by the voters at an election on the issue.⁹³⁶

General Law Cities General Bond Authority

Chapter 1331 of the Government Code provides general law cities the authority to issue bonds to construct or purchase public buildings, waterworks, sewers, roads, bridges, streets and other permanent improvements within the city limits.⁹³⁷ There is also statutory authority for general law cities to issue bonds for items such as hospital sites;⁹³⁸ park purposes;⁹³⁹ airports;⁹⁴⁰ utility systems; parks or swimming pools;⁹⁴¹ civic centers, auditoriums, museums, libraries, golf courses, tennis courts and other municipal buildings;⁹⁴² municipal parks; airports; and recreational facilities such as swimming pools, golf courses, ballparks and fairgrounds.⁹⁴³ If ad valorem taxes are to be pledged to support bonds, the bond issuance also must be approved by the voters at an election on the issue.

⁹²⁹ Tex. Loc. Gov't Code Ann. § 280.003 (Vernon 2005).

⁹³⁰ *Id.* ch. 331.

⁹³¹ Tex. Transp. Code Ann. § 22.052 (Vernon Supp. 2008); Tex. Gov't Code Ann. chs.1503, 1508 (Vernon 2000 & Supp. 2008).

⁹³² Tex. Gov't Code Ann. ch. 1502 (Vernon 2000 & Supp. 2008).

⁹³³ *Id.* ch.1504.

⁹³⁴ *Id.* ch. 1506.

⁹³⁵ *Id.* ch. 1508.

⁹³⁶ *Id.* § 1331.052(b) (Vernon 2000).

⁹³⁷ *Id.* § 1331.001.

⁹³⁸ Tex. Loc. Gov't Code Ann. § 280.003 (Vernon 2005).

⁹³⁹ *Id.* ch. 331 (Vernon Supp. 2008).

⁹⁴⁰ Tex. Transp. Code Ann. § 22.052 (Vernon Supp. 2008); Tex. Gov't Code Ann. chs.1503, 1508 (Vernon 2000 & Supp. 2008).

⁹⁴¹ Tex. Gov't Code Ann. ch. 1502 (Vernon 2000 & Supp. 2008).

⁹⁴² *Id.* ch. 1504.

⁹⁴³ *Id.* ch. 1508.

Authority Under Local Government Code Chapter 380

Many cities cite Chapter 380 of the Local Government Code for their authority to offer grants or loans of city funds as an incentive to new or expanding businesses. There is no authority, however, for such grants or loans to be funded by general obligation bonds (bonds payable in whole or part from ad valorem tax revenues) or revenue bonds (bonds payable solely from the revenues of a project.) Although Local Government Code Chapter 380 allows the provision of city grants and loans to promote economic development, this chapter does not specifically authorize the issuance of any type of bonds or other long term obligations to finance such a program.

Attorney General Opinion DM-185 (1992) concluded that Local Government Code Chapter 380 did not specifically authorize the issuance of bonds to fund city grant and loan programs. Such authorization, however, may be contained in a city charter of a home rule city (city with a population of 5,000 or more when it adopts a home rule charter). Accordingly, a home rule city could issue general obligation bonds to provide grants or loans under its economic development program if two conditions were met. Specifically, there must be a provision in the city charter that allows the issuance of bonds for that purpose. Second, the voters must approve the bond issuance at an election held on the issue. Attorney General Opinion DM-185 does not address what specific charter language would be necessary to authorize bonds to fund a loan or grant program.

Attorney General Opinion DM-185 also concluded that any grant of funds under the authority of Local Government Code Chapter 380 must comply with the constitutional requirement that public resources be used for the direct accomplishment of a public purpose. Thus, any program to provide grants or loans under Chapter 380 must contain sufficient controls to ensure that the funds involved are actually used to further the intended public purpose.

Cities with a population of under 5,000 or without a charter are classified as general law cities. General law cities without a charter lack any charter provisions authorizing the issuance of bonds. Accordingly, it would be difficult for a general law city to legally justify the issuance of bonds or debt to finance loans or grants, due to the lack of both a charter and any authorization from Texas statutes for the issuance of bonds for that purpose. Consequently, general law cities should offer loans or grants only to the extent that the expenditures may be funded from the city's current fiscal year budget.

Procedures for Issuing Bonds for Economic Development

If an economic development project involves the issuance of bonds, a city will generally contract for assistance from experts in the financial and legal aspects of a bond financing. With regard to the financial implications, a city usually hires a financial advisor who is available through any of a number of investment banking firms in Texas. For assistance in complying with the legal requirements of a bond financing, bond counsel should be hired.

The chosen financial advisor and bond counsel will review the proposed structure of the bond financing. If there are unusual legal issues associated with the issuance of the bonds, bond counsel may contact the Public Finance Division of the Office of the Attorney General to resolve

these issues. Ordinarily, these issues will be settled prior to submission of the financing instrument to the attorney general for approval. If bond counsel is satisfied with the legal aspects of the proposed financing, the financial advisor can complete the analysis of the financial feasibility of the financing. Financial issues could include consideration of the likely market reaction to the proposed bonds and the strength of the sources of repayment of the bonds.

When bond counsel and the financial advisor are satisfied that all legal requirements have been met and that the bonds will be marketable at a reasonable price, the bonds are sold. The bond sale can be pursuant to competitive bids or through a negotiated sale with a preselected “underwriter,” as provided by law. The financial advisor is responsible for advising the city as to the best approach for selling the bonds. The financial advisor, in conjunction with bond counsel, must also determine that all federal regulations are met regarding the issuance of the bonds.

The attorney general’s review of financial instruments is a legal one. The decision to approve or not approve the bonds is made by determining that the legally required procedures have been followed and that the issuance of the bonds is authorized by law.⁹⁴⁴ The attorney general does not pass on the financial viability of a bond issue or make any determination as to the desirability of the project being financed.

The minimum time requirement for review of bonds by the attorney general is 12 working days for economic development-related financing. Additional time will be required if all of the necessary documentation is not provided at the time the bonds are submitted. In a complex financing, the attorney general may require certain revisions to the documents or may seek the resolution of legal issues that arise. If so, the review process may take substantially longer than the minimum time period. Once the attorney general has approved the bonds, they are registered with the State Comptroller and can then be delivered to the purchaser in return for the purchase price. The financing then “closes,” and the bond proceeds are considered available for the construction or acquisition of the facilities.

Effect of Attorney General Approval of Bonds

The significance of attorney general approval of bonds is that once bonds are approved, they are incontestable for any reason,⁹⁴⁵ except for unconstitutionality. If questions arise concerning the constitutionality of a transaction or the legal basis upon which a transaction is predicated, the attorney general will require that a formal attorney general opinion be obtained or that a bond validation judgment be sought by the filing of a bond validation lawsuit.

Other Instruments to Finance Infrastructure Improvements

There are a number of financial instruments other than bonds that are typically used by cities to finance public improvements. Whether such instruments may be used to fund economic development-related expenditures depends on the relevant statutory authority and any authorization provided by the city charter. While there is no direct constitutional limit on the amount of debt that cities may incur, the Office of the Attorney General has promulgated rules

⁹⁴⁴ *Id.* § 1202.003(b) (Vernon 2000).

⁹⁴⁵ *Id.* § 1202.006.

limiting the amount of debt that a public entity may incur.⁹⁴⁶ Those rules prevent most local governments from incurring debt that would require more than two-thirds of the issuer's tax rate to be dedicated to debt service. Further, under the attorney general's rules, a home rule city with the maximum legal property tax rate of \$2.50 per \$100 of valuation may not incur an amount of debt that would require more than \$1.50 of that rate for debt service. Additionally, other law, such as the city charter of a home rule city, may place stricter limits on the amount of debt that a city may incur.

Certificates of Obligation and Time Warrants

Certificates of Obligation (COs) are a form of municipal securities authorized under Chapter 271, Subchapter C, of the Local Government Code. Home rule cities and certain general law cities⁹⁴⁷ may issue COs. Cities may issue COs to finance expenditures for public facilities which the city will own.⁹⁴⁸ They also may be used to pay for professional services, for the demolition of substandard structures, and for the restoration of historic structures.⁹⁴⁹ The statutory authority to issue COs predates the constitutional amendment that allowed cities to expend public funds to promote economic development. Consequently, it may be difficult to argue that the Legislature anticipated that a CO could be used to finance economic development-related expenditures.

A time warrant is a type of written promise by a city to pay an obligation in the future. Time warrants are no longer used by Texas cities with any frequency because they are not as easily transferable as certificates of obligation. As in the case of COs, the statutory authority for time warrants predates the constitutional amendment allowing cities to expend public money to promote economic development. Accordingly, it is questionable whether time warrants may be used for economic development-related expenditures.

Bank Loans and Other Forms of Indebtedness

Long-term bank notes (notes for more than one year) may be executed by cities if such borrowing is authorized under the city charter or under other statutory authority. Accordingly, a home rule city could borrow money from a bank or enter into other forms of indebtedness to further economic development, to the extent authorized by the city charter and the Texas Constitution. One caveat is that ad valorem taxes cannot be pledged for debt service without voter approval, and the authority for calling an election to approve obligations other than bonds is questionable.

⁹⁴⁶ 1 Tex. Admin. Code § 53.5.

⁹⁴⁷ Tex. Loc. Gov't Code Ann. § 271.044 (Vernon 2005). (The general law cities which may issue certificates of obligation are those cities that have the authority to levy a property tax of \$1.50 on \$100 valuation. The city does not have to actually levy its property tax at this rate. It merely has to have the legal authority to do so. This would include all Type A general law cities. It would also include Type C cities with a population of between 501 and 4,999 inhabitants.) See Tex. Const. art. 11, § 5 (property tax cap for home rule cities); art. 11, § 4 (general property tax cap for general law cities). See also Tex. Tax Code Ann. § 302.001 (Vernon 2008) (special statutory property tax cap for Type B cities); Tex. Loc. Gov't Code Ann. § 51.051 (Vernon 2008) (indicating that some Type C cities have the powers of a Type A city while others have the powers of a Type B city, depending on population).

⁹⁴⁸ Tex. Loc. Gov't Code Ann. § 271.045 (Vernon Supp. 2008).

⁹⁴⁹ *Id.* § 271.0461 (Vernon 2005).

General law cities have limited authority to borrow money. Section 101.005 of the Local Government Code states that in order to meet the infrastructure needs of the city, the governing body may borrow money based on the credit of the city. This provision, however, does not provide authority for these cities to issue long-term notes (obligations that are payable beyond the current fiscal year.)⁹⁵⁰

⁹⁵⁰ See *McNeill v. City of Waco*, 33 S.W. 322 (1895) (the word “debt” as used in Texas Constitution Article XI section 5, prohibiting the creating or incurring by a city of a debt for any purpose and in any manner without at the same time making provision to assess and collect annually a sufficient sum to pay the interest and create a sinking fund of at least two per cent, means any pecuniary obligation imposed by contract, except such as are at the date of the contract within the lawful and reasonable contemplation of the parties to be satisfied out of the current revenues for the year, or out of some fund then within the immediate control of the corporation. For Constitutional purposes, “debt” is any contractual obligation that creates a liability that can not be paid out of current budget year revenues). See also *Andrus v. Crystal City*, 253 S.W. 557 (Tex. Civ. App. -- San Antonio 1923), *aff’d*, 265 S.W.550 (Tex. Comm’n App. 1924) (municipal debts may be created without tax levy when they are to be paid out of funds for current year).

VII. Other Economic Development Initiatives

Public Improvement Districts

Cities and counties often need to make certain improvements to their infrastructure to facilitate economic growth within an area. New businesses may choose not to locate where there are inadequate streets, substandard utility services, or other public facilities or services that are inferior. It is also difficult for existing businesses to prosper in areas that have poor public infrastructure. Texas law provides a number of ways to finance needed public improvements, including the use of special assessments. Public Improvement Districts (PIDs) offer cities and counties a means for undertaking such projects.

The Public Improvement District Assessment Act allows any city to levy and collect special assessments on property that is within the city or within the city's extraterritorial jurisdiction (ETJ). Further, counties may levy and collect special assessments on property located within the county unless within 30 days of a county's action to approve the public improvement district, a home rule city objects to its establishment within the home rule city's corporate limits or ETJ.⁹⁵¹ The statute authorizing the creation of PIDs is found in Chapter 372 of the Local Government Code. The public improvement district may be formed to accomplish any of the following improvements:⁹⁵²

- water, wastewater, health and sanitation, or drainage improvements (including acquisition, construction, or improvements of water, wastewater or drainage improvements);
- street and sidewalk improvements (acquiring, constructing, improving, widening, narrowing, closing or rerouting sidewalks, streets or any other roadways or their rights-of-way);
- mass transit improvements (acquisition, construction, improvement or rerouting of mass transportation facilities);
- parking improvements (acquisition, construction or improvement of off-street parking facilities);
- library improvements (acquisition, construction or improvement of libraries);
- park, recreation and cultural improvements (the establishment or improvement of parks);

⁹⁵¹ Tex. Loc. Gov't Code Ann. § 372.003(d) (Vernon 2005).

⁹⁵² *Id.* § 372.003(b).

- landscaping and other aesthetic improvements (erection of fountains, distinctive lighting and signs);
- art installation (acquisition and installation of pieces of art);
- creation of pedestrian malls (construction or improvement of pedestrian malls);
- similar improvements (projects similar to those listed above);
- supplemental safety services for the improvement of the district, including public safety and security services; or
- supplemental business-related services for the improvement of the district, including advertising and business recruitment and development.

The nine steps involved in creating a public improvement district are as follows:

Step One:

The governing body or a group of the affected property owners must initiate a petition that calls for a defined area of the city or county to be declared a public improvement district.⁹⁵³

The petition must state:⁹⁵⁴

- the general nature of the proposed improvements;
- the estimated cost of the improvements;
- the boundaries of the improvements;
- the proposed method of assessment, which may specify included or excluded classes of assessable property;
- the proposed apportionment of costs between the public improvement district and the municipality or county as a whole;
- whether the district will be managed by the municipality or county, by the private sector, or by a partnership of the two;
- that the persons signing the petition request or concur with the establishment of the district; and

⁹⁵³ *Id.* § 372.002. See also Op. Tex. Att’y Gen. No. 96-129 (1996) (concluding a petition is a prerequisite for the establishment of a public improvement district).

⁹⁵⁴ Tex. Loc. Gov’t Code Ann. § 372.005(a) (Vernon 2005).

- that an advisory board may be established to develop and recommend an improvement plan to the governing body of the municipality or the county.

The petition is sufficient if it meets two conditions. First, it must be signed by owners of more than 50 percent of the taxable real property value that is subject to assessment under the proposal. Second, the petition must also include signatures from more than 50 percent of the number of taxable property owners who would be assessed, or include signatures from owners of more than 50 percent of the surface area to be assessed under the proposal.

Step Two:

After receiving a petition to establish a public improvement district, the governing body of the city or county may appoint an advisory board to develop an improvement plan for the PID.⁹⁵⁵

Texas statutes do not provide a set number of members for the advisory board. The membership of the board, however, must be sufficient to meet two criteria. First, it must be composed of taxable real property owners who represent more than 50 percent of the appraised value of taxable real property that is subject to assessment. Second, this board must include representation by more than 50 percent of the property owners who would be liable for assessment, or include more than 50 percent of the owners of taxable surface area under the proposed plan.

Upon initiation of the PID by petition, the governing body of the city or county should prepare a report on whether the improvements are feasible and whether the plan should be augmented by other authorized improvements. The feasibility report may be conducted using the services of municipal employees, county employees or outside consultants. The purpose of the report is to determine whether an improvement should be made as proposed by the petition, or in combination with other improvements authorized under Chapter 372 of the Local Government Code.⁹⁵⁶

Step Three:

A public hearing on the advisability of the improvements must be conducted after meeting statutory notice requirements.⁹⁵⁷

After the feasibility study is completed, a public hearing must be held by the governing body of the city or county to determine the advisability of the proposed improvements. Notice of the public hearing must be published in a newspaper of general circulation in the municipality or county more than 15 days prior to the date of the hearing. Additionally, notice of the PID must be mailed more than 15 days prior to the date of the hearing to the owners of property within the proposed PID. The notice must contain the following information:

- the time and place of the hearing;
- the general nature of the proposed improvements;

⁹⁵⁵ *Id.* § 372.008(a).

⁹⁵⁶ *Id.* § 372.007(a).

⁹⁵⁷ *Id.* § 372.009.

- the estimated cost of the improvements;
- the boundaries of the proposed district;
- the proposed method of assessment; and
- the proposed apportionment of cost between the improvement district and the municipality or county as a whole.

The municipality or county must make findings regarding Items 2 through 6 by resolution from information gathered at the public hearing. Additionally, the municipality or county must make findings (by resolution) regarding the advisability of the proposed improvements.

Step Four:

The governing body of the city or county must adopt a resolution by majority vote authorizing the creation of a PID.⁹⁵⁸

The authorization of the PID must be done within six months of the public hearing on the PID. The authorization is effective once notice of the resolution is published in a newspaper of general circulation in the municipality or county. If any part of the improvement district is located in the extraterritorial jurisdiction (ETJ) of the municipality, the notice must also be published once in a newspaper of general circulation in the city's ETJ.⁹⁵⁹

Step Five:

Twenty days after authorization of the PID, the city or county may begin construction of the improvements.⁹⁶⁰

Construction may not begin, however, if within the 20-day period a protest petition is filed. Such a petition must be signed by owners representing at least two-thirds of the taxable surface area of the district or by two-thirds of all the land owners in the district. In response, the governing body of the city or county may choose to assess only part or none of the area of the district.⁹⁶¹ The area to be assessed may not, in any case, be increased beyond the boundaries described in the original notices unless an additional notice and public hearing are provided.⁹⁶²

Attorney General Opinion GA-528 (2007) reminds that the Texas Constitution requires that improvements funded under chapter 372 must be constructed on land in which a city has an appropriate interest in order to maintain sufficient control and protect the public interest.

⁹⁵⁸ *Id.* § 372.010(a).

⁹⁵⁹ *Id.* § 372.010(b).

⁹⁶⁰ *Id.* § 372.010(c).

⁹⁶¹ *Id.* (protest must be signed by owners of property within the district), *id.* § 372.012 (appearing to give the city's or county's governing body the authority to reduce the size of a proposed district). (Under these sections, a city's or county's governing body could arguably change the district boundaries so as to exclude the property of those protesting the proposed PID).

⁹⁶² *Id.* § 372.012.

Step Six:

A five-year on-going service plan and assessment plan must be developed.⁹⁶³

The service and assessment plan must define the annual indebtedness and projected costs of the improvements for the PID. The plan must also be reviewed and updated annually for purposes of determining an annual budget for the PID. The plan may be prepared by the municipality, county or PID advisory board, if one is appointed.

In addition, the governing body of the city or county must prepare an assessment plan,⁹⁶⁴ which must be included in the annual service plan.⁹⁶⁵ Assessments must be based upon the special benefits that accrue to the property because of an improvement.⁹⁶⁶ Costs may be assessed in any manner that results in equal shares of the cost being absorbed by similarly benefitted properties within the PID. Assessments may be adjusted annually upon review of the service plan. The city and county are responsible for payment of assessments against exempt municipal or county property within the district. Payment of assessments by other tax exempt jurisdictions must be established by contract.⁹⁶⁷

Step Seven:

The city or county must provide notice and a hearing to determine the total cost of the improvements and to prepare an assessment roll.⁹⁶⁸

If the city forms the district, a copy of the proposed assessment roll must be filed with the city secretary. If the county forms the district, the proposed assessment roll must be filed with the county tax assessor-collector.⁹⁶⁹ Notice of the public hearing on the roll must be mailed to affected property owners. The notice must also be published in the newspaper in the same manner that notice was given for the creation of the PID, except that at least 10 days' notice must be provided. An additional statement must be included in this notice that written or oral objections will be considered at the public hearing. At the public hearing, the governing body must hear and rule on any objections that are raised.⁹⁷⁰

⁹⁶³ *Id.* § 372.013(a), (b).

⁹⁶⁴ *Id.* § 372.014(a).

⁹⁶⁵ *Id.*

⁹⁶⁶ *Id.* § 372.015.

⁹⁶⁷ *Id.* § 372.014(b).

⁹⁶⁸ *Id.* § 372.016 .

⁹⁶⁹ *Id.* § 372.016(b).

⁹⁷⁰ *Id.* § 372.017(a).

Step Eight:

After all the objections have been heard and considered, the governing body may levy, by ordinance or order, the special assessment against the taxable properties within the district.⁹⁷¹

The ordinance or order must include the method of payment and may provide for installment payments to meet annual costs and retire any indebtedness for the improvements within the district. The assessment is a first and prior lien against the property, superior to all other liens and claims except liens for state, county, school district or city ad valorem taxes. Delinquent installments of assessments shall incur interest, penalties and attorney's fees in the same manner as delinquent ad valorem taxes.⁹⁷² However, a special assessment is not considered a tax as that term is used in the Texas Constitution. Thus, this office held that a homestead may not be subjected to forced sale for nonpayment of a public improvement district assessment.⁹⁷³ However, this office then qualified that conclusion by stating that an assessment may be enforced by foreclosure provided that the statutory lien associated with the assessment attached to the real property prior to the date the property became a homestead.⁹⁷⁴

The costs of the improvements called for under the district may be paid from available general funds of the municipality or county, from any special assessments levied, and from proceeds of the sale of general obligation bonds and related revenue bonds, temporary notes and time warrants.⁹⁷⁵

Step Nine: The governing body may make additional assessments against property within the district to correct omissions or mistakes regarding the costs of the improvements.⁹⁷⁶

Before such an additional assessment may be made, the city or county must provide the same type of notice and public hearing that was required for the original assessment.

A public improvement district may also be dissolved after public notice and a public hearing has been held.⁹⁷⁷ The notice and hearing requirements are the same as those required to create a PID. A petition requesting dissolution must be filed with the city secretary and must contain the signatures of at least the same number of property owners required to create the PID.⁹⁷⁸ If the district is dissolved, the PID stays in effect until it has paid off any indebtedness that remains for the improvements.

⁹⁷¹ *Id.* § 372.017(b).

⁹⁷² *Id.* § 372.018(b).

⁹⁷³ Op. Tex. Att'y Gen. No. JC-386 (2001).

⁹⁷⁴ Op. Tex. Att'y Gen. No. GA-237 (2004). *Also, see id.* at 2 n. 2 (it may be advisable to record the statutory assessment lien due to Section 51.008 of the Property Code).

⁹⁷⁵ Tex. Loc. Gov't Code Ann. § 372.023 (Vernon 2005).

⁹⁷⁶ *Id.* § 372.019.

⁹⁷⁷ *Id.* § 372.011.

⁹⁷⁸ *Id.* §§ 372.011, 372.005. (Section 372.005 (c) of the Local Government Code provides that the "petition may be filed with the municipal secretary or other officer performing the functions of the municipal secretary." This section does not note the county official with whom a petition to dissolve a county PID should be filed with).

Municipal Management Districts

Municipal management districts are relatively new statutory vehicles that allow commercial property owners to enhance a defined business area. The districts, also called downtown management districts, are created within an existing commercial area to finance facilities, infrastructure and services beyond those already provided by individual property owners or by the municipality. The improvements may be paid for by a combination of self-imposed property taxes, special assessments and impact fees, or by other charges against property owners within the district. The creation of such a district does not relieve a city from providing basic services to an area included within the district. A district is created to supplement, not to supplant, the municipal services available to the area. A number of Texas cities have used municipal management districts to provide much-needed funding to enhance the economic vitality of the business centers within the municipality. The general statutes governing municipal management districts are located in Chapter 375 of the Local Government Code, although many districts are also subject to statutes specific to each district in subchapters within Chapter 376. An area is eligible for designation as a municipal management district if it is devoted primarily to commercial development or business activity.⁹⁷⁹ A district may include the extraterritorial jurisdiction of a city, if the city has a population of at least 25,000 and if the area has an assessed valuation of \$500 million or more according to the appraisal district.⁹⁸⁰ A municipal management district is considered a governmental agency and a political subdivision of the state.⁹⁸¹ The creation of a municipal management District within an eligible commercial area involves five steps.

Step One:

The owners of a majority of the assessed value of the real property in the proposed district, or 50 persons who own real property in the proposed district, must sign a petition asking for the creation of a district.⁹⁸²

This petition must include the proposed district boundaries, purposes, general nature of the projects or services to be undertaken by the district, the estimated cost of the proposed work, and the names of the proposed directors (noting the directors' experience and length of initial service). The petition must also include a copy of a resolution that was adopted by the governing body of the city in support of the district. The name of the district must start with a general description of the location of the district followed by the term "Management District." The description of the boundary of the proposed district must be by metes and bounds or by lot and block number (if there is a recorded map or plat and survey of the area).⁹⁸³ All of these documents, along with the petition requesting creation of the district, must be submitted to the Texas Commission on Environmental Quality for approval of the district.⁹⁸⁴

⁹⁷⁹ *Id.* § 375.021(a).

⁹⁸⁰ *Id.* § 375.021(b).

⁹⁸¹ *Id.* § 375.004(a).

⁹⁸² *Id.* § 375.022(b).

⁹⁸³ *Id.* § 375.022(c).

⁹⁸⁴ *Id.* § 375.022(a).

Step Two:

The Texas Commission on Environmental Quality (TCEQ), or a person authorized by the TCEQ, sets a date, time and place for a public hearing to consider the petition.⁹⁸⁵

The TCEQ must publish notice of the hearing once a week for two consecutive weeks in a newspaper of general circulation in the municipality in which the district is to be located.. The first publication must occur not later than the 31st day before the date on which the hearing will be held. Upon request, the TCEQ must also mail the county and the municipality the aforementioned notice. A municipality may make such a request to the TCEQ in January of each year to receive these notices by mail.⁹⁸⁶

Step Three:

The petitioner has a duty to send by certified mail a notice of the public hearing to each property owner in the proposed district who did not sign the petition. The notice must be sent at least 30 days prior to the hearing.⁹⁸⁷

The notice must include all of the information noted in the second step.

Step Four:

The TCEQ must hold the public hearing and consider the need for the district and the sufficiency of the underlying documentation.⁹⁸⁸

At the hearing, the TCEQ examines the petition and hears testimony from any interested person on the sufficiency of the petition, whether the district is feasible and necessary, and whether the district would be a benefit to all or any part of the land to be included. The availability of comparable services from other systems and the reasonableness of the proposed projects and services are factors to be considered by the TCEQ. If the TCEQ finds that the district is feasible, necessary and a public benefit, the TCEQ orders that finding, grants the petition, and appoints the initial board of directors.⁹⁸⁹ The initial board of directors is composed of at least nine but not more than 30 directors who serve staggered terms of two or four years.⁹⁹⁰ To be qualified to serve as a director, a person must fit one of the following characteristics: own property within the district; own stock of a corporate entity within the district; be the beneficiary of a trust that owns property in the district; be an agent, employee, or tenant of any of the aforementioned entities; or be a resident of the district.⁹⁹¹

⁹⁸⁵ *Id.* § 375.023.

⁹⁸⁶ *Id.* § 375.024.

⁹⁸⁷ *Id.* § 375.024(e).

⁹⁸⁸ *Id.* § 375.025.

⁹⁸⁹ *Id.* § 375.026.

⁹⁹⁰ *Id.* §§ 375.061, 375.062.

⁹⁹¹ *Id.* § 375.063.

Step Five:

Upon approval of the petition by TCEQ, the municipal management district board appoints its officers.⁹⁹²

Each of the appointed officers must execute a bond of \$10,000 and take a written and oral oath of office.⁹⁹³ Once qualified, the board members themselves must elect a president, a vice-president, a secretary and any other officers the board considers necessary. One-half of the number of directors constitutes a quorum, and a concurrence of a majority of a quorum of directors is required for any official action of the district.⁹⁹⁴ The initial and succeeding board of directors recommend to the governing body of the city persons to serve on subsequent boards.⁹⁹⁵ Persons appointed to the board must have experience in one of the areas outlined by Section 375.064 of the Local Government Code. The city's governing body shall approve or disapprove the directors recommended by the board. Board members may serve successive terms.

After a public hearing, a director may be removed by the governing body of the city for misconduct or for failure to carry out duties after petition by the board of directors.⁹⁹⁶ A vacancy is filled by the remaining members of the board for the unexpired term.⁹⁹⁷ Directors serve without compensation but are entitled to reimbursement for actual expenses.⁹⁹⁸ A director generally may not vote on matters that affect property owned by the director or that affect the director's employer.⁹⁹⁹

Rights and Powers of the District

To accomplish its purposes, the district may employ the rights granted to political subdivisions under Article 16, Section 59, of the Texas Constitution (powers of a conservation and reclamation district), including those conferred by Chapter 54 of the Water Code (powers of a municipal utility district), and the powers under Article 3, Section 52, of the Texas Constitution (powers of a road district and the power to levy property taxes.)¹⁰⁰⁰

Specifically, the district has the power to levy an ad valorem property tax for water, wastewater, drainage, road or mass transit improvements that are located inside and outside of the district.¹⁰⁰¹ A district may also levy impact fees pursuant to the state impact fee act (Chapter 395 of the Local Government Code).¹⁰⁰² To authorize the levy of property taxes or impact fees, or to

⁹⁹² *Id.* § 375.068.

⁹⁹³ *Id.* § 375.067.

⁹⁹⁴ *Id.* § 375.071.

⁹⁹⁵ *Id.* § 375.064.

⁹⁹⁶ *Id.* § 375.065.

⁹⁹⁷ *Id.* § 375.066.

⁹⁹⁸ *Id.* § 375.070.

⁹⁹⁹ *Id.* § 375.072.

¹⁰⁰⁰ *Id.* § 375.091.

¹⁰⁰¹ *Id.* §§ 375.091, 375.092, 375.111.

¹⁰⁰² *Id.* §§ 375.141, 375.142.

propose the issuance of bonds, the board must obtain the written consent of at least two-thirds of the number of directors of the district.¹⁰⁰³

A district may, under certain circumstances, levy special assessments against the benefitted property within the district.¹⁰⁰⁴ Special assessments may be used to pay for all or part of the construction or maintenance of the following types of improvements: landscaping, lighting, signs, streets and walkways, drainage, solid waste, water, sewer, power facilities, parks, historic areas, works of art, parking facilities, transit systems and other similar improvements. The assessments may also fund supplemental services for advertising, economic development, business recruitment, promotion of health and sanitation, public safety, traffic control, recreation and cultural enhancement.

In order to use special assessments to finance a project or service, the district must first receive a petition to make such improvements, signed by the owners of 50 percent or more of the assessed value of the property in the district, or signed by the owners of 50 percent or more of the surface area of the district.¹⁰⁰⁵ The area to be assessed may be the entire district or any part of the district.¹⁰⁰⁶ Before levying a special assessment, the district must provide notice of a hearing on the proposed improvements and the proposed method of assessment.¹⁰⁰⁷ The notice must be published at least 30 days before the hearing and must be sent by certified mail to the owners subject to the assessment at least 30 days before the hearing.

The cost of the improvements shall be apportioned by any reasonable assessment plan that bases the assessment on the special benefits that accrue to the property because of the improvement or service.¹⁰⁰⁸ Governmental entities may contract with the district to provide for the payment of assessments on publicly owned property.¹⁰⁰⁹ Certain residential properties of lesser density than large apartment complexes are exempt from assessments and impact fees as defined by Section 375.161 of the Local Government Code.

A district may incur liabilities, borrow money, issue bonds and notes, and purchase, sell or receive real and personal property.¹⁰¹⁰ The board may call a bond election on the written petition of the owners of 50 percent of the assessed value of the property in the district or by a petition of owners of at least 50 percent of the surface area of the district.¹⁰¹¹ The approval of the governing body of the city must also be obtained to issue bonds for an improvement project.¹⁰¹² Additionally, if a project involves the right-of-way of streets or the use of city land or easements, the district must receive the city's approval before undertaking such a project.¹⁰¹³

¹⁰⁰³ *Id.* § 375.071.

¹⁰⁰⁴ *Id.* §§ 375.111, 375.112.

¹⁰⁰⁵ *Id.* § 375.114.

¹⁰⁰⁶ *Id.* §§ 375.111, 375.117(a).

¹⁰⁰⁷ *Id.* §§ 375.113, 375.115.

¹⁰⁰⁸ *Id.* § 375.119.

¹⁰⁰⁹ *Id.* § 375.162.

¹⁰¹⁰ *Id.* §§ 375.092(d)-(e).

¹⁰¹¹ *Id.* § 375.243.

¹⁰¹² *Id.* § 375.207(a).

¹⁰¹³ *Id.* § 375.207(c).

A district may own and operate facilities inside or outside of the district, and may enter into contracts for joint use of district facilities.¹⁰¹⁴ It may charge rents or fees for use of constructed improvements owned or operated by the district. The district may hire employees and consultants and do all things necessary to carry out the purposes of the district, except that a district may not exercise the powers of eminent domain.¹⁰¹⁵ A district has an obligation to attempt to stimulate the growth of disadvantaged businesses inside its boundaries by encouraging participation of these businesses during procurement and other district activities.¹⁰¹⁶ The district is subject to competitive bidding requirements as described by Section 375.221 of the Local Government Code. Although this is not addressed in the implementing legislation, a district is subject to the Open Meetings Act and the Public Information Act because of its status as a governmental body.¹⁰¹⁷

Finally, the district may be dissolved upon a vote of the board of directors or upon a petition of the owners of 75 percent of the assessed value of the property within the district or by petition of the owners of 75 percent of the surface area of the district.¹⁰¹⁸ Additionally, the district, by ordinance of the city, may be dissolved pursuant to a vote of two-thirds of the governing body of the city.¹⁰¹⁹ In this circumstance, the city succeeds to the assets and liabilities of the district. The district may be dissolved, however, only after any remaining bonded indebtedness has been paid or assumed by the municipality.¹⁰²⁰

Municipal Development Districts

In 2005, the Texas Legislature passed legislation enabling all cities to establish municipal development districts, which are governed by chapter 377 of the Texas Local Government Code. Prior to this, only cities which were located in two neighboring counties could take advantage of chapter 377. These districts are financed through an additional sales tax approved by the city's voters, a tax which is similar to the economic development sales tax discussed in chapter I of this handbook.

There are two possible advantages of a municipal development district sales tax over an economic development district sales tax: (1) the municipal development district tax need not be levied over the entire city, which is useful for cities that are at the two-percent sales tax "cap" in some portion of the city but not in others; and (2) it is the only municipal sales tax that may be levied in a city's extraterritorial jurisdiction (ETJ).

¹⁰¹⁴ *Id.* § 375.092(f) & (g).

¹⁰¹⁵ *Id.* § 375.094. *See* Op. Tex. Att'y Gen. No. GA-268 (2004).

¹⁰¹⁶ Tex. Loc. Gov't Code Ann. § 375.222 (Vernon 2005).

¹⁰¹⁷ *See* Tex. Gov't Code Ann. chs. 551 (Open Meetings Act), 552 (Public Information Act) (Vernon 2004 & Supp. 2008).

¹⁰¹⁸ Tex. Loc. Gov't Code Ann. §§ 375.261, 375.262 (Vernon 2005).

¹⁰¹⁹ *Id.* § 375.263(a).

¹⁰²⁰ *Id.* §§ 375.263(b), 375.264.

Creation of a Municipal Development District

A municipality may create a Municipal Development District comprising all or part of its city limits, all or part of its extraterritorial jurisdiction (ETJ), or any combination of all or part of these areas.¹⁰²¹ To create a district, a city must call an election through an order that defines the proposed boundaries of the district.¹⁰²² The ballot at this election must be printed to allow voting for or against the following proposition:¹⁰²³

“Authorizing the creation of the _____ Municipal Development District (*insert name of district*) and the imposition of a sales and use tax at the rate of _____ of one percent (*insert one-eighth, one-fourth, three-eighths, or one-half, as appropriate*) for the purpose of financing development projects beneficial to the district.

In the order calling the election, the city may provide that the district boundaries will automatically conform to future changes in the city’s boundaries, as when increased through annexation, and also to future changes in the city’s ETJ, through annexation and population growth.¹⁰²⁴ If the voters turn down creation of the district, a subsequent election to establish a district may not be held within a year of the first election.¹⁰²⁵

Sales Tax

Chapter 323 of the Texas Tax Code generally governs the specifics of assessing and administering the tax.¹⁰²⁶ The district may not impose a sales and use tax that would result in a combined local tax rate of more than two percent in any location in the district.¹⁰²⁷ The sales tax rate adopted must be one-eighth, one-fourth, three-eighths, or one-half of one percent.¹⁰²⁸ The rate may be changed at a subsequent election. The ballot at this election must be printed to allow voting for or against the following proposition:¹⁰²⁹

“The adoption of a sales and use tax at the rate of ____ of one percent (*insert one-fourth, three-eighths, or one-half, as appropriate*).

The adoption of the tax or a change in its rate takes effect on the first day of the first calendar quarter occurring after the expiration of the first complete quarter occurring after the date the Texas Comptroller receives notice of the election’s results.¹⁰³⁰

¹⁰²¹ *Id.* § 377.002(a).

¹⁰²² *Id.* § 377.021(b).

¹⁰²³ *Id.* § 377.021(c).

¹⁰²⁴ *Id.* § 377.021(g).

¹⁰²⁵ *Id.* § 377.021(e). (Currently, this means that cities will have to wait through one election date, either in May or November, as there are only two uniform election dates).

¹⁰²⁶ *Id.* § 377.102(a).

¹⁰²⁷ *Id.* § 377.101(c).

¹⁰²⁸ *Id.* § 377.103.

¹⁰²⁹ *Id.* § 377.104(c).

¹⁰³⁰ *Id.* § 377.106.

Rights and Powers of the District and its Board

The district must establish a development project fund, which may have separate accounts within the fund. The district must deposit the sales tax proceeds and all revenue from the sale of bonds or other obligations into the fund. The money in the fund may be used to pay costs associated with development projects in the district, including maintenance and operation costs, as well as to pay costs relating to bonds or other obligations.¹⁰³¹ A development project may consist of a 4B project as defined by section 4B of the Development Corporation Act, article 5190.6 of the Texas Revised Civil Statutes (see chapter I of this handbook).¹⁰³²

A project may it may also include a convention center facility or related improvements, including parking facilities and civic center hotels.¹⁰³³

The district may accept grants or loans; buy, sell, and lease property; employ necessary personnel; enter into contracts with public and private parties; and adopt rules to govern its operation.¹⁰³⁴ It may not levy an ad valorem tax.¹⁰³⁵ It may issue bonds or other obligations to pay the costs of a development project after approval by the Texas Attorney General.¹⁰³⁶ The district is a political subdivision of Texas as well as the creating municipality; the district is subject to the Open Meetings Act and the Public Information Act.¹⁰³⁷

A district is governed by a board of at least four directors, although it would be best to have an odd number of directors to prevent tie votes. The board is appointed by the city council of the city that created the district. Directors serve staggered two-year terms, so the initial terms must have about half the directors serving two-year terms and about half serving one- or three-year terms. Directors may be removed by the city council without cause. Directors must reside in the city or its ETJ. An employee or officer of the city or a member of the city council may serve as a director, but this person may not have a personal interest in a contract executed by the district.¹⁰³⁸ Board members are not compensated but may be reimbursed for actual and necessary expenses.¹⁰³⁹ Board meetings must be in the city that created the district, not in the ETJ or elsewhere.¹⁰⁴⁰

Finally, the district's sales tax may be repealed by an election called by the city council of the city that created the district. (The statute does not contain any provision for calling an election

¹⁰³¹ *Id.* § 377.072(a)-(d). (A district located in a county with a population of 3.3 million or more may spend money on development projects in the ETJ even if it is outside the district).

¹⁰³² Effective April 1, 2009, the former 4B law is recodified at Sections 505.151-505.158 of the Local Government Code.

¹⁰³³ *Id.* § 377.001(3) (Vernon Supp. 2008).

¹⁰³⁴ *Id.* § 377.071(a)-(b) (Vernon 2005).

¹⁰³⁵ *Id.* § 377.071(c).

¹⁰³⁶ *Id.* § 377.073.

¹⁰³⁷ *Id.* § 377.022.

¹⁰³⁸ *Id.* § 377.051.

¹⁰³⁹ *Id.* § 377.052.

¹⁰⁴⁰ *Id.* § 377.053.

through petition of voters in the district.) The ballot at this election must be printed to allow voting for or against the following proposition:¹⁰⁴¹

“The repeal of the sales and use tax for financing development projects in the _____ Municipal Development District (*insert name of district*).”

The repeal of the tax takes effect on the first day of the first calendar quarter occurring after the expiration of the first complete quarter occurring after the date the Texas Comptroller receives notice of the election’s results.¹⁰⁴² However, if the district has outstanding bonds or obligations at the time of the election, then the district continues to collect the tax until these bond or obligations are paid, at which time the district should notify the Comptroller.¹⁰⁴³

Neighborhood Empowerment Zones

In 1999, the Texas Legislature passed legislation allowing cities to create neighborhood empowerment zones, a potential vehicle for economic development in Texas cities. A Neighborhood Empowerment Zone is a designated area within a municipality that is created to promote certain activities described below.¹⁰⁴⁴ Chapter 378 of the Texas Local Government Code contains the legislative provisions addressing this authority.

Creation of a Neighborhood Empowerment Zone

A city is authorized to create more than one Neighborhood Empowerment Zone. Further, an area may be included in more than one Neighborhood Empowerment Zone.¹⁰⁴⁵

To establish a Neighborhood Empowerment Zone, a city council must adopt a resolution containing the following:¹⁰⁴⁶

a determination that the Neighborhood Empowerment Zone will:

- promote the creation of affordable housing, including manufactured housing within the zone;
- increase economic development within the zone;
- increase the quality of social services, education or public safety provided to residents within the zone; or
- promote the rehabilitation of affordable housing within the zone;

¹⁰⁴¹ *Id.* § 377.104.

¹⁰⁴² *Id.* § 377.106.

¹⁰⁴³ *Id.* § 377.107.

¹⁰⁴⁴ *Id.* § 378.002.

¹⁰⁴⁵ *Id.* § 378.003(b).

¹⁰⁴⁶ *Id.* § 378.003(a)(1)-(4).

a legal description that sufficiently describes the boundaries of the zone;¹⁰⁴⁷

a finding by the city council that the creation of the zone benefits and is for the public purpose of increasing the public health, safety and welfare of the persons within the city; and

a finding by the city council that the zone satisfies the requirements contained in Section 312.202 of the Tax Code. This section lists the criteria to create a tax abatement reinvestment zone. To be designated a Neighborhood Empowerment Zone, the area must either be:¹⁰⁴⁸

- an area whose present condition substantially arrests or impairs the city's growth, retards the provision of housing, or constitutes an economic or social liability to the public health, safety, morals or welfare because of one or more of the following conditions: a substantial number of substandard or deteriorating structures, inadequate sidewalks or street layout, faulty lot layouts, unsanitary or unsafe conditions, a tax or special assessment delinquency that exceeds the fair market value of the land, defective or unusual conditions of title, or conditions that endanger life or property by fire or other cause;
- an area that is predominately open, and because of obsolete platting, deteriorating structures or other factors, substantially impairs or arrests the growth of the city;
- an area that is in a federally assisted new community located in a home rule city or in the area immediately adjacent to a federally assisted new community in a home rule city;
- 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); or
- reasonably likely as a result of the designation as a Neighborhood Empowerment Zone 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 city.

¹⁰⁴⁷ See *Parker v. Harris County Drainage Dist. No. 2*, 148 S.W. 351, 353 (Tex. Civ. App. - Galveston 1912, writ ref'd) (County line used as boundary line in petition was held sufficient. Petition need only contain a sufficient definite description of the boundaries of the proposed district to notify landowners that their lands were included within the district).

¹⁰⁴⁸ Tex. Tax Code Ann. § 312.202(a)(1) - (6) (lists the Tax Abatement Reinvestment Zone criteria) (Vernon 2008). (To create a Neighborhood Empowerment Zone the area must meet one of these six conditions contained in Section 312.202 of the Tax Code. However, Section 312.202(a)(5) of the Tax Code apparently would not apply because it describes "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.")

Municipal Powers Within the Zone

Creation of a Neighborhood Empowerment Zone vests a city with various development powers within the designated area. These powers include:

Building Fee Waiver: The power to waive or adopt fees related to the construction of buildings in the zone, including impact fees and fees for the inspection of buildings;¹⁰⁴⁹

Municipal Sales Tax Refunds: For the purpose of benefitting the zone, the power to enter into municipal sales tax refund agreements. These agreements may be for a term not to exceed 10 years, and apply to municipal sales taxes on sales made within the zone;¹⁰⁵⁰

Property Tax Abatement: The power to enter into agreements abating municipal property taxes on property in the zone, subject to the 10-year duration limit for tax abatement agreements under Section 312.204 of the Tax Code;¹⁰⁵¹ and

Environmental Goals: The power to set baseline performance standards, such as the Energy Star Program as developed by the Department of Energy, to encourage the use of alternative building materials that address concerns relating to the environment or to the building costs, maintenance or energy consumption.¹⁰⁵²

North American Free Trade Agreement Impact Zones

In 2001, the Texas Legislature passed additional legislation allowing general law cities and home rule cities to establish North American Free Trade Agreement (NAFTA) Impact Zones. The statute governing NAFTA Impact Zones is found in chapter 379 of the Local Government Code. The permissible agreements and mechanics in creating these zones are very similar to those found in chapter 378 addressing Neighborhood Empowerment Zones.

Creation of NAFTA Impact Zone

A city is authorized to create more than one NAFTA Impact Zone. Further, an area may be included in more than one NAFTA Impact Zones.¹⁰⁵³

To establish a NAFTA Impact Zone, a city council must adopt a resolution containing the following:¹⁰⁵⁴

¹⁰⁴⁹ Tex. Loc. Gov't Code Ann. § 378.004(1) (Vernon 2005).

¹⁰⁵⁰ *Id.* § 378.004(2).

¹⁰⁵¹ *Id.* § 378.004(3).

¹⁰⁵² *Id.* § 378.004(4).

¹⁰⁵³ *Id.* § 379.003(b).

¹⁰⁵⁴ *Id.* § 379.003(a)(1)-(3).

a determination that the NAFTA Impact Zone will:

- promote business opportunities for local businesses within the zone;
- increase economic development within the zone; or
- promote employment opportunities for residents within the zone;

a legal description that sufficiently describes the boundaries of the zone;¹⁰⁵⁵ and

a finding by the city council that the zone satisfies the requirements contained in section 312.202 of the Tax Code. Section 312.202 of the Tax Code lists the criteria to create a tax abatement reinvestment zone. To be designated a NAFTA Impact Zone, the area must either be:¹⁰⁵⁶

- an area whose present condition substantially arrests or impairs the city's growth, retards the provision of housing, or constitutes an economic or social liability to the public health, safety, morals or welfare because of one or more of the following conditions: a substantial number of substandard or deteriorating structures, inadequate sidewalks or street layout, faulty lot layouts, unsanitary or unsafe conditions, a tax or special assessment delinquency that exceeds the fair market value of the land, defective or unusual conditions of title, or conditions that endanger life or property by fire or other cause;
- an area that is predominately open, and because of obsolete platting, deteriorating structures or other factors, substantially impairs or arrests the growth of the city;
- an area that is in a federally-assisted new community located in a home rule city or in the area immediately adjacent to a federally assisted new community in a home rule city;
- 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); or
- reasonably likely as a result of designation as a North American Free Trade Agreement Impact Zone 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 city.

¹⁰⁵⁵ See note 74 *supra*.

¹⁰⁵⁶ See note 75 *supra*.

Permissible NAFTA Impact Zone Agreements

Once property is located within a NAFTA Impact Zone, a city is authorized to enter into certain agreements. These powers include:

Building Fee Waiver: The city is authorized to waive or adopt fees related to the construction of buildings in the zone, including inspection and impact fees;¹⁰⁵⁷

Municipal Sales Tax Refund and Abatement Agreements: The municipality may enter into sales tax refund agreements or municipal sales tax abatement agreements, not to exceed 10 years, for the purpose of benefiting the zone on sales made within the zone.¹⁰⁵⁸ Additionally, a city can enter into certain tax abatement agreements;

Property Tax Abatement: The city can abate municipal property taxes on property located within the zone subject to the 10-year duration limit contained in Section 312.204 of the Tax Code;¹⁰⁵⁹ and

Environmental Goals: The city may set baseline performance standards, such as the Energy Star Program as developed by the Department of Energy, to encourage the use of alternative building materials to address concerns related to the environment or to building costs, maintenance or energy consumption.¹⁰⁶⁰

NAFTA Displaced Workers

A business operating within a NAFTA Impact Zone must make a good faith effort to hire individuals receiving NAFTA transitional adjustment assistance under 19 U.S.C. Section 2331 if the business enters into an agreement with the city for the waiver or adoption of building fees, inspection fees or impact fees. Similarly, if the business enters into an agreement with the city for a municipal sales tax refund, municipal sales tax abatement or municipal property tax abatement, the business shall make a good faith effort to hire individuals receiving NAFTA transitional adjustment assistance.¹⁰⁶¹ And finally, a business that has entered into such an agreement must report to the city council annually the percentage of the total number of individuals hired by the business who are receiving NAFTA transitional adjustment assistance.¹⁰⁶²

¹⁰⁵⁷ Tex. Loc. Gov't Code Ann. § 379.004(1) (Vernon 2005)

¹⁰⁵⁸ *Id.* § 379.004(2).

¹⁰⁵⁹ *Id.* § 379.004(3).

¹⁰⁶⁰ *Id.* § 379.004(4).

¹⁰⁶¹ *Id.* § 379.005(a).

¹⁰⁶² *Id.* § 379.005(b).

Economic Development Projects in Certain Counties

The 79th Texas Legislature created a new program for economic development for certain counties.¹⁰⁶³ An eligible county may create either an economic development project or a public improvement district, if the county determines that a district is in the county's best interest.¹⁰⁶⁴ The commissioners court of an eligible county may, on receipt of a petition that satisfies the requirements of Sections 372.005 and 372.105(a) of the Texas Local Government Code, establish by order either a project in a designated portion of the county or a district only in an area: (1) located in the extraterritorial jurisdiction of a city in that county; or (2) containing at least 2,000 contiguous acres of land that is located wholly or partly in the extraterritorial jurisdiction of a municipality with a population of 1.1 million or more.¹⁰⁶⁵ The order must:

- Describe the territory in which the project is to be located or the boundaries of a district;
- Specifically authorize the district to exercise the powers of the district if the county has determined that creating a district is in the county's best interest; and
- State whether the petition requests improvements to be financed and paid for with taxes authorized by this law instead of or in addition to assessments.¹⁰⁶⁶

Board of Directors

If the county elects to delegate its authority, it shall establish a board of directors to manage the project or the govern the district.¹⁰⁶⁷ The board of directors will consist of seven directors to serve staggered two-year terms, with three or four directors' terms expiring June 1 of each year. To serve as a director, a person must be at least 18 years old.¹⁰⁶⁸ However, if the population of the district is more than 1,000, to be eligible to be director, a person must be at least 18 years old, reside in the district and be either: 1) an owner of property in the district; 2) an owner of stock, whether beneficial or otherwise, or a corporate owner of property in the district; 3) an owner of a beneficial interest in a trust that owns property in the district; or 4) an agent, employee, or tenant of a person covered by 1, 2 or 3 above.¹⁰⁶⁹

Each director shall execute a \$10,000 bond payable to the district and conditioned on the faithful performance of the director's duties.¹⁰⁷⁰ Once the bond is approved by the board, the director shall take the oath of office prescribed by the constitution for public officers. The bond and the

¹⁰⁶³ Tex. Loc. Gov't Code Ann. §372.102 (Vernon Supp. 2008). See *Id.* §§ 372.1011 and 372.105(a) and (b) (effectively establishes that only Dallas, Bexar and Comal Counties are authorized to create this type of public improvement district).

¹⁰⁶⁴ *Id.* § 372.103 (Vernon 2005).

¹⁰⁶⁵ *Id.* § 372.105(a) and (b) (Vernon Supp. 2008).

¹⁰⁶⁶ *Id.* § 372.105(c).

¹⁰⁶⁷ *Id.* § 372.106 (Vernon 2005).

¹⁰⁶⁸ *Id.* § 372.107(a).

¹⁰⁶⁹ *Id.* §§ 372.107(b), 375.063.

¹⁰⁷⁰ *Id.* §§ 372.111, 375.067.

oath shall be filed with the district and retained in the records. Directors are compensated not more than \$50 a day for each day that the director performs the duties of a director.¹⁰⁷¹ Vacancies on the board are filled by the county.¹⁰⁷² If a conflict of interest arises, Chapter 171 of the Texas Local Government Code governs.¹⁰⁷³

The county may authorize the board to adopt rules:

- To administer and operate the district;
- For the use, enjoyment, availability, protection, security, and maintenance of district property, including facilities;
- To provide public safety and security in the district: or¹⁰⁷⁴
- To regulate the private use of public roadways, open spaces, parks, sidewalks, and similar public areas in the district, if the use is for a public purpose.¹⁰⁷⁵

Also, the county may authorize a board to establish, revise, repeal, enforce, collect, and apply the proceeds from user fees or charges for the enjoyment, sale, rental, or other use of its facilities or other property, or for services or improvement projects.¹⁰⁷⁶

Powers and Duties of the County or the District

If the county operates the project or the county authorizes the management of the project or district to the board of directors, the powers and duties are derived from:

- A county development district under Chapter 383 of the Texas Local Government Code;
- A road district created by a county under Section 52, Article III of the Texas Constitution; and
- A city or county under Chapters 380 or 381, or under 372.003(b)(9) of the Texas Local Government Code.¹⁰⁷⁷

However, a county cannot delegate to a district the powers and duties of a road district or the power to provide water, wastewater, or drainage facilities unless both the city and county consent by resolution.¹⁰⁷⁸

¹⁰⁷¹ *Id.* § 372.110.

¹⁰⁷² *Id.* § 372.108.

¹⁰⁷³ *Id.* § 372.109.

¹⁰⁷⁴ *Id.* § 372.118.

¹⁰⁷⁵ *Id.* § 372.120. *See id.* § 372.120(b)-(c). (deals with conflict and providing safe and orderly use).

¹⁰⁷⁶ *Id.* § 372.119

¹⁰⁷⁷ *Id.* §§ 372.113(a). *See* Chapter 4 of this handbook for information on County Development Districts, Chapter 5 for information on Chapter 380. (Section 372.003(b)(9) deals with the acquisition, construction, or improvement of water, wastewater, or drainage facilities or improvements that are authorized improvement projects for public improvement districts).

¹⁰⁷⁸ *Id.* § 372.113(c). *See id.* § 372.121. (Dealing with the county delegating authorization of road projects to the district).

The district may not exercise the power of eminent domain.¹⁰⁷⁹ Also, the board is not granted any right-of-way management authority over public utilities.¹⁰⁸⁰ To the extent that a project requires the relocation or extension of public utility facilities, the district shall reimburse the public utility for the all of the costs associated with the relocation, or extension of the facility. As for tax abatements, a county may not grant a tax abatement or enter into a tax abatement agreement for a district.¹⁰⁸¹

The district can only issue bonds or negotiable promissory notes with the approval of the commissioners court of the county that created the district.¹⁰⁸² Bonds may only be issued with the a majority vote of the voters of the district voting in an election held for that purpose.¹⁰⁸³ If the commissioners court grants approval for bonds, notes or other district obligations, then the district may use district revenues, taxes or assessments, or any combination of taxes and revenue pledged to the payment of bonds to secure them.¹⁰⁸⁴

Authority to Impose Assessments and Taxes

A county or district may accomplish its purposes and pay the cost of services and improvements by imposing:

- An assessment;
- An ad valorem tax;
- A sales and use taxes; or
- A hotel occupancy tax.¹⁰⁸⁵

A district may impose an ad valorem tax, hotel occupancy tax, or sales and use tax to accomplish the economic development purposes prescribed by Article III, Section 52a of the Texas Constitution, if the tax is approved by the commissioners court of the county that created the district and a majority of the voters of the district voting at an election held for that purpose. The county must adopt an order providing to the district the authority to impose these taxes and provide the rate at which the district may impose the tax.

If the district imposes ad valorem tax on property in the district, then it must do so in accordance with Chapter 257 of the Texas Transportation Code.¹⁰⁸⁶ If the district imposes a sales and use tax, it must generally do so in accordance with Chapter 383 of the Texas Local Government Code or Chapter 323 of the Texas Tax Code and the ballot must follow prescribed statutory language.¹⁰⁸⁷ The rate of the sales and use tax may be imposed in increments of one-eighth of

¹⁰⁷⁹ *Id.* § 372-124.

¹⁰⁸⁰ *Id.* § 372.122.

¹⁰⁸¹ *Id.* § 372.125.

¹⁰⁸² *Id.* § 372.126 (Vernon Supp. 2008).

¹⁰⁸³ *Id.*

¹⁰⁸⁴ *Id.*

¹⁰⁸⁵ *Id.* § 372.127(a) (Vernon 2005).

¹⁰⁸⁶ *Id.* § 372.131.

¹⁰⁸⁷ *Id.* § 372.130(b) (Vernon Supp. 2008).

one percent up to a rate of two percent.¹⁰⁸⁸ The ballot for a sales tax election shall be printed to provide for voting for or against the proposition:

“A sales and use tax at a rate not to exceed ___ [insert percentage rate] in the ___ [insert name of district]” or “The adoption of a ___ [insert percentage rate] sales and use tax in the ___ [insert name of district].”¹⁰⁸⁹

A tax authorized at a sales and use tax election may be imposed at a rate less than or equal to the rate printed in the ballot proposition.¹⁰⁹⁰ If authorized by the county, a district shall impose a hotel occupancy tax as provided by Chapter 383 of the Texas Local Government Code and Section 352.107 of the Texas Tax Code.¹⁰⁹¹ Hotel occupancy taxes may be used for any purpose authorized by this law. However, hotel occupancy taxes can only be imposed if the owner of the hotel agrees to the imposition.¹⁰⁹² Once an owner agrees, the agreement may not be revoked by the owner or any subsequent owners of the hotel. Any tax authorized by a county to be imposed in the district may be used to accomplish any improvement project or road project, or to provide any service authorized by this chapter, or Chapter 380, 381, or 383 of the Texas Local Government Code.¹⁰⁹³

Agreements and Contracts

There are various agreements or contracts that the county or the district can make to promote an economic development project. A county may enter into an economic development agreement, only on terms and conditions that commissioners court and a board consider advisable, to make a grant or loan of public money to promote state or local economic development and to stimulate business and commercial activity in the area where the economic development project is located or in the district.¹⁰⁹⁴

A district, if authorized by the county, may order an election to approve a grant or loan agreement.¹⁰⁹⁵ The grant or loan may be payable over a term of years and be enforceable on the district under the terms of the agreement and the conditions of the election. The terms of the agreement may include the irrevocable obligation to impose an ad valorem tax, sales and use tax, or hotel occupancy tax for a term not to exceed 30 years. If the voters approve the agreement, then the board may contract to pay the taxes to the recipient of the grant or loan in accordance with the agreement.

¹⁰⁸⁸ *Id.* § 372.130(a).

¹⁰⁸⁹ *Id.* § 372.130(c).

¹⁰⁹⁰ *Id.* § 372.130(d).

¹⁰⁹¹ *Id.* § 372.129(b) (Vernon 2005).

¹⁰⁹² *Id.* § 372.129(d).

¹⁰⁹³ *Id.* § 372.128.

¹⁰⁹⁴ *Id.* § 372.115(a). (This includes grants or loans to induce the construction of a tourist destination or attraction in accordance with Chapter 380 or 381 of the Texas Local Government Code).

¹⁰⁹⁵ *Id.* § 372.115(b).

A county may enter into a development agreement with an owner of land in the territory designated for an economic development project or district.¹⁰⁹⁶ The terms of the development agreement may not exceed 30 years on any terms and conditions the county or the board consider advisable. The parties may amend the agreement.

A district may contract with any person or political subdivision to:

- accomplish any district purpose; and
- receive, administer, and perform the county's or district's duties and obligations under an improvement project or proposed improvement project.¹⁰⁹⁷

This includes contracts to pay, repay or reimburse from tax proceeds or another specified source of money any costs, including reasonable interest, incurred by a person on the county's or the district's behalf, including all or part of the costs of an improvement project. State agencies, cities, counties, other political subdivisions, corporations or other persons may contract with the county or district to carry out the purposes of this law. Also, a district may contract for materials, supplies, and construction in accordance with the law applicable to counties or in the same manner as local government corporations created under Chapter 431 of the Texas Transportation Code.¹⁰⁹⁸

Annexation by a City

If a city annexes the entire territory of a district, the city assumes that district's assets, but not the district's debt or obligations.¹⁰⁹⁹ The district will remain in existence, even after annexation by a city, in order to collect any taxes or assessments. The taxes and assessment that are collected will be used solely for the purpose of satisfying any preexisting debt or obligation. After the debt or obligations have been discharged or two years have expired since the date of the annexation, the district is dissolved and any outstanding debt or obligations are extinguished.¹¹⁰⁰

County Assistance Districts

Many smaller Texas counties have found it challenging when it comes to funding economic development programs. Chapter 387 of the Texas Local Government Code was originally created by the 76th Legislature, but the specific eligibility requirement limited it to very few counties. The 79th Legislature amended Chapter 387 in an attempt to open the door for smaller counties to create county assistance districts and to adopt a local sales tax. However, the law still proved to be too restrictive for most small counties to participate. The 80th Legislature removed the eligibility restrictions, making county assistance districts available to all counties.

¹⁰⁹⁶ *Id.* § 372.114.

¹⁰⁹⁷ *Id.* § 372.116.

¹⁰⁹⁸ *Id.* § 372.117.

¹⁰⁹⁹ *Id.* § 372.134.

¹¹⁰⁰ *Id.* See *id.* § 372.135. (Deals with imposition of taxes in a district that is wholly or partly annexed by a city and how the legislature intends that the level of taxation of areas where the district and the city overlap do not exceed the level of taxation of fully annexed areas).

Initiating an Election for the Creation of a County Assistance District

The commissioners court of a county may call an election for the creation of a county assistance district. The election order must:

- define the boundaries of the district to include any portion of the county in which the combined tax rate of all local sales and use taxes imposed, including the rate to be imposed by the district if approved at the election, would not exceed two percent; and
- call the election to be held within those boundaries.¹¹⁰¹

If the proposed district includes any territory of a city, the commissioners court shall send notice by certified mail to the city's governing body of its intent to create the district. If the city has created a development corporation under Section 4A or 4B of the Development Corporation Act of 1979, the commissioners court shall also send the notice of the board of directors of the corporation. The commissioners court must send the notice by the 60th day before the date the commissioners court orders the election. The governing body of the city may exclude the city's territory from the proposed district by sending notice of its wish to have the territory excluded to the commissioners court by certified mail no later than the 45th day after the city received the original notice from the commissioners court. City territory excluded in this manner may later be included in the district in an election held by the commissioners court with the city's consent.¹¹⁰²

In addition, the following requirements must be met:

Potential Election Dates. The election must be held on a uniform election date as provided by Chapter 41 of the Election Code. The current uniform election dates are:

- the second Saturday in May; or
- the first Tuesday after the first Monday in November.¹¹⁰³

Time Frame for Ordering the Election. The county must order the election at least 62 days prior to the date of the election, unless the election is the general election for state and county officers.¹¹⁰⁴ If the election is the general election for state and county officers, then the city must order the election at least 70 days prior to the date of the election.¹¹⁰⁵ Although the Tax Code requires only that the city order the election at least 30 days before the date of the election,¹¹⁰⁶ the Election Code provision governing the time frame specifically supersedes any law outside the Election Code to the extent of any conflict.¹¹⁰⁷ Additionally, it is advisable to provide at least

¹¹⁰¹ *Id.* § 387.003(b) (Vernon Supp. 2008).

¹¹⁰² *Id.* § 387.003(b-1).

¹¹⁰³ Tex. Elec. Code Ann. § 41.001(a) (Vernon Supp. 2008).

¹¹⁰⁴ *Id.* § 3.005(a).

¹¹⁰⁵ *Id.* § 3.005(c).

¹¹⁰⁶ Tex. Tax Code Ann. § 321.403 (Vernon 2008).

¹¹⁰⁷ Tex. Elec. Code Ann. § 3.005(b) (Vernon Supp. 2008).

62 or 70 days' notice since this is the requirement applicable to most other special elections in Texas and it allows time to comply with other Election Code requirements, such as early voting. The special election must also be submitted for "preclearance" to the U.S. Department of Justice.

Notice to be Provided of Election. The county must publish notice of the election at least once in a newspaper of general circulation in the territory of the proposed district.¹¹⁰⁸ The notice must be published not more than 30 days and not less than 10 days before the date of the election. The notice must state the nature and date of the election, the location of each polling place, hours that the polls will be open, and any other early voting and election-related information required by law. The notice must also include the wording of all the ballot propositions. The entire notice must generally be provided in both English and Spanish.¹¹⁰⁹

Prohibition on Electioneering. The county is prohibited from expending public funds or public resources to influence the results of an election, commonly referred to as "electioneering." A county may publish fact sheets to inform the public of the applicable statistics and proposed plans for the use of the tax; however, county stationery, county funds and county staff (during the work day) may not be used to urge the public to vote one way or the other.¹¹¹⁰

Additionally, in certain cases a court may find that a county has "made a contract" with the voters to use money for a specific purpose if the county has indicated in voter information sheets or through other means that the money would be used for that purpose.¹¹¹¹ Therefore, a county will want to be careful not to represent that money from the county assistance district sales tax will be used for a particular project unless the county intends to be legally limited by that representation.

Other Procedural Requirements. The county must follow all other procedural requirements under the Election Code for special elections. For further information about the requirements contained in the Election Code, contact the Secretary of State's Office, Elections Division, at (800) 252-8683. For further information about the prohibition against expenditure of public funds to influence the results of an election, contact the Texas Ethics Commission at (800) 325-8506.

Required Ballot Wording for County Assistance District Ballot. There is statutorily required wording for a county assistance district and sales tax proposition ballot. The wording that must be used is as follows:¹¹¹²

¹¹⁰⁸ See Id. ch. 4 (Vernon 2003 & Vernon Supp. 2008) (general requirements for providing notice of an election).

¹¹⁰⁹ See Id. ch. 272.

¹¹¹⁰ Id. § 255.003 (Vernon 2003).

¹¹¹¹ See *San Saba County v. McCraw*, 108 S.W. 2d 200 (Tex. 1937); *Black v. Strength*, 246 S.W. 79 (Tex. 1922); *Devorsky v. La Vega I.S.D.*, 635 S.W.2d 904 (Tex. App. -- Waco 1982, no writ); *Wright v. Allen*, 257 S.W. 980 (Tex. Civ. App.-- Dallas 1923, writ ref'd). *But see also San Antonio I.S.D. v. Hudson*, 92 S.W.2d 527 (Tex. Civ. App. -- San Antonio 1936), affirmed, 95 S.W.2d 673 (Tex. 1936). See also Op. Tex. Att'y Gen. No. JC-400 (2001) at 4-5.

¹¹¹² Tex. Loc. Gov't Code. Ann. § 387.003(c) (Vernon Supp. 2008).

“Authorizing the creation of the _____ County Assistance District (insert name of district) and the imposition of a sales and use tax at the rate of (insert one-eighth, one-fourth, three-eighths, or one-half, as appropriate) of one percent for the purpose of financing the operations of the district.”

The actual wording used on the ballot must indicate what rate is proposed for the county assistance district’s sales tax. The voters then vote for or against the proposition.

Reporting Election Results of a County Assistance District’s Tax.

If a majority of the voters approve the district and adopt the sales tax, the commissioners court by resolution entered in the minutes of the proceedings, must declare the results of the election. The order or the resolution should include statements showing:

- the date of the election;
- the proposition on which the vote was held;
- the total number of votes cast for and against the proposition; and
- the number of votes by which the proposition was approved.¹¹¹³

If the election results change the application of the local sales tax, the county judge should send a certified copy of the order or the resolution, by U.S. certified or registered mail, to the Revenue Accounting, Tax Allocation Section of the Comptroller’s office. The order or resolution should also include a map showing the boundaries of the district.¹¹¹⁴

If a majority of votes received at the election are against the creation of the district, another election on the question of creating a county assistance district may not be held in the county for one year from the date of the previous election.¹¹¹⁵

Effective Date of County Assistance District Sales Tax

After the voter approval and proper notification to the Comptroller, the tax becomes effective after one complete calendar quarter has elapsed.¹¹¹⁶ For example, if the county were to hold a successful election in May 2008 and properly notified the Comptroller by June 2008, the sales tax would take effect October 1, 2008. The district would begin receiving sales tax allocations from the Comptroller starting in December 2008.

¹¹¹³ Tex. Tax Code Ann. § 323.405 (Vernon 2008).

¹¹¹⁴ Id. § 323.405(b). See Tex. Loc. Gov’t Code Ann. § 387.008 (Vernon 2005). (making Chapter 323 of the Texas Tax Code applicable to County Assistance district except where inconsistent with Chapter 387 of the Texas Local Government Code).

¹¹¹⁵ Tex. Loc. Gov’t Code Ann. § 387.003(e) (Vernon Supp. 2008).

¹¹¹⁶ Id. § 387.012 (Vernon 2005).

Allocation of the Sales Tax Proceeds by the Comptroller

Once the sales tax is effective, retailers collect it along with any other applicable sales taxes including the state sales tax, and remit the revenues to the Comptroller. The Comptroller remits the proceeds to the district. The County Sales and Use Tax Act (Chapter 323 of the Tax Code) governs the imposition, computation, administration and use of the tax, except where it is inconsistent with the County Assistance District Act (Chapter 387 of the Local Government Code).¹¹¹⁷

Use of Revenue

The district, which is governed by the commissioners court of the county¹¹¹⁸, must use the sales tax revenues to perform the following functions of the district:

- the construction, maintenance, or improvement of roads or highways;
- the provision of law enforcement and detention services;
- the maintenance or improvement of libraries, museums, parks, or other recreational facilities;
- the provision of services that benefit the public welfare, including the provision of firefighting and fire prevention services; or
- the promotion of economic development and tourism.¹¹¹⁹

Powers of the District

A district is a political subdivision of the state.¹¹²⁰ The members of the commissioners court are not entitled to compensation for service on the governing body of the district, but are entitled to reimbursement for actual and necessary expenses.¹¹²¹ The district may:

- perform any act necessary to the full exercise of the district's functions;
- accept a grant or loan from the United States, state agencies, political subdivisions, or public or private persons;
- acquire, sell, lease, convey, or otherwise dispose of property under terms determined by the district;
- employ necessary personnel; and
- adopt rules to govern the operation of the district and its employees and property.¹¹²²

The district may contract with a public or private person to perform any act the district is authorized to perform.¹¹²³ However, the district may not levy an ad valorem tax.¹¹²⁴

¹¹¹⁷ *Id.* § 387.008.

¹¹¹⁸ *Id.* § 387.005.

¹¹¹⁹ *Id.* § 387.003(a) (Vernon Supp. 2008).

¹¹²⁰ *Id.* § 387.004 (Vernon 2005).

¹¹²¹ *Id.* § 387.005.

¹¹²² *Id.* § 387.006(a).

¹¹²³ *Id.* § 387.006(b).

Expanding the District, Repealing or Changing the Tax Rate

After creation of the district, it can be expanded if the commissioners court calls and holds an election for that purpose in the territory to be added to the district.¹¹²⁵ A majority of voters in the territory to be added must approve the expansion. An election may not be held in an area that is included in an authority governed by Chapter 451 or 452 of the Texas Transportation Code.

Also, the commissioners court, by order, may increase or decrease the tax or repeal the tax if the change or repeal is approved by a majority of the voters in the district.¹¹²⁶ The tax may be changed in one or more increments of one-eighth of one percent to a maximum of one-half of one percent. The ballot for an election to change the tax shall be printed to permit voting for or against the proposition:¹¹²⁷

“The change of a sales and use tax for the _____ County Assistance District (insert name of district) from the rate of _____ (insert one fourth, three-eighths, or one-half, as appropriate) to the rate of _____ (insert one-fourth, three-eighths, or one half, as appropriate) of one percent.”

A district may not adopt an increase in the tax if the adoption of the increase would result in a combined tax rate of all local sales and use taxes of more than 2 percent in any location in the district.¹¹²⁸

For a district to abolish the tax rate, the ballot for the election to repeal the tax shall be printed to permit voting for or against the proposition:¹¹²⁹

“The repeal of the sales and use tax for financing the _____ County Assistance District (insert name of district).”

There is no statutory authorization for a voter-initiated petition to decrease or abolish the tax. An election on these issues is called at the discretion of the commissioners court.

¹¹²⁴ *Id.* § 387.006(c).

¹¹²⁵ *Id.* § 387.003(f).

¹¹²⁶ *Id.* § 387.010.

¹¹²⁷ *Id.* § 387.010(c).

¹¹²⁸ *Id.* § 387.007(b).

¹¹²⁹ *Id.* § 387.010(d).

VIII. Public Disclosure of Economic Development Negotiations

Open Meetings and Public Information Acts

Local governments must comply with the requirements of both the Open Meetings Act and the Public Information Act in their quest to promote economic development. Economic development corporations, pursuant to a provision in the Development Corporation Act of 1979, are also subject to the requirements of the Open Meetings Act¹¹³⁰ and the Public Information Act.¹¹³¹ Accordingly, cities, counties and development corporations must consider applicable open meetings and open records requirements when they deal with companies that request that certain financial information and the company's intent to relocate be kept confidential.

The Open Meetings Act and the Public Information Act permit certain economic development-related issues to be discussed in an executive session and provide a limited time period during which certain records regarding economic development prospects would be considered confidential.¹¹³² The Open Meetings Act allows a governmental body to conduct a closed session to deliberate commercial or financial information that the governmental body has received from a business prospect.¹¹³³ In order to hold a closed session under this exception, the business prospect must be one that the governmental body is seeking to have locate, stay or expand in or near the governmental body's territory. In addition, the business prospect must be one with which the governmental body is conducting economic development negotiations. If a business prospect meets both of these requirements, then the governmental body will also be authorized to conduct a closed session to deliberate the offer of an incentive to the business prospect. No cases or attorney general opinions have construed this provision.

The Public Information Act authorizes a governmental body to withhold information relating to economic development negotiations involving a governmental body and a business prospect.¹¹³⁴ In order to be eligible for this exception, the business prospect must be one that the governmental body is seeking to have locate, stay or expand in or near the governmental body's territory. In addition, in order to be withheld, the information must relate to either: 1) a trade secret of the business prospect or 2) commercial or financial information, the disclosure of which would cause substantial competitive harm to the person from whom the information was obtained. Information about a financial or other incentive being offered to the business prospect is also

¹¹³⁰ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 11(b) (Vernon Supp. 2008). *See also*, Op. Tex. Att'y Gen. No. LO 96-104 (1996). *But see*, Op. Tex. Att'y Gen. No. JC-327 (2001) (the board of the Bryan - College Station Economic Development Corporation, formed under the Texas Non-Profit Corporation Act and not the Development Corporation Act of 1979, was held not to be subject to the Open Meetings Act).

¹¹³¹ Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 14A (Vernon Supp. 2008).

¹¹³² Tex. Gov't Code Ann. §§ 551.087; 552.131 (Vernon 2004).

¹¹³³ *Id.* § 551.087.

¹¹³⁴ *Id.* § 552.131.

excepted from required public disclosure unless and until an agreement is made with the business prospect.

Once an agreement is made with the business prospect, information about the incentive becomes public. Even if an incentive is offered by a person other than the governmental body, information regarding that incentive would generally be open to the public if the incentive may directly or indirectly result in the expenditure of public funds by a governmental body or in the reduction of revenue received by a governmental body. Finally, it is important to note that, when submitting its request for a ruling, a governmental body should raise all applicable exceptions to disclosure. A governmental body that intends to assert that information relating to its economic development negotiations is excepted under the marketplace interests aspect of Texas Government Code section 552.104, must timely assert that exception. A section 552.104 claim is waived if it is not asserted within ten business days of receiving the request for information. **A claim under section 552.131(b) that information concerning a financial or other incentive being offered to a business prospect is excepted from disclosure can also be waived by a governmental body if not timely asserted.**

Other Confidentiality Statutes

Texas statutes contain a confidentiality provision for documents that are collected pursuant to a tax abatement agreement.¹¹³⁵ The information loses its confidentiality once the tax abatement agreement is executed. Additionally, this confidentiality can be waived by the mutual consent of the taxing entity and the involved business.

Texas law also addresses the collection and maintaining of records related to the hotel occupancy tax. Certain organizations that conduct an activity pursuant to the local hotel occupancy tax must maintain complete and accurate financial records of each expenditure of the local hotel occupancy tax. State law further provides that upon request of the city council or any other person, the entity must make available for inspection and review financial documents related to each hotel occupancy tax expenditure.¹¹³⁶

¹¹³⁵ Tex. Tax Code Ann. § 312.003 (Vernon 2002).

¹¹³⁶ Tex. Tax Code Ann. § 351.101(d) (Vernon Supp. 2008).

IX. Synopses of Attorney General Opinions on Economic Development

Readers should be certain to check for any opinions issued by the Attorney General after the publication of this handbook and also make certain that the opinions mentioned below have not been overruled by subsequent opinions or court cases.



Denotes legislative action related to the statute(s) interpreted in the preceding Attorney General Opinion.

Section 4A Sales Tax

GA-0522 Tax Exemption for Private Businesses May Be Unconstitutional

Under the terms of section 4B(k) of article 5190.6, Texas Revised Civil Statutes (the “Act”), land and improvements for the specifically listed purposes in section 4B(a)(2) of the Act constitute projects eligible for tax exemptions. Additionally, any other land and improvements that the Westworth Redevelopment Authority’s (the “Authority”) board of directors determines promote or develop business enterprises in accordance with section 4B(a)(3) of the Act are such eligible projects. But whether a particular property or improvement constitutes a “project” under the section 4B(a) standards is a question of fact. The Act grants the Authority’s board of directors the discretion to make that determination in the first instance subject to judicial review for abuse of discretion. Under the terms of section 4B(k) of the Act, projects used for private commercial purposes would be eligible for tax exemption. A court could determine that section 4B(k), when applied to exempt from ad valorem taxes such projects that do not meet the established public purpose use test, is unconstitutional as applied. The Tax Code permits the Tarrant County Appraisal District and a taxing unit in which a particular property designated by the Authority as a section 4B(k) project is located to challenge the property’s tax-exempt status.



GA-0320 Infrastructure Expenses Allowed

An expenditure for road construction may qualify as a “project” under section 2(11)(A) of the Development Corporation Act of 1979, provided the board of directors of an industrial development corporation finds that the expenditure is “required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises.” *Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 2(11)(A) (Vernon Supp. 2005)*. Section 4(A)(i) of the Act does not preclude a 4A corporation from providing a transportation facility that benefits property acquired for another authorized project.

GA-0264 House Bill 2912 and Grandfathered Projects

House Bill 2912 significantly amended the Development Corporation Act of 1979, Tex. Rev. Civ. Stat. Ann. art. 5190.6, but contained a grandfather provision continuing former law for a project undertaken or approved before the bill's June 20, 2003 effective date. The Port Arthur Economic Development Corporation is now authorized to grant funds and refund sales taxes to a private corporation to promote economic development if former law authorized it to do so and if paying these funds constitutes a "project" "undertaken or approved" before June 20, 2003. The development corporation's board of directors must demonstrate that a project was "undertaken or approved" either by reference to some final official action taken by the board in an open meeting prior to June 20, 2003, or by reference to the terms of an election held under section 4A(r)-(s) of the Act prior to that date. The grant and sales tax refund were not a "project" under former law. Moreover, because development corporation's board of directors did not vote to make the grant or sales tax refund at an open meeting prior to June 20, 2003, it would not fall within the House Bill 2912 grandfather provision.

GA-0086 Section 4A Sales Tax and Promotional Expenditures

Whether a hippopotamus statue would serve a Hutto Economic Development Corporation ("HEDC") promotional purpose is a question of fact for the HEDC board of directors to resolve in the first instance, subject to judicial review and the supervisory authority of the Hutto City Council. The City Council may disapprove an HEDC expenditure for the statue. The HEDC may not spend more than 10% of its current annual revenues for promotional purposes in any given year. In addition, unexpended revenues specifically set aside for promotional purposes in past years may be expended for such purposes.

JC-0553 City Council Retains a Degree of Control over Disposition of Section 4A Assets Upon Dissolution

An industrial development corporation that is dissolving under article 5190.6, section 4A(k) of the Revised Civil Statutes must submit its dissolution plan to the corporation's creating unit for its review and approval. *See Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 4A(k) (Vernon Supp. 2005)*. But the creating unit may not use its approval power to prevent the development corporation from performing its statutory duty to, "to the extent practicable, . . . dispose of its assets and apply the proceeds to satisfy" the corporation's obligations. *Id.* Neither article 5190.6 nor the Non-Profit Corporation Act preclude an industrial development corporation from establishing an escrow account to meet calculable future financial commitments.

JC-0547 Mayor May Simultaneously Serve as Paid Executive Director of EDC Corporation

Under current law, a mayor of a city that creates an industrial development corporation pursuant to article 5190.6, Revised Civil Statutes, is not prohibited from serving as a salaried executive director of the corporation. If, however, he receives more than ten percent of his gross income from his compensation as executive director, he must disclose that interest whenever the city council considers any matter involving the industrial development corporation, so long as the

action contemplated will have an economic effect on the industrial development corporation that is different from its effect on the public. In such instance, he must file “an affidavit stating the nature and effect of the interest” and he must “abstain from further participation in the matter.”

JC-0362 Section 4A Funds for Job Training

The City of Port Arthur Economic Development Corporation is authorized to expend sales and use tax proceeds to finance the Port Cities Rescue Mission’s “rehabilitation and job training/educational facility” only if the Corporation’s board of directors reasonably finds that such a facility promotes business development and otherwise complies with the Development Corporation Act of 1979, article 5190.6 of the Revised Civil Statutes. The Act does not expressly authorize a “grant” for the Mission’s facility. Instead, any sales tax expenditure for such a facility must be made pursuant to a contract or other arrangement that ensures that the funds will be used for the authorized purpose and otherwise be in compliance with the Act.

In 2003, the Texas Legislature amended sections 2(11)(A) and 38 of the Development Corporation Act of 1979. These sections address projects and job training. Consequently, primary job training facilities for use by institutions of higher education are an authorized project. Further, certain job training classes are permissible provided the business enterprise commits in writing to create new jobs that pay wages at least equal to the prevailing wage for the applicable occupation in the local labor market area. *See Tex. H.B. 2912, 78th Leg., R.S. (2003).*

JC-0349 Section 4A Board of Directors May be Reappointed to Subsequent Term

Directors of a corporation created under section 4A of article 5190.6, Revised Civil Statutes, serve a six-year term pursuant to section 11 of article 5190.6, subject to removal at any time by the governing body of the city that created the corporation, unless the articles of incorporation or bylaws of the corporation establish a shorter term of service. Neither article 5190.6 nor the Texas Non-Profit Corporation Act, article 1396 of the Revised Civil Statutes, bars a director of a corporation created under article 5190.6, section 4A from being reappointed as director. The governing body of the City of Copperas Cove may reappoint a director of the corporation to subsequent service as director, absent any contrary provision in the articles of incorporation or bylaws of the Copperas Cove Economic Development Corporation, or in the city charter, an ordinance, or a resolution of the City of Copperas Cove. Whether or not the city reappoints a particular individual as director is a matter for the governing body of the city, in the exercise of its reasonable discretion.

JC-0032 Prevailing Wage Law and Development Corporations

Chapter 2258 of the Government Code applies to a worker employed on a public work “by or on behalf of the state or a political subdivision of the state.” *Tex. Govt. Code Ann. § 2258.021(a) (Vernon 2000)*. Because a development corporation created under the Development Corporation Act of 1979 is not a political subdivision for purposes of the laws of this state, *see Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 22 (Vernon Supp. 2005)*, chapter 2258 does not apply to a worker employed by or on behalf of a development corporation. Chapter 2258 will apply to a worker on a project undertaken by a development corporation only if the development corporation

undertakes the project on behalf of the state or a political subdivision of the state. In order for the project to be undertaken on behalf of the state or a political subdivision, the state or political subdivision must be a party to the construction contract.

LO-97-061 Donation of Section 4A Funds to Local College

Given the information provided, it appears that the board of directors of the Pampa Economic Development Corporation would have no basis on which to conclude that an expenditure of section 4A proceeds to support a Clarendon College center in Pampa, Texas would be consistent with the purposes of the Development Corporation Act of 1979. Furthermore, the act does not permit a section 4A development corporation to make gifts of public funds.

In 2003, the Texas Legislature amended section 2(11)(A) of the Development Corporation Act of 1979 by removing “educational facilities” from the definition of project. Further, the Act was amended to allow funding of “primary job training facilities for use by institutions of higher education”. *See Tex. H.B. 2912, 78th Leg., R.S. (2003)*.

LO-96-104 Economic Development Corporation is Subject to Open Meetings Act

The board of directors of the Beeville-Bee County Redevelopment Authority Corporation is subject to the Open Meetings Act, Gov’t Code ch. 551, by virtue of section 11(b) of the Development Corporation Act of 1979, V.T.C.S. art. 5190.6.

LO-96-010 No Nepotism Prohibition

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 is 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, is inapplicable.

No statute precludes one member of a city council from voting on removal of a member of the board of directors of an industrial development corporation, even where the city council member and director of the industrial development corporation are related within the second degree by affinity.

DM-0299 Industrial Development Corporations and Debt Prior to Restriction

Section 4A(q) of the Development Corporation Act is not retroactive. Section 4A(q) states that an industrial development corporation may not cover any debt executed prior to the corporation’s existence. This provision does not prevent an industrial development corporation from paying prior debts that were incurred before Section 4A(q)’s effective date.

LO-94-037 Section 4A Economic Development Sales Tax & Promotional Expenses

A development corporation created to administer the economic development sales tax may spend the proceeds of the 4A economic development sales tax for “promotional purposes” provided it does not exceed the 10% cap.

LO-93-104 Combined Proposition/Sales Tax for Property Tax Relief

The city should use the proposition language set out in section 4A(p) of article 5190.6 for a simultaneous election on the imposition of a section 4A sales tax for economic development and the reduction of a previously adopted sales tax for property tax relief under Tax Code section 321.101(b).

LO-92-086 Use of Section 4A Tax Money for Technical College

The Marshall Economic Development Corporation may use proceeds of a sales and use tax collected pursuant to article 5190.6, section 4A, to finance bonds for the start-up costs of the Texas State Technical College System Extension Center in Marshall, Texas, so long as the funds are used solely for technical-vocational training purposes.

In 2003, the Texas Legislature amended section 2(11)(A) of the Development Corporation Act of 1979 by removing “educational facilities” from the definition of project. Further, the Act was amended to allow funding of “primary job training facilities for use by institutions of higher education”. *See Tex. H.B. 2912, 78th Leg., R.S. (2003)*.

DM-0137 Economic Development Tax Reduction Application to Bonds Issued

Where an election is held to reduce the sales tax rate collected by a municipality on behalf of a Section 4A industrial development corporation, or to limit the length of time during which the tax may be collected, such reduction or limitation may not be applied to any bonds issued prior to the date of the election.

DM-0080 Economic Development Corporation Could Not Fund a Hospital

Hospitals are not “manufacturing or industrial facilities” or facilities “required or suitable for the promotion of commercial development” and may not be financed by bonds issued by industrial development corporations created pursuant to the Development Corporation Act of 1979, as amended.

Section 4B Sales Tax

GA-0265 Voter Approval Allows 4B Funding of Youth Football Field

Consistent with the election proposition approved by the voters in 1997, the sales taxes collected in Gun Barrel City under section 4B of the Development Corporation Act of 1979 may be used

to fund facilities for amateur sports, including children's sports, athletic, and public park purposes. The legislature has determined that section 4B(a)(2)(A) projects accomplish public purposes relating to economic development and the board of an economic development corporation is not required to make this finding for individual projects within this provision. Attorney General Opinion JC-0494 (2002), which was based on incorrect facts, is overruled to the extent it is inconsistent with this opinion.

GA-0004 Section 4B Corporation is Not Governmental Entity for Purposes of Section 272.001 (b)(5) of Local Government Code

Section 272.001(b)(5) of the Local Government Code exempts "a real property interest conveyed to a governmental entity that has the power of eminent domain" from the public notice and bidding requirements generally applicable to the sale or exchange of land owned by a political subdivision. The Eules Economic Development Corporation, a nonprofit industrial development corporation created under the Development Corporation Act of 1979, article 5190.6 of the Revised Civil Statutes, is not a "governmental entity" for the purposes of section 272.001(b)(5) of the Local Government Code. Furthermore, section 272.001(b)(5) does not authorize a political subdivision to transfer land to a private party by using a "governmental entity" as a pass-through.

JC-0547 Mayor May Simultaneously Serve as Paid Executive Director of EDC Corporation

Under current law, a mayor of a city that creates an industrial development corporation pursuant to article 5190.6, Revised Civil Statutes, is not prohibited from serving as a salaried executive director of the corporation. If, however, he receives more than ten percent of his gross income from his compensation as executive director, he must disclose that interest whenever the city council considers any matter involving the industrial development corporation, so long as the action contemplated will have an economic effect on the industrial development corporation that is different from its effect on the public. In such instance, he must file "an affidavit stating the nature and effect of the interest" and he must "abstain from further participation in the matter."

JC-0494 Consistent with Particular Ballot Proposition Section 4B Proceeds Could Only be Used for Projects Which Promote Business Development (overruled by GA-0265 due to new facts presented)

Consistent with the particular 1997 voter-approved election proposition, the sales taxes collected in Gun Barrel City under section 4B of the Development Corporation Act of 1979 may be used only for projects that promote business development. The Board of Directors of the Gun Barrel City Economic Development Corporation may not use the sales tax proceeds to fund a project that does not promote business development.

JC-0488 Section 4B Proceeds Could be Used for Access Road to Undeveloped Commercially Zoned Property

Under section 4B of the Development Corporation Act of 1979, the sales and use tax is levied for the benefit of the Lake Jackson Development Corporation established by the City of Lake

Jackson under section 4B; and the Corporation, rather than the City, is authorized to expend the tax proceeds for authorized projects.

The 1995 sales and use tax election proposition approved by the voters of the City of Lake Jackson pursuant to section 4B does not prohibit the Lake Jackson Development Corporation from using the sales tax proceeds to build an access road to service undeveloped commercially zoned property that fronts a state highway if the expenditure will promote development of new or expanded business enterprises.

JC-0400 Section 4B Ballot Language and Use of Proceeds for Public Park or Nature/Birding Center

The Industrial Development Corporation of the City of Sonora, Texas is not precluded, as a matter of law, from using sales and use tax proceeds for a “nature/birding center” or a public park project that was not specifically approved by the voters when they authorized collection of the tax because it was within the scope of the purposes for which the voters approved the sales and use tax. The particular tax election ballot language submitted to the voters indicated that the tax proceeds would be used for projects authorized by section 4B of the Development Corporation Act of 1979; and, on the date of the tax election, the statute authorized public park projects. Additionally, the city published notice of the proposed project as required by section 4B, and no subsequent voter petition requesting an election on the project was submitted.

JC-0338 Section 4B May Not Approve Loan to Section 4B Director

The board of an economic development corporation may not approve a loan to a director of the corporation. An economic development corporation is not prohibited by law from entering into other transactions with a member of the board or with an entity in which a board member is interested if it complies with the provisions of the Texas Non-Profit Corporation Act governing transactions between corporations and directors, or, in the event the corporation bylaws impose a stricter standard, with the bylaws.

JC-0118 All Section 4B Incidental Costs Must be Related to a Project /May Not Expend Section 4B Sales Tax Proceeds for Promotional Purposes

Sales and use taxes levied under section 4B of the Development Corporation Act of 1979, TEX. REV. CIV. STAT. ANN. art. 5190.6 (Vernon Supp. 2005), may only be used for project costs; they may not be used for “promotional” costs unrelated to projects.

In 2001, the Texas Legislature amended section 4B(b) of the Development Corporation Act of 1979 to allow 4B corporations to spend up to 10 percent of the sales tax revenue for “promotional purposes.” *See Tex. H.B. 3298, 77th Leg., R.S. (2001).*

JC-0109 Section 4B Corporations Not Subject to Chapter 272 Sale of Property Requirements

A development corporation established under section 4B of article 5190.6 of the Revised Civil Statutes is not subject to section 272.001 of the Local Government Code, which establishes procedures political subdivisions must follow to sell land. However, a development corporation must ensure that it receives fair market value for any land, purchased with sales and use tax proceeds, that the development corporation sells for non-project purposes. Although article 5190.6 prohibits a city from granting a development corporation public money or free services, the Act does not preclude a city from providing funds or services to a development corporation in exchange for consideration from the development corporation, within certain limitations.

In 2001, the Texas Legislature amended Section 21 of the Development Corporation Act of 1979. This section still provides that a city is not authorized to lend its credit or grant any public money or thing of value in aid of a 4A or 4B corporation. Nonetheless, an exception was created. House Bill 782 allows a home-rule city to grant public money to a 4A or 4B corporation under a contract authorized by Section 380.002 of the Local Government Code. *See Tex. H.B. 782, 77th Leg., R.S. (2001)*.

JC-0032 Prevailing Wage Law and Development Corporations

Chapter 2258 of the Government Code applies to a worker employed on a public work “by or on behalf of the state or a political subdivision of the state.” *Tex. Govt. Code Ann. § 2258.021(a) (Vernon 2000)*. Because a development corporation created under the Development Corporation Act of 1979 is not a political subdivision for purposes of the laws of this state, *see Tex. Rev. Civ. Stat. Ann. art. 5190.6, § 22 (Vernon Supp. 2005)*, chapter 2258 does not apply to a worker employed by or on behalf of a development corporation. Chapter 2258 will apply to a worker on a project undertaken by a development corporation only if the development corporation undertakes the project on behalf of the state or a political subdivision of the state. In order for the project to be undertaken on behalf of the state or a political subdivision, the state or political subdivision must be a party to the construction contract.

LO-98-062 Section 4B Proceeds to Fund Maintenance and Operating Costs of a Project

Under V.T.C.S. article 5190.6, section 4B(a-2), section 4B tax proceeds may not be used to pay for maintenance and operating costs of a project unless the city publishes notice of this proposed use. If the proposed use is challenged by a petition of more than 10% of the voters within 60 days of the notice, the City of League City will be required to hold an election to obtain voter approval of the proposed use because such use has not been approved in a prior election.

LO-96-110 Joint Propositions for Economic Development Sales Tax

A city is not authorized to combine in a single proposition proposals for voting on adoption of an economic development tax under Section 4B, V.T.C.S. article 5190.6, and a sales and use tax for property tax relief under Tax Code Section 321.101(b).

In 2005, the Texas Legislature enacted Section 321.409 of the Texas Tax Code, which enables a city to use a combined ballot proposition to lower or repeal any dedicated or special purpose sales tax and simultaneously raise or adopt another such tax, including the sales tax for property tax relief. *See Tex. H.B. 3195, 79th Leg., R.S. (2005).*

LO-96-104 Economic Development Corporation is Subject to Open Meetings Act

The board of directors of the Beeville-Bee County Redevelopment Authority Corporation is subject to the Open Meetings Act, Gov't Code ch. 551, by virtue of section 11(b) of the Development Corporation Act of 1979, V.T.C.S. art. 5190.6.

LO-96-010 No Nepotism Prohibition

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 is 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, is inapplicable.

No statute that precludes one member of a city council from voting on removal of a member of the board of directors of an industrial development corporation, even where the city council member and director of the industrial development corporation are related within the second degree by affinity.

LO-95-072 Construction of Residential Sewer Lines

V.T.C.S. article 5190.6, section 4B authorizes the board of directors of a development corporation organized under V.T.C.S. article 5190.6 to determine whether the construction of sanitary sewer lines in an existing residential subdivision would promote or develop new or expanded business enterprises. Although it seems unlikely that the construction of sewer facilities in a residential subdivision would promote or develop new or expanded business enterprises, this office cannot exclude the possibility as a matter of law. The board's determination would be reviewed under an abuse of discretion standard.

City/County Venue Project Tax

GA-0156 City Must Spend Funds Consistent With Voter Approval

The terms of the election pursuant to which the Terrell County voters approved the venue-project tax for park improvements constitute a contract with the voters, and Terrell County is authorized to use venue-project funds for improvements outlined in the current Expenditure Plan only if the improvements are consistent with the election orders.

Improvements proposed by Terrell County constitute a “venue project,” as defined by Local Government Code section 334.001(3), (4)(B), and (5), only if Terrell County intends to develop and construct a convention center facility and to undertake other improvements and infrastructure in conjunction with the development and construction of the convention center facility, and if the other improvements are related improvements located in the convention center facility’s vicinity or infrastructure that relate to and enhance the convention center facility.

LO-98-074 City May Not Hold a Sales Tax Election Earlier Than One Year From Date of Previous Sales Tax Election

Section 321.406, Tax Code, which limits the frequency of sales tax elections held by a municipality, is applicable to elections held under chapter 334, Local Government Code. Thus, the city of Arlington may not hold a sales tax election under chapter 334 earlier than one year from the date of any previous sales tax election.

DM-0455 Houston’s Ability to Participate in Sports Authority

The City of Houston is authorized to participate in the Harris County-Houston Sports Authority created pursuant to House Bill 92, Act of May 22, 1997, 75th Leg., ch. 551, 1997 Tex. Sess. Law Serv. 1929.

DM-0454 Houston’s City Council Limited Authority over Harris County-Houston Sports Authority

The city council has very limited powers with regard to the Harris County-Houston Sports Authority. The council, together with the county commissioners court, is specifically authorized to “create” the Authority by concurrent order. After the Authority is created, the power to contract, Local Gov’t Code section 335.071(b), and the power to enter into lease agreements, *id.* § 335.071(a), is vested in the Authority itself. The council is, however, given the right of “prior approval” of bonds or other obligations. I. Thus, after the Authority has been created, the city council has no “general oversight responsibilities” beyond its power to approve bonds or other obligations.

DM-0453 Harris County Not Required to Hold a Second Election to Impose Hotel Occupancy and Short Term Car Rental Taxes

Harris County is not required to hold an election under the provisions of House Bill 92, Act of May 22, 1997, 75th Leg., R.S., ch. 551, 1997 Tex. Sess. Law Serv. 1929, 1929. The imposition of hotel occupancy and short-term car rental taxes does not, in the absence of a second election, contravene the due process clauses of the federal or state constitutions. Neither does House Bill 92 unconstitutionally discriminate against residents of Harris County on equal protection grounds. Section 7 of the bill is not a “local or special law” in contravention of article III, section 56, Texas Constitution.

Property Tax Abatement

GA-0600 Abatement for Improvements Allowed if Governing Body Members Owns Only Real Property

A county may enter into a tax abatement agreement with the owner of taxable real property located in a reinvestment zone, and with the owner of a leasehold interest in or improvements on tax-exempt property located in a reinvestment zone. Assuming that the “fixtures and improvements” owned by a wind turbine company constitute “improvements on tax-exempt real property that is located in a reinvestment zone” under section 312.402 of the Tax Code, the mere fact that a member of a commissioners court owns the real property on which the fixtures and improvements will be located does not prohibit fixtures and improvements from being the subject of a tax abatement agreement. A member of a commissioners court generally must abstain from a vote on a matter if it is reasonably foreseeable that an action on the matter will have a special economic effect on the value of the property distinguishable from its effect on the public. Whether a vote on a particular tax abatement agreement will have such a special economic effect is generally a question of fact that cannot be resolved in an attorney general opinion.



GA-0304 Successive Tax Abatements for Personal Property on Same Real Property Parcel Allowed

Under the Property Redevelopment and Tax Abatement Act, chapter 312 of the Tax Code, 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.

GA-0134 Tax Abatement Agreements May Not Retroactively Extinguish Existing Tax Liability

Section 312.208 of the Tax Code, permitting amendment of tax abatement agreements, does not modify the rule established by section 11.42(a) of the Tax Code that a “person who does not qualify for an exemption on January 1 of any year may not receive the exemption that year.” Tex. Tax Code Ann. §11.42(a) (Vernon Supp. 2005). In addition, a retroactive amendment of a tax abatement agreement that extinguishes an existing tax liability violates article III, section 55 of the Texas Constitution.

JC-0300 Tax Abatement Agreements Must be Executed With Owner of Real Property

Section 312.206(a) of the Tax Code authorizes a commissioners court to enter into a tax abatement agreement only with the “owner of taxable real property.” The owner of a leasehold interest in tax-exempt real property is not such an “owner of taxable property.”

In 2001, sections 312.204(a) and 312.402 (a) of the Tax Code were amended to allow taxing units to also enter into tax abatement agreements with “the owner of a leasehold interest” in real property. *See Tex. H.B. 1448, 77th Leg., R.S. (2001) and Tex. S.B. 985, 77th Leg., R.S. (2001).*

JC-0236 Newly Elected Councilmember Loses Benefit of Tax Abatement Agreement on Date Councilmember Assumes Office

Attorney General Opinion JC-0155 (1999) determined that property owned or leased by a member of a municipality’s governing body is not eligible for a tax abatement agreement authorized by the Property Redevelopment and Tax Abatement Act, chapter 312 of the Tax Code. Attorney General Opinion JC-0155 is clarified by determining when the property loses the tax exemption granted by the tax abatement agreement.

If the owner of property subject to the tax abatement agreement is elected to the municipality’s governing body, the tax exemption created by the agreement is lost on the date the property owner assumes office as a member of the governing body. The tax due on the property for the year is determined according to the method set out in section 26.10 of the Tax Code.

In 2001, section 312.204 (d) of the Tax Code was amended to allow a tax abatement agreement to continue in effect if the property owner becomes a member of city council or a member of the zoning or planning commission. *See Tex. H.B. 1194, 77th Leg., R.S. (2001).*

JC-0155 Property Owner Subject to Tax Abatement Agreement Becomes Ineligible to Continue to Receive Tax Abatement Once Elected to City Council

The Property Redevelopment and Tax Abatement Act, chapter 312 of the Tax Code, does not bar a property owner from serving on the city council that granted a municipal tax abatement to the property owner. However, the owner’s position on the council makes his property ineligible to continue to receive a tax abatement. Section 171.004 of the Local Government Code bars him from participating in a vote on a matter involving the property if he has a substantial interest in the property or in the business that owns the property, and if it is reasonably foreseeable that an action on the matter would confer a special economic benefit on the property that is distinguishable from the effect on the public. Votes made in violation of section 171.004 of the Local Government Code are voidable only if the measures on which the property owner voted would not have passed without his vote.

In 2001, section 312.204 (d) of the Tax Code was amended to allow a tax abatement agreement to continue in effect if the property owner becomes a member of city council or a member of the zoning or planning commission. *See Tex. H.B. 1194, 77th Leg., R.S. (2001).*

JC-0133 Tax Abatement Agreements May Not Exceed Ten Years

A tax abatement agreement made pursuant to chapter 312 of the Tax Code, the Property Redevelopment and Tax Abatement Act, may not exceed ten years. A governmental entity may not grant a tax abatement for property that previously received a ten-year tax abatement. In order

for property to receive more than ten years of tax abatement, the agreement for the abatement must have been made prior to September 1, 1989.

In 2001, section 312.204 (a) of the Tax Code was amended to allow a tax abatement agreement to take effect on January 1 of the next tax year after the date the improvements or repairs are substantially completed. *See Tex. H.B. 3001, 77th Leg., R.S. (2001).*

JC-0106 Tax Abatement May Apply to Relocated Beach Property

The movement of a structure from one location on a piece of property in a reinvestment zone to another location on the property may constitute a “specific improvement or repair” to the property for purposes of a tax abatement agreement under Property Redevelopment and Tax Abatement Act, chapter 312 of the Tax Code, if it improves or repairs the property in the ordinary sense and if the improvement or repair is consistent with the purpose of the reinvestment zone designation.

JC-0092 County Provision of an Economic Development Grant to a Private Company

Chapter 312 of the Tax Code neither precludes nor authorizes a commissioners court agreement to make payments of county funds to a private company that are the economic equivalent of an abatement of real property taxes. However, section 381.004 of the Local Government Code, which Dallas County cites as the basis for its authority to make such payments, neither expressly or impliedly authorizes a commissioners court to enter into an agreement of this kind. The legislative history indicates that the legislature did not intend section 381.004 to implement article III, section 52-a of the Texas Constitution and, moreover, confirms that the legislature did not intend section 381.004 to authorize county economic development loans and grants.

In 2001, the Texas Legislature added subsection 381.004(g) of the Local Government Code. This subsection now allows the county commissioners court to develop and administer a permissible Chapter 381 program which includes entering into a tax abatement agreement with an owner or lessee of a property interest. *See Tex. H.B. 2870, 77th Leg., R.S. (2001).*

LO-98-001 Commissioners Court May Enter Into Tax Abatement Agreement Despite Ownership Interest

Tax Code Section 312.402 (d) does not preclude a commissioners court from entering into a tax abatement agreement with a corporation merely because a commissioners’ court member owns a very small percentage of shares in the corporation or the corporation’s parent or because a commissioners’ court member invests in the corporation by way of a mutual fund.

LO-97-096 City Cannot Meet in Executive Session to Discuss a Tax Abatement Agreement

A city council or county commissioners court is not authorized to meet in executive session under the Open Meetings Act to discuss a proposed city or county property tax abatement for an existing industry.

In 1999, the Texas Legislature added section 551.086 of the Texas Government Code, now renumbered to section 551.087 of the Texas Government Code. This section allows governmental bodies to meet in executive session to deliberate or discuss certain commercial or financial information or to deliberate the offer of a financial or other incentive to a business prospect.

DM-0456 County Not Authorized to Delete Land From Existing Reinvestment Zone

A county is not authorized to amend a Tax Code chapter 312 tax abatement agreement by deleting land from an existing reinvestment zone. A county reinvestment zone under chapter 312 must be contiguous and may not consist of only a portion of a building. The legislature intended to leave the substance of criteria for tax abatement agreements to the discretion of each county commissioners court, subject to very general constraints and certain specific limitations imposed by chapter 312.

LO-95-090 City Cannot Abate Delinquent Taxes

Neither Local Government Code section 380.001 nor Tax Code section 312.204 authorizes a municipality to abate delinquent taxes owed by a taxpayer who participates in the municipality's enterprise zone. Moreover, article III, section 55 of the Texas Constitution expressly forbids the abatement of delinquent taxes.

DM-0090 90-Day Opt in Period for Tax Abatement Agreements

The authority of the Chambers-Liberty Counties Navigation District to enter into a tax abatement agreement pertaining to land that is the subject of a county tax abatement agreement expired 90 days after the date of the execution of the county agreement.

In 2001, the Texas Legislature amended section 312.206(a) of the Tax Code removing the 90-day period for other tax entities to enter into a tax abatement agreement on property located within a city. *See Tex. S.B. 1710, 77th Leg., R.S. (2001).*

Tax Increment Financing

GA-0549 School Value to Deduct Includes Only Increment Actually Paid

Section 403.302(d)(4) of the Government Code requires the Texas Comptroller of Public Accounts to deduct the total dollar amount of only the percentage of the captured appraised value of school district property located in a tax increment reinvestment zone that corresponds to the percentage of the tax increment actually paid into the tax increment fund by the school district.



GA-0514 TIF Area Must Be Blighted Despite No Use of Bonds

A city may not designate an area as a reinvestment zone under Tax Code section 311.005(a)(5) unless the area is “unproductive, underdeveloped, or blighted,” within the meaning of article VIII, section 1-g(b) of the Texas Constitution, even if the area’s plan of tax increment financing does not include issuance of bonds or notes.



GA-0474 Homestead Preservation District Anomalies

Local Government Code chapter 373A enacted in 2005 provides for the creation of homestead preservation districts and homestead reinvestment zones. Section 373A.108’s tax exemption applies to land trust real property owned by a community housing organization or a housing finance corporation operating as a land trust in a homestead preservation district only if the real property is inside the district. The exemptions provided by Tax Code sections 11.182 and 11.1825 and by Local Government Code section 394.905 do not apply to such property inside the district. A city creating a homestead reinvestment zone is not authorized to establish a termination date for the zone. Additionally, a city and a participating county are not authorized to execute an agreement that requires the county to deposit its tax increments into the zone’s tax increment fund for a period exceeding one year and under which the county does not have the right to annually reconsider its participation in the zone. Finally, the tax increment fund revenues may be used only to purchase real property, construct or rehabilitate housing units in the zone, and pay zone and housing-related administrative expenses. A family’s income eligibility to receive a benefit from a homestead preservation reinvestment zone tax increment fund under Local Government Code section 373A.157(b) may be determined in accordance with the United States Department of Housing and Urban Development’s family income eligibility rules codified at part 5 of title 24 of the Code of Federal Regulations. Additionally, the section 373A.157(b) median family income eligibility determination is required only for the year in which the family is granted a housing benefit from the tax increment fund.



GA-0305 Competitive Bidding Statute Applies to Increment Fund Expenditures

A city may use a Tax Code chapter 311 tax increment fund to pay a private developer for environmental remediation, renovation, or facade preservation costs if the costs constitute “project costs” within the scope of section 311.002(1). A tax increment fund is a municipal fund within the meaning of chapter 252 of the Local Government Code, and chapter 252’s competitive bidding requirements may apply to expenditures from the tax increment fund. Whether a particular expenditure is subject to competitive bidding will depend upon whether the expenditure falls within the terms of section 252.021 and whether the expenditure is exempt from chapter 252 under section 252.022. If a municipal expenditure is subject to chapter 252, the city would be precluded from reimbursing a person for costs incurred for work not performed pursuant to a competitively bid contract.

In 2005, the Texas Legislature amended section 311.010(g) to except any dedications, pledges, or other uses of revenue in the increment fund from chapter 252.

GA-0276 City May Not Extend Original Termination Date of Reinvestment Zone

A home-rule city may not extend a Tax Code, Chapter 311 reinvestment zone's termination date beyond the date provided in the ordinance designating the zone.

GA-0169 Councilmember May Serve on Reinvestment Zone Board

A city council member is not prohibited from simultaneously serving as a member of the board of directors of a tax increment reinvestment zone created by his or her municipality under chapter 311 of the Tax Code.

JC-0373 Tax Increment Financing Under The Texas Urban Renewal Law

The predecessor of Local Government Code chapter 374, subchapter D was unconstitutional when adopted. It was not impliedly validated by the 1981 adoption of article VIII, section 1-g of the Texas Constitution authorizing tax increment financing, but it was validated in 1987 when the predecessor statute was reenacted in the codification of laws relating to local government. A municipality may not adopt tax increment financing under Local Government Code, chapter 374, subchapter D unless it holds an election as required by section 374.031(a) of that statute.

JC-0152 Petitioned-For Tax Increment Financing Reinvestment Zones Must Also be Unproductive, Underdeveloped or Blighted

A city may not designate an area as a tax increment financing reinvestment zone, including an area subject to a petition under section 311.005(a)(5) of the Tax Code, unless the area is "unproductive, underdeveloped, or blighted" within the meaning of article VIII, section 1-g(b) of the Texas Constitution. An area that satisfies the criteria of section 311.005(a)(1), (a)(2), or (a)(3) comports with this constitutional requirement. A city must determine that an area subject to a petition under section 311.005(a)(5) is "unproductive, underdeveloped, or blighted" either according to the criteria set forth in subsection (a)(1), (a)(2), or (a)(3) of section 311.005 or according to its own, similar criteria. This determination is for the city to make in the first instance, in good faith, exercising reasonable discretion, subject to judicial review.

Section 403.302 of the Government Code defines the "taxable value" of school district property for purposes of school-finance funding equalization formulas. Subsections (d) and (e) of section 403.302, which exclude from the definition of "taxable value" the value of property located within certain chapter 311 reinvestment zones, do not as a matter of law violate the constitutional mandate that the legislature establish and maintain an "efficient system of public free schools," Tex. Const. art. VII, § 1.

JC-0141 City May Not Use Unexpended Tax Increment Funds After Termination of Reinvestment Zone For Improvements Outside of Reinvestment Zone

Under chapter 311 of the Tax Code, a city is not authorized to undertake or complete a reinvestment zone project in a manner that is not consistent with the reinvestment zone board of directors' project and financing plans, which must provide for projects within the zone.

Therefore, as a general matter, a city may not use unexpended tax increment fund money after termination of a reinvestment zone to build an improvement outside the zone. The city may do so only if, prior to the zone's termination, the reinvestment zone board of directors agreed to dedicate revenue from the tax increment fund to replace areas of public assembly, and if construction of the improvement is a cost of replacing an area of public assembly under section 311.010(b) of the Tax Code, as added by, Act of May 24, 1989, 71st Leg., R.S., ch. 1137, § 22, sec. 311.010, 1989 Tex. Gen. Laws 4683, 4690.

DM-0390 City Which Terminates a Tax Increment Financing Reinvestment Zone May Create a New Reinvestment Zone With Identical Geographic Boundaries

A municipality that terminates a reinvestment zone by ordinance pursuant to section 311.017(a) of the Tax Code may then create a new reinvestment zone with geographic boundaries identical to those of the original zone. A municipality's loan to the first reinvestment zone may not be treated as a "project cost" of the second reinvestment zone pursuant to section 311.002(1) of the act, nor may such a loan be assumed by the second reinvestment zone. There is no mechanism for adjusting the tax increment base of a reinvestment zone to account for a severe decrease in the total appraised value of the real property in the reinvestment zone. See Tax Code § 311.012(c).

LO 96-138 City May Be Permitted to Condemn Property in a Reinvestment Zone as a Group

Section 311.008(a) of the Tax Increment Financing Act authorizes but does not require a city to exercise the powers listed, including the power to condemn property, to implement a reinvestment zone redevelopment plan. A city may be permitted to condemn property as a group under certain circumstances at the discretion of the court.

Adopting the Freeport Exemption

DM-0463 Freeport Exemption for Component Parts

Article VIII, section 1-j of the Texas Constitution establishes an exemption from ad valorem tax for "freeport" goods, that is, certain property destined for shipment out-of-state within 175 days after the date the property was acquired in or imported into the state. The freeport exemption is available to property where it is acquired or imported in this state by a person who detains it in the state "for assembling, storing, manufacturing, processing, or fabricating purposes," even though the property is not sold or transported out of the state by that person, but is instead sold to an in-state purchaser who uses the property in manufacturing other items which are then transported out of state within 175 days of the time the first owner acquired it.

Local Hotel Occupancy Tax

GA-0408 Tax in Extraterritorial Jurisdiction May Cause Total Tax to Exceed 15 Percent if Adopted Before County Tax

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.

GA-0124 Use of Hotel Occupancy Tax Revenue Towards County Senior Center

Under section 351.101 of the Tax Code, a municipality may expend its municipal hotel occupancy tax revenue “only to promote tourism and the convention and hotel industry” and only for the specific uses listed in the statute. *Tex. Tax Code Ann. § 351.101(a) (Vernon Supp. 2005)*. Whether a particular proposed expenditure of municipal hotel occupancy tax revenue is a permissible use and will “directly enhanc[e] and promot[e] tourism and the convention and hotel industry” is for a municipality’s governing body to determine in the first instance.

JC-0105 City Which Collected More Than \$2 Million in Hotel Occupancy Tax Revenue in Calendar Year Is Not Bound By Allocation Formula of Section 351.103 (a) of the Tax Code

Pursuant to section 351.103(b) of the Texas Tax Code, the allocation restriction of section 351.103(a) of the Tax Code does not apply to a municipality that has collected in excess of \$2 million in hotel occupancy tax revenue in the most recent calendar year.

LO 97-005 City May Not Collect a Municipal Hotel Occupancy Tax in a Municipal Utility District Annexed For Limited Purposes

A city may not collect a municipal hotel occupancy tax in a municipal utility district annexed for limited purposes pursuant to a strategic partnership agreement under Local Government Code section 43.0751. A city with a population of less than 35,000, however, may impose a hotel occupancy tax in the city’s extraterritorial jurisdiction pursuant to Tax Code section 351.0025 irrespective of city annexation of the area.

LO 96-113 Committee of Chamber of Commerce Not Subject to Open Meetings Act

A committee of the chamber of commerce that is expending funds raised by the local hotel tax under contract with the city is not a governmental body under the Open Meetings Act.

DM-0394 Use of Hotel Occupancy Tax Funds as Proposed for George Bush Presidential Library Was Impermissible

The City of College Station may, without violating article III, section 52 of the Texas Constitution, spend public funds on the George Bush Library to be established by Texas A&M University only if there is a city purpose for the expenditure, if the city receives adequate consideration for the expenditure, and if sufficient controls are attached to the transaction to ensure that the public purpose will be carried out. Hotel-motel occupancy taxes raised by the city under chapter 351 of the Tax Code may be spent only for the purposes expressly set out in section 351.101 of the code. No showing has been made that the tax funds proposed for allocation to the George Bush Library will be used for any purpose stated in section 351.101.

LO 93-55 Convention and Visitors Bureau Funded with Hotel Tax Monies Not Subject to Open Meetings Act

Neither the Greater San Marcos Chamber of Commerce, the Greater San Marcos Economic Development Council, nor the San Marcos Convention and Visitors Bureau, which is funded primarily by the city's hotel/motel tax, are governmental bodies subject to the Texas Open Meetings Act, V.T.C.S. article 6252-17 (currently Chapter 551 of the Government Code).

LO 92-51 City May Expend Municipal Hotel Tax Funds to Improve Visitors Information Center

A city may expend municipal hotel tax funds for the improvement of a visitors information center. The city must insure that the expenditure fulfills one or more of the specific purposes authorized by Tax Code section 351.101. Tax Code section 351.103 governs the allocation of tax receipts.

LO 92-16 Municipal Hotel Tax Funds Generally May Not be Used for General Landscaping and Sidewalk Improvements

Hotel occupancy tax funds may only be expended in conformity with chapter 351 of the Tax Code. It appears that the proposed use would be "for the general revenue purposes or general governmental operations of a municipality" in contravention of subsection (b). Tax Code section 351.101 (b). This office, however, is not equipped to resolve the factual issues involved in the determination of that central issue.

LO 89-103 City May Not Use Municipal Hotel Occupancy Tax for Reconstruction of Municipal Tennis Courts

Of the purposes for which Clarendon hotel tax funds may be spent under the applicable provisions, we think only that of "improvement" or "equipping" of a convention center facility under section 351.101(a)(1) might conceivably include reconstruction of municipal tennis courts. We assume from your letter that the courts are not part of a convention center. Therefore, we

think that the city of Clarendon lacks authority to spend municipal hotel tax funds on tennis court reconstruction.

JM-1080 Federal Employee Travelling on Official Business is Not Exempt From Local Hotel Occupancy Tax

A federal employee travelling on official business whose travel expenses are reimbursable by his employer, either on a per diem or actual expenses basis, is not exempt from a local hotel occupancy tax imposed under chapters 351 or 352 of the Tax Code when he rents hotel accommodations.

Texas Tax Code sections 156.103 (a) and 351.006 (a) now exempt federal employees from payment of the local hotel occupancy tax “when traveling on or otherwise engaged in the course of official duties” for the governmental entity.

JM-0972 State Officials Traveling on State Business Are Not Exempt from Local Hotel Occupancy Tax

State officials or employees traveling at state expense on state business are not exempt from the hotel occupancy tax provided for in chapters 156, 351 and 352 of the Tax Code.

Texas Tax Code sections 156.103(b), (c), (d) and 351.006 (b), (c), (d) now exempt certain state officials from payment of the local hotel occupancy tax. Other state employees must still pay the hotel occupancy tax when paying their bill, but the state agency may request a refund from the city.

JM-0965 Municipality May Not Use Hotel Tax to Supplement Recreational Budget

Section 351.101 of the Tax Code sets out the exclusive purposes for which the municipal hotel tax may be used. The tax may not be used for the operation of general recreational facilities.

JM-0865 No Authority for Exemptions from Hotel Occupancy Tax

Neither a county nor a home rule city possesses the authority to grant an “exception” for religious, charitable or educational purposes from the hotel occupancy tax absent constitutional and statutory authority to do so.

JM-0690 Limited Use of Hotel and Motel Tax

Municipalities are to use the hotel and motel occupancy tax to promote tourism. Use of the tax to attract new business or permanent residents to the city is not authorized.

JM-0184 Hotel Occupancy Tax May Not Be Used for Golf Course

A county may not use revenues from a county hotel occupancy tax to purchase golf carts or finance general improvements for a county-operated golf course.

County Development District Tax

JC-0291 County Development District Not Authorized to Levy Ad Valorem Taxes

A county development district created under chapter 383 of the Local Government Code is not authorized to levy ad valorem taxes. A county development district may undertake a project only if it is consistent with the purpose of chapter 383 - “providing incentives for the location and development of projects in certain counties to attract visitors and tourists.” *Tex. Loc. Gov’t Code Ann. § 383.002 (Vernon 2005) (statement of legislative intent)*.

Loans Under Local Government Code Chapter 380

GA-0529 City May Fund Housing that Promotes Economic Development

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.



GA-0137 Municipal Sales Tax Agreements

House Bill 3534, which amended sections 321.002(a)(3) and 321.203 of the Tax Code, prevents certain outlets, offices, facilities or locations from qualifying as a “place of business of the retailer” for municipal sales tax purposes. House Bill 3534 does not invalidate existing municipal sales tax rebate contracts nor prohibit municipalities and businesses from executing new contracts.

GA-0071 Municipal Sales Tax Rebates

If a business collects and remits municipal sales taxes as required by law, the city’s rebate of those taxes to the business does not violate article III, section 55 of the Texas Constitution. See Tex. Const. art. III, § 55 (prohibiting the legislature and political subdivisions from “releasing or extinguishing, in whole or in part, the indebtedness, liability or obligation of any corporation or individual” to the state or political subdivision).

LO 95-090 City Cannot Abate Delinquent Taxes

Neither Local Government Code section 380.001 nor Tax Code section 312.204 authorizes a municipality to abate delinquent taxes owed by a taxpayer who participates in the municipality’s enterprise zone. Moreover, article III, section 55 of the Texas Constitution expressly forbids the abatement of delinquent taxes.

DM-0185 Economic Development Program

Section 380.001 of the Local Government Code, which the legislature enacted pursuant to article III, section 52-a of the Texas Constitution, is constitutional. The legislature intended section 380.001 to authorize municipalities to offer a range of incentives designed to promote state or local economic development. It is outside the scope of the opinion process to determine, however, whether a particular incentive or combination of incentives constitutes a “program . . . to promote state or local economic development” for purposes of section 380.001 of the Local Government Code.

A home-rule municipality may issue bonds to fund an economic development program that the municipality has established in accordance with section 380.001, but only if two conditions are met.

First, the bonds must be in an amount and to the extent allowed by the city charter. Second, a majority of the duly qualified property tax-paying voters must approve the bond issuance at an election held to consider the issue.

Public Improvement Districts

GA-0528 City Must Have Interest in Land it Funds



Texas Constitution article III, section 52(a) requires a city that builds a seawall on privately-owned land to maintain sufficient control over it to ensure that the public purpose is accomplished and to protect the public’s interest in it. To carry out this duty, a city must have an appropriate interest in the land on which a seawall funded from assessments levied pursuant to Local Government Code, chapter 372, subchapter A or B will be located.

GA-0237 Homestead is Subject to Forced Sale for Nonpayment of Public Improvement District Assessments Relating to Lien Created Before Property Used as Homestead

A public improvement district assessment may be enforced by foreclosure of a homestead provided that the statutory lien created by section 372.018(b) of the Local Government Code predates the date the property became a homestead and the amounts to be collected fall within the lien’s scope.

JC-0386 Homestead is Not Always Subject to Forced Sale for Nonpayment of Public Improvement District Assessment

Local Government Code chapter 372 authorizes a city to levy special assessments on real property to aid in funding improvements in public improvement districts. The municipal governing body is authorized by statute to collect these assessments according to the procedures

for collecting an ad valorem tax on real property, except for procedures applicable to the forced sale of homestead property to collect ad valorem taxes.

Assessments are not “taxes” as that term is used in the Texas Constitution, and a homestead may not be subjected to forced sale for nonpayment of a public improvement district assessment under the “taxes due thereon” clause of article XVI, section 50 of the Texas Constitution.

A homestead may not be subjected to forced sale for nonpayment of a public improvement district assessment under the “improvement thereon” clause of article XVI, section 50, absent a written, signed contract between the owner of the homestead property and the supplier of materials and labor for an improvement on the homestead property.

LO 96-129 City Must Receive a Petition From Property Owners First to Establish a Public Improvement District

The petition referenced in section 372.002 of the Local Government Code and described in section 372.005 of the Local Government Code is a prerequisite for the establishment of a public improvement district.

Municipal Management Districts

GA-0386 Member of Legislature May Not Be District Employee

Article XVI, section 40(d) of the Texas Constitution prohibits an employee of a municipal management district operating under Local Government Code chapter 375 from simultaneously serving as a member of the Texas Legislature. This constitutional provision does not prohibit an individual who works as an independent contractor for a municipal management district from simultaneously serving as a member of the Legislature. Attorney General Letter Opinion 90-55A is overruled.



GA-0307 Dual Office Holding Forbids Holding Two Board Positions

Under the conflicting loyalties aspect of the common-law doctrine of the incompatibility, an individual may not simultaneously serve as trustee of the New Caney Independent School District and director of the East Montgomery County Improvement District.



GA-0268 Municipal Management Districts Generally Do Not Have Power of Eminent Domain

A municipal management district (MMD) created under chapter 375 of the Local Government Code has no power of eminent domain. A municipal management district created under chapter 376 has eminent domain power only if the power is conferred expressly or implicitly. Those districts whose enabling statutes expressly withhold eminent domain power do not have such power. Harris County Improvement District No. 3 does not have eminent domain power. The

enabling statute of any other municipal management district must be analyzed to consider whether the statute confers expressly or implicitly the power of eminent domain. A municipal management district with the power of eminent domain may use the power to acquire property for a use consistent with the district's legitimate purposes even if exercise of the eminent domain power may interfere with a transaction between private parties. Whether property is being condemned, in any particular circumstance, for a legitimate purpose of the condemning municipal management district is a question of fact. SB 224 (2005) clarified that most MMD's have no eminent domain power.

GA-0150 Special Districts with Municipal Management District Powers May Not Provide General Law Enforcement Services

The Town Center Improvement District of Montgomery County (with powers of a MMD) may not enter into a contract with a city to provide general law enforcement services outside the city's jurisdiction in unincorporated areas of Montgomery County.

County Economic Development Powers

JC-0092 County Provision of an Economic Development Grant to a Private Company

Chapter 312 of the Tax Code neither precludes nor authorizes a commissioners court agreement to make payments of county funds to a private company that are the economic equivalent of an abatement of real property taxes. However, section 381.004 of the Local Government Code, which Dallas County cites as the basis for its authority to make such payments, neither expressly or impliedly authorizes a commissioners court to enter into an agreement of this kind. The legislative history indicates that the legislature did not intend section 381.004 to implement article III, section 52-a of the Texas Constitution and, moreover, confirms that the legislature did not intend section 381.004 to authorize county economic development loans and grants.

In 2001, the Texas Legislature added subsection 381.004 (g) of the Local Government Code. This subsection allows the county commissioners court to develop and administer a permissible Chapter 381 program, which includes entering into a tax abatement agreement with an owner or lessee of a property interest. *See Tex. H.B. 2870, 77th Leg., R.S. (2001)*.

LO 98-007 County Lacks Authority to Fund Small Business Development Program

Local Government Code Section 381.004 does not authorize a commissioners court to appropriate funds to a small business development program that was not developed by the county and is not administered either by the county or by another entity under contract with the county.

LO 96-035 Donation of County Tax Funds to a Nonprofit Organization

Article III, section 52 of the Texas Constitution prohibits a county commissioners court from making a donation of county tax funds pursuant to Local Government Code section 381.001(f) to a nonprofit organization whose purpose is to assist industrial development.

Public Disclosure of Economic Development Negotiations

ORD-639 Adopting Two-Prong Test for Confidentiality of Commercial or Financial Information; Overruling Open Records Decision No. 592

National Parks & Conservation Association v. Morton, 498 F.2d 765 (D.C. Cir. 1974), which established a two-prong test for the confidentiality of commercial or financial information, is a “judicial decision” for the purpose of Section 552.110 of the Government Code. Information is confidential if disclosure is likely to either impair the government’s ability to obtain necessary information in the future or cause substantial harm to the competitive position of the person from whom the information was obtained.

Miscellaneous Opinions Concerning Economic Development

GA-0472 Hospital District Status Defined

The Sabine County Hospital District, which intends to maintain an ambulance only for transporting patients between hospitals, is not required by law to dispatch its ambulances for emergency calls, even if there are no other ambulances operating within the District. The District may provide financial incentives in a contract to induce a doctor to move to the District so long as the District finds that such an incentive is necessary for the direct accomplishment of a legitimate public purpose, that the District receives adequate consideration for its expenditure, and that appropriate controls are in place to assure that the public purpose will be carried out. Furthermore, the Professional Services Procurement Act, Government Code chapter 2254, which governs a hospital district’s contract for professional services, requires that payment for services rendered under the contract be fair and reasonable, that they be consistent with and not higher than the recommended practices and fees published by the applicable professional associations, and that they not exceed any maximum provided by law. The act does not permit the contract to be competitively bid. The District may meet under Government Code section 551.071 in a closed meeting to discuss legal issues raised in connection with the contract for the doctor’s professional services. The District may not meet under Government Code section 551.087 in a closed meeting to deliberate economic development negotiations.



GA-0206 Business Council Not Subject to Open Meetings Act

The Bryan Business Council, Inc. is not a “governmental body” within the terms of the Open Meetings Act, chapter 551 of the Government Code.



JC-0567 Enterprise Zone May Not Receive an Additional Designation

Under chapter 2303 of the Government Code and section 151.429 of the Tax Code, a business entity located in an enterprise zone and presently designated an “enterprise project” and allocated

the maximum jobs and related tax benefits may not receive an additional and concurrent enterprise project designation in the same enterprise zone and an additional maximum job allocation and the related tax benefits.

In 2003, the Texas Legislature added section 2303.406(e) to the Texas Government Code. This section allows the “department [to] designate multiple concurrent enterprise projects in the same enterprise zone. . .” *See, Tex. H.B. 2424, § 92, 78th Leg., R.S. (2003)*. Additionally, the Texas Legislature amended section 151.429 of the Tax Code. This section now allows a maximum refund of \$500,000 to a “double jumbo enterprise project” and a maximum refund of \$750,000 to a “triple jumbo enterprise project” in each state fiscal year. *See Tex. S.B. 275, §§ 3.51 to 3.53, 78th Leg., R.S. (2003)*.

JC-0327 Non Profit Corporation Not Subject to Open Meetings Act

The board of the Bryan-College Station Economic Development Corporation, an EDC organized under the Texas Non-Profit Corporation Act and not incorporated under the Development Corporation Act of 1979, is not subject to the Open Meetings Act.

LO 98-082 Meaning of the Phrase “Fair Market Value of the Land”

Under Local Government Code section 272.001(h), the fair market value of a municipality’s interest in land is the amount that a willing buyer, who desires but is not obligated to buy, would pay a willing seller, who desires but is not obligated to sell. Unless evidence to the contrary is produced, the leasehold estate merges into the fee simple estate when the lessee purchases the land he or she currently leases. A lessee who purchases the whole of the city’s interest in a lakeside lot under section 272.001(h) must pay for both the city’s right to future rent payments and the city’s reversionary interest. A municipality may not instruct an appraiser as to whether to value the land as encumbered or unencumbered.

LO 96-073 Withdrawing from Transit Tax to Adopt Sales Tax for Economic Development

Should the City of Richardson decide by election to withdraw from the Dallas Area Rapid Transit (DART), it would be able--presuming it met the qualifications of article V.T.C.S. 5190.6, section 4B and Tax Code section 321.101(f) for the ceiling on its sales and use taxes--to adopt a section 4B sales and use tax. However, the city would not be eligible to adopt a sales and use tax under V.T.C.S. article 5190.6, section 4A, or the “additional sales and use tax” created by Tax Code section 321.101(b).

LO 95-085 Private Entity Included in Qualified Hotel Project

The term “qualified hotel project,” as defined by House Bill 2282, Act of May 11, 1993, 73rd Leg., R.S., ch. 231, 1993 Tex. Gen. Laws 480, includes a private entity selected by a municipality.

DM-0188 Public Property Leases and Taxation

Property owned by the City of Amarillo consisting of an airport maintenance hangar that is leased to a private party for operation is exempt from ad valorem taxation if the property is used in direct support of the operation of the airport by the city. Buildings that are owned by the city are not tax-exempt if they are owned purely for the purpose of renting them to private commercial interests. An office complex owned by the Amarillo Independent School District and partially leased to private parties and other political subdivisions remains tax-exempt if the facility was acquired in its entirety for the purpose of conserving school district funds. Property acquired by the Amarillo Junior College District for purposes of future expansion and temporarily leased to private persons for storage units is tax-exempt. Property rented to students and employees of the junior college for residential housing also remains tax-exempt, but property rented for these purposes to persons who are not students or employees is subject to property taxation.

X. Different Economic Development Programs, Loans & Grants Offered by State Agencies

Defense Economic Adjustment Assistance Grant Program (DEAAG)

The Defense Economic Adjustment Assistance Grant Program (DEAAG) was established by the 75th Texas Legislature to assist adversely impacted defense-dependent communities recovering from defense closures, realignments of defense installations or reductions or termination of defense contracts.

The 75th Texas Legislature appropriated \$20 million for the DEAAG program to assist installations that have been closed or realigned during the previous base realignment and closure rounds. The 76th and 77th Texas Legislature each appropriated \$1 million for the defense economic adjustment assistance grant program.

In FY 2003 the Office of the Governor allocated \$1 million dollars for the DEAAG program.

The 79th Legislature modified the program to include defense communities that have been positively impacted by the BRAC process.

The 80th Legislature appropriated \$5 million for the DEAAG program.

These grants have acted as a catalyst for creating over 12,000 new jobs in impacted defense communities.

State grants are available to local municipalities, counties or regional planning commissions, junior public colleges districts, a campus or extension center for education purposes of the Texas State Technical College all or part of which is located in an affected defense-dependent community.

Funding is available to these local governmental entities to meet matching requirements for federal funding or for the purchase of Department of Defense property, new construction, rehabilitation of facilities or infrastructure, or the purchase of capital equipment or insurance.

The state grants provides 50 percent of the amount of matching money or investment that the local governmental entity is required to provide (in some cases, special community hardship grants may be provided up to 80 percent of the local governmental entity share).

The total amount of the grant may range from \$50,000 to \$2 million.

Applications are scored by a review panel appointed by the Executive Director of the Texas Military Preparedness Commission. Scoring criteria includes:

- the significance of the negative effect of the loss of DoD expenditures within the local community
- the significance of the positive effect of the increase of DoD expenditures within the local community
- the extent to which local resources are used to promote economic development
- the amount of previous state grants received by the applicant
- the anticipated jobs to be created as a result of the grant
- the impact of the grant on the region

Applicants are encouraged to acquire financial assistance for eligible development projects from a variety of sources, including federal, state, local and public/private foundations. In addition, the review panel ensures that one adversely affected defense-dependent community is not disproportionately favored over another in recommending grant funding.

The governing board of the Texas Military Preparedness Commission will approve or disapprove the award of a grant.

<http://www.governor.state.tx.us/divisions/tmpc/deaagp>

Defense Economic Readjustment Zone Program

Program Objective

The Defense Economic Readjustment Zone Program (DERZ) was established as a tool for business recruitment and job creation in adversely impacted defense dependent communities. It is designed to provide assistance to Texas communities, businesses and workers impacted by, or vulnerable to, the closure or realignment of military installations and the reduction of federal defense contracting expenditures.

Benefits to participation

Designated readjustment projects are eligible to apply for franchise tax credit and state sales, and use tax refund on qualified expenditures. The level and amount of the credit/refund is related to the sales and use tax on qualifying expenditures and the number of jobs created/retained at the site.

- The number of jobs eligible for a refund will not exceed 500 or a number equal to 110% of the anticipated new permanent/retained jobs.
- The maximum refund per allocated job is \$2,500.

Local communities may also offer benefits to participants under the defense economic readjustment zone program as well. These may include tax abatement, tax increment financing, one-stop permitting and others.

Participation Requirements

- A community must nominate and receive designation as a Defense Economic Readjustment Zone and provide specific information as required by statute.
- A company must receive nomination from their local community.
- Applications for readjustment zone or project designation may be filed with the department on any day.
- DERZ's are designated for a period of seven 7 years with no limitation on the number of zones.
- A DERZ may have no more than two defense readjustment projects.
- DERZ projects may be designated for up to a five 5 year period, in addition to a 90-day window prior to the designation date. Employment and community commitments must be met within this time frame.
- At least 25% of the qualified business new employees in the DERZ must be residents of the governing jurisdiction; economically disadvantaged; or dislocated defense workers.

Fee

A non-refundable fee of \$500 for either a defense readjustment zone or defense readjustment project designation application.

Benefit Documents:

Please contact the Comptroller of Public Accounts at (512) 305-9902

http://www.governor.state.tx.us/divisions/ecodev/ed_bank/derz

Federal Tax Credits

Federal Historic Preservation Tax Incentives

A federal tax credit worth 20 percent of the eligible rehabilitation costs is available for buildings listed in the National Register of Historic Places. A building needs to be eligible for listing at the beginning of the rehabilitation project, but need not be officially listed until the tax credit is claimed by the owner.

Eligible Buildings and Costs

The work undertaken as part of the project must meet The Secretary of the Interior's Standards for Rehabilitation. The tax credit is available only for income-producing properties. For example, office, retail, hotel and apartments are eligible. Owner-occupied residential properties are NOT eligible for the credit. The credit is also limited to buildings only; structures such as bridges and silos do not qualify.

The tax credit is designed for substantial rehabilitation projects, not small remodeling projects. The eligible project costs generally must exceed the value of the building itself (not including the land) at the beginning of the project. Most rehabilitation costs are eligible for the credit, such as structural work, building repairs, electrical, plumbing, heating and air conditioning, roof work

and painting. Some specific costs are NOT eligible for the credit, such as acquisition, new additions, furniture and landscaping.

The Application Process

An application for the tax credits MUST be submitted before the project is completed, although work may begin prior to the application or approval. Ideally the application should be submitted during the planning stages of the work so the owner can receive the necessary guidance to ensure that the project meets the Standards for Rehabilitation, and therefore may qualify for the credits. The application consists of three parts.

- Part One, the Evaluation of Significance, determines if the building is eligible for the National Register and thus the credits. Part One is not needed if the property is already individually listed in the National Register.
- Part Two describes the proposed work, and photographs are required showing the major features of the building prior to work beginning.
- Part Three of the application is submitted upon completion of the rehabilitation.

The tax credit requirements, which include both National Park Service and Internal Revenue Service (IRS) regulations, can appear confusing at times. The Texas Historical Commission staff will assist property owners in understanding and applying for the credits. The IRS also allows a separate 10 percent tax credit for income-producing buildings constructed prior to 1936, but not listed in the National Register.

For more information about tax credits, including a downloadable application and FAQs about the IRS requirements, see the National Park Service Web site: www.thc.state.tx.us/links/lkhp.shtml#tax

Office of the Governor

Texas Tourism Opportunities

Community Tourism Assessment

Tourism is increasingly looked upon as a growth industry that has the potential to help communities on many different levels. Economic, social, and aesthetic benefits can all be achieved by successfully implementing plans that increase the presence and coordination of local tourism efforts.

Conducting a Community Tourism Assessment can provide a new set of eyes to evaluate: attractions, resources, events and other features that are indigenous to each community. The Community Tourism Assessment program is administered by the Office of the Governor Economic Development & Tourism Division in an attempt to assist smaller and rural Texas communities. An assessment application must be requested by the community. The office conducts three to four assessments a year.

Community Tourism Assessment Purpose

A Community Tourism Assessment offers useful services to a community such as:

- Organizes local attractions into one report
- Provides recommendations for improving community resources based on observations from tourism professionals
- Uncovers untapped or underutilized attractions in a community
- Encourages regional collaboration and the creation of tourism partnerships
- Educates communities on how to develop local tourism attractions
- Establishes a foundation for future tourism planning or development efforts

The Community Tourism Assessment Process

- Assessments are only performed at the request of the community. Interested communities must submit an application. While assessments are free, if accepted, a community must provide transportation, lodging, meals and an itinerary for the duration of the assessment schedule for the evaluation team.
- Assessments begin with staff performing research on local community operations to provide background for the final report. Input from local residents, travel professionals and local government officials will add to the quality and value of the report by creating a sense of ownership within the community.
- Assessments are generally conducted over two days in which tourism staff and a staff member from another state agency meet with local officials and observe tourism attractions. Tourism assessment staff will then compile a report that details their observations and provides recommendations for enhancing local tourism efforts.
- The report will cover specific strengths, weaknesses, opportunities and threats to the viability of the local tourism industry. The final report is meant to provide an objective analysis that may be used at the sole discretion of the host community for any purpose that it deems valuable in developing the community's tourism product and potential.

Texas Tourism Development

Developing Tourism in Your Community

(www.travel.state.tx.us/DocumentStore/Developing%20Tourism%20in%20Your%20Community.pdf) and Sources of Assistance for Tourism in Texas

(www.travel.state.tx.us/DocumentStore/Sources%20of%20Assistance%20for%20Tourism%20in%20Texas.pdf) reports and Website links provide communities with a guide for developing tourism and a comprehensive list of sources of assistance and contacts available to help implement new initiatives. www.travel.state.tx.us/development.aspx

Advertising Opportunities

The Co-op Advertising plan provides partners the opportunity to participate in Texas Tourism advertising by purchasing cooperative space in print, radio and interactive ads. By participating in co-op advertising, partners are able to extend their reach into markets and to audiences that may not have been attainable without these cost-saving opportunities. There are a variety of ways to utilize the co-op advertising plan to promote Texas destinations to a captive audience at regional, national and international levels.

Co-op Advertising Samples

Cooperative advertising campaign options for Texas Tourism partners illustrates how Texas really is “like a whole other country.” From mountains to beaches, fishing to golf, these creative executions offer our partners the variety of activities and landscapes that best complement their particular geography, attractions and events.

www.travel.state.tx.us/TexasTourismCo-OpAds.aspx

Texas Tourism Images & Logos

A selection of high resolution photographs and logos are available for editorial usage through PictureTrax. A username and password are necessary to access this information. Please click the link below to access the Texas PictureTrax site or to request registration information. If you need assistance, please call (866) 233-TRAX (8729). tximages.picturetrax.com/

Public Relations

The Public Relations section works pro-actively with the travel trade industry (tour operators, wholesalers, travel agents, airlines, etc.) and travel media (newspapers, magazines, broadcast, electronic) throughout the United States and top international and emerging markets. These markets include Mexico, Canada, United Kingdom, Germany, Japan, China, France, Korea and Latin America.

Travel Trade/Media Leads

Sales and media leads generated at trade shows and sales missions are on line and downloadable. Leads will be updated on the Web site within 30 working days from the conclusion of the activity. The site is password protected. Please contact Tourism Public Relations at (512) 936-0101 for the login name and password. www.travel.state.tx.us/MediaLeads/

2008 Co-op PR/Marketing Opportunities Calendar

The calendar is a listing of planned marketing and public relations activities for the current fiscal year. The calendar includes activities open to Texas tourism industry partner cooperative participation such as trade shows, sales and media missions, and familiarization tours. The calendar also includes information on travel industry conferences. www.travel.state.tx.us/marketing/

Research

The Travel Research program area provides information about domestic and international travel behavior and provides statistics on important tourism indicators such as travel volume and behavior, hotel data, and economic impact.

Economic Impact Database

Use this database to request dollars spent, taxes collected, and employment generated for the state, a specific county, region, MSA (metropolitan statistical area), or legislative district. Information is available from 1994 through the most current year available. travel.state.tx.us/asp/tspend.aspx

Economic Impact of Travel on Texas Report

The report provides estimates of dollars spent, taxes collected, and employment generated for each region, county and metropolitan statistical area (MSA).

www.travel.state.tx.us/EconomicImpact.aspx

Travel Volume and Behavior

This Report of Travel To Texas provides a market assessment of the US and Texas, targeting that describes visitor characteristics, positioning Texas against competing destinations and communicating the origin of visitors to Texas.

travel.state.tx.us/DocumentStore/YE2006%20TX%20Visitor%20Profile_Full%20Report%20-%20Final_revised.pdf

Destination Reports

The Destination Reports provide visitor profile information for the seven tourism regions in Texas and for each Metropolitan Statistical Area (MSA) and Metropolitan Division (MD).

www.travel.state.tx.us/travelreport.aspx

Hotel Database

Use this database to request hotel revenue and occupancy information for a specific county, place or MSA (metropolitan statistical area). Information is available from 1995 through the most current year available. travel.state.tx.us/asp/customreports.aspx

Hotel Performance Reports

The report provides estimates of the number of hotels, rooms, nights sold, revenues and percent occupancy for chain and independent lodging establishments for the Texas metropolitan statistical areas (MSAs). www.travel.state.tx.us/HotelReports.aspx

For more information contact:

Office of the Governor
Economic Development and Tourism
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936-0100
Fax: (512) 936-0450

For additional information on developing tourism and for travel research data visit the Office of the Governor Economic Development & Tourism Web site, www.travel.state.tx.us. For Texas travel information, visit www.traveltex.com. For Office of the Governor Web site, visit www.governor.state.tx.us

Product Development Fund

The Product Development was established as revolving loan programs through a \$25 million bond issuance in 2005. The Texas Product Development Fund provides financing to aid in the development, production and commercialization of new or improved products within the state. Categories within the Fund may include an invention, device, technique or process, that has

advanced beyond the theoretical stage and is currently or readily capable of having a commercial application.

Contact Information

Office of the Governor
Economic Development and Tourism
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936-0100
Fax: (512) 936-0520

Small Business Incubator Fund

The Small Business Development Fund was established as revolving loan programs through a \$20 million bond issuance in 2005. The Texas Small Business Fund provides financing to foster and stimulate the development of small and medium sized businesses in Texas. Special funding preferences will be given to emerging technologies including semiconductors, nanotechnology, biotechnology and biomedicine, renewable energy, agriculture and aerospace.

Contact Information

Office of the Governor
Economic Development and Tourism
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936-0100
Fax: (512) 936-0520

Revolving Loan Fund Update

Overview

The Texas Military Value Revolving Loan Fund (TMVRLF) was created by Senate Bill 652 and signed by the Governor during the 78th Legislative session as a provision of the Military Preparedness Act¹¹³⁷ to assist defense communities in accomplishing economic development projects that enhance the military value of their installations. The 79th Legislature amended this legislation to extend the fund to communities positively and negatively impacted by BRAC 2005 or later¹¹³⁸. The goal of the fund is to assist defense communities in accomplishing economic development projects that enhance the military value of their installations, create new jobs in the community and provide funds for infrastructure development. The bill provides a low cost source of revenue to eligible communities who meet the application criteria. Funding is obtained through the sale of up to \$250 Million in general obligation bonds authorized by Texas' voters on September 13, 2003, through passage of Constitutional Amendment 20. Statutory

¹¹³⁷ The detailed substantive and procedural requirements of the revolving loan program are set forth in the Texas Administrative Code, Title I, Part 1, Chapter 4, Subchapter A

¹¹³⁸ Sec 436. 1531-1532

responsibility for administration of the fund rests with the Texas Military Preparedness Commission.

The Texas Military Revolving Loan Fund has a three-fold purpose:

- Assist defense communities in enhancing the value of the military facility in their area;
- Assist defense communities adversely impacted by a BRAC 2005 action through economic development projects that will attract new industries and create new job opportunities; and
- Assist defense communities positively impacted by a BRAC 2005 action by funding new infrastructure, utilities, or transportation needs.

Defense communities desiring to apply for funds from the TMVRLF are required to comply with the Texas Administrative Code rules and meet the criteria established by the TMPC Commission. A defense community in Texas is defined as a political subdivision, including a municipality, county, or special district, that is adjacent to, is near, or encompasses any part of a defense base. Provisions of the statute require repayment of the loan as specified in the contract. The minimum amount of a loan is \$1,000,000 while the maximum amount of a loan will be determined by the availability of funds and the creditworthiness of the applicant. The state may provide up to 100 percent of the cost of the described project, dependent upon the creditworthiness of the applicant.

In order for communities to request project funds, communities should submit a letter of interest to the office of the TMPC. Once this has been done, communities should develop a Military Value Enhancement Statement or a Community Redevelopment Statement to accompany their application. These statements outline the benefit to the community and military installation as a result of acquiring loan funds.

The role of the Texas Military Preparedness Commission is to provide oversight to the loan program through:

- Publicizing the program to potential applicants and providing information
- Evaluating each application for completeness
- Working closely with applicant to ensure all relevant information is included
- Appointing a review panel of seven members to evaluate applications
- Approving or disapproving the award of the loan by a vote of a simple majority of the Commission.

www.governor.state.tx.us/divisions/tmpe/loan

Texas Department of Agriculture

Agriculture and Economic Development Loan Programs

In more rural areas, economic development often focuses on the promotion and protection of agricultural business operations. The Texas Department of Agriculture (TDA) strives to facilitate such efforts through the Texas Agricultural Finance Authority (TAFA), a public authority within the Texas Department of Agriculture. The Authority oversees three financial assistance programs that offer short-term and long-term financial assistance to businesses and individuals engaged in agricultural enterprises and another loan program for rural political subdivisions engaged in economic development. The general rules and contact person information for the three programs are at the end of the section.

Interest Rate Reduction Program: Low Interest Loans for Agriculture

Program Benefit

The Interest Rate Reduction Program (formerly known as Linked Deposit program) allows financial institutions to offer lower interest rates on agricultural loans than would otherwise be available under current market conditions. Participating financial institutions are able to offer lower interest rates because the Texas Comptroller of Public Accounts provides matching deposits of state funds to participating institutions. Under the program, the matching deposits yield interest to the state at less than market rates, allowing the bank to pass on the savings in the form of lower interest rates to loan participants. The Interest Rate Reduction Program has the effect of “buying down” the interest rate for loans on qualifying agricultural projects. It is not a guaranteed loan program.

Who May Apply

Applicants must be in or entering the business of:

- processing and marketing agricultural crops in Texas;
- producing alternative crops;
- producing agricultural crops for which the production has declined markedly due to natural disasters;
- producing agricultural crops in Texas using water conservation equipment;
- developing certain water conservation projects; or
- the provision of nonagricultural goods or services that provide an economic benefit to a city or county in a rural area.

An eligible lender is a financial institution that makes commercial loans, is eligible to be a depository of state funds, and agrees to follow the requirements of the Interest Rate Reduction Program.

Use of Funds

Funds from the program may be used for any agriculture-related operating expense, including the purchase or lease of land, fixed asset acquisition or fixed asset improvement, as identified in the application. The term of the loan is determined by the lender and the borrower.

The program works with loans that will result in enhanced agricultural production; the processing and marketing of certain crops; the production of crops affected due to natural disasters; the purchase of water conservation equipment and water conservation projects; and the provision of nonagricultural goods or services in a rural area. The maximum amount of the deposit depends on the use of the proceeds, but in no case exceeds \$500,000.

The Application Process

Participating lenders determine program eligibility. Loans are subject to the lender's normal credit evaluation. The lender submits an application to the Department. If approved, the application is forwarded to the Treasury for funding. There is no appeal for an applicant who is rejected, but the applicant may always reapply.

Young Farmer Loan Guarantee Program

Program Benefit

The Young Farmer Loan Guarantee Program, found in Chapter 58 of the Texas Agriculture Code, provides financial assistance through loan guarantees to individuals who are at least 18 years old, but younger than 40 years of age, and who are establishing or enhancing their farm and/or ranch operation or an agriculture-related business. Loan guarantees are limited to \$250,000 or 90 percent of the total project cost, whichever is less.

Who May Apply

Applicants must be Texas residents, meet the age criteria and provide evidence of practical farm and/or ranch experience.

Use of Funds

Funds may be used to provide working capital for operating the farm and/or ranch, including the lease of facilities, the purchase of machinery and equipment, the purchase of real estate/land for the agriculture-related business or for any agriculture-related business purpose, as identified in the agriculture business plan.

Loan Terms

The terms of the loans vary with each application. The term cannot exceed the useful life of the assets being financed, and in no case may the loan term exceed 10 years. The loans must be secured by a first lien on sufficient collateral to give the lender and the authority reasonable assurance of repayment. Applicant must provide reasonable equity to the total project.

Interest rates are determined by the lender and approved by the Authority. An eligible applicant and lender may apply for the Interest Reduction Program, which reimburses the applicant up to 3 percent of the fixed interest rate charged by the lender to an approved applicant.

The Application Process

Participating lenders determine program eligibility. Loans are subject to the lender's normal credit evaluation. The lender submits an application for the guaranty to the Department. TDA staff reviews the application and the requested guaranty amount. Guaranty amounts are approved by TDA management and presented to the TAFAs Board for ratification. The TAFAs Board meets on an as needed basis.

Rural Development (Municipal) Finance Program

The Texas Agricultural Finance Authority (TAFAs), created in 1987, is a public authority within the Texas Department of Agriculture that provides financial assistance to public entities, such as cities, counties and special purpose districts in rural areas of Texas. TAFAs's Rural Development Finance Program (RDFP) was created to provide loans to stimulate economic activity in rural Texas.

Program Benefit

TAFAs is authorized to loan money from \$100,000 up to an amount approved by TAFAs's board of directors to rural political subdivisions. Further, TAFAs has the authority to purchase an anticipation note, in lieu of a certificate of obligation, from a city or other eligible political subdivision in an amount not to exceed \$500,000 for any single project, for a term of not more than 30 years, without the approval of the Attorney General's Office. Financing more than \$500,000 will require approval of the Attorney General's Office.

Who May Apply

Applicants located within rural areas of the state who provide significant benefits for the rural area and provide evidence of ability to repay the commitment. An eligible rural area is a non-metropolitan statistical area or an unincorporated area, or city, with a population of under 20,000 that is not adjoining a city, or group of cities, with an aggregate population of 50,000 or more. Applicants include: city and county governments; economic development corporations; hospital districts; rail districts; utility districts; special districts; agricultural districts; and private water and wastewater corporations. Applicants must have the authority to enter into legally binding debt instruments.

Use of Funds

Loans will conform to the borrowing entity's authority to enter into a binding debt instrument. A detailed description of the purpose and need for the financing, and how it will promote or sustain economic development, will be required. Funds may generally be used to finance real estate, building improvements, equipment, water and wastewater systems, municipal infrastructure projects and any other use that can be identified to improve or assist in the economic development of a rural area. Public purposes could include basic infrastructure development, public facilities and works improvements, and rehabilitation of historic structures.

Loan Terms

The terms of the loans vary with each application. The term cannot exceed the useful life of the assets or improvements being financed, which is determined on a case-by-case basis, with a maximum maturity in the year 2031. Interest rate are determined by the TAFA board and are adjusted as the cost of funds changes. Rates are annually adjustable.

The Application Process

Loan applications are submitted directly to the Department. TDA staff review the application and perform the required due diligence and credit evaluation. All eligible loan requests are presented to the TAFA Board for approval. The TAFA Board meets on an as needed basis. For an application, additional information or assistance on TAFA programs, please contact: www.agr.state.tx.us

Texas Department of Agriculture
Texas Agriculture Finance Authority
1700 N. Congress Avenue or P.O. Box 12847
Austin, Texas 78711-2847
Phone Number: (512) 936-0273
Fax Number: (888) 216-9867
E-mail: finance@agr.state.tx.us
Toll-Free Rural Assistance Hotline
(877) 428-7848

Texas Capital Fund Programs

The Texas Capital Fund (TCF) is an economic development grant and loan program funded with U.S. Department of Housing and Urban Development monies. It is designed to provide financial assistance to “non-entitlement communities.” Non-entitlement communities are defined as either cities of under 50,000 population or counties of under 200,000 population. There are four subprograms within the Texas Capital Fund through which communities may access Capital Fund monies: the Infrastructure Development Program, the Real Estate Development Program, the Main Street Improvements Program and the Downtown Revitalization Program.

Infrastructure Development Program

The Infrastructure Development Program is designed to help communities fund public infrastructure needed to assist businesses that commit to create and/or retain permanent jobs. The program encourages existing and new business development and expansion.

Who May Apply

Non-entitlement communities, as defined above, are eligible. In order to apply, the city or county must have the business entity join in the application and provide much of the pertinent information.

Use of Funds

This program provides funds for project specific infrastructure, which may include water and sewer, street improvements, electric, telephone and fiber optic lines, pre-treatment facilities and railroad spurs. Full repayment of the funds is required for private infrastructure. Public infrastructure is not intended to require repayment.

The minimum normal award amount is \$50,000 and the maximum amount is \$750,000. The award may not exceed 50 percent of the total project cost, and a minimum equity match of 10 percent of the total cost is required to be made by the business.

The Application Process

Cities and counties apply directly to the Texas Department of Agriculture for funding. The involved businesses join in and provide much of the information for the application. In fact, there must be a business ready to commit to participate in the program. Applications are accepted four times annually. Check with the Department of Agriculture for the specific deadline date.

Applications are scored and reviewed by Department staff, who recommend the projects to be funded to the Commissioner of Agriculture for the final funding decision. The review process typically takes 60 to 90 days. Funds are made available upon completion of various contract conditions. For applications that are rejected, the appeals process simply involves requesting a reevaluation of the application. Additionally, eligible applicants may always reapply.

Real Estate Development Program

The Real Estate Development Program is designed to provide financial resources to non-entitlement communities for real estate development that promotes business expansion or development. Typical awards involve improvements to physical facilities for existing or new businesses.

Who May Apply

Non-entitlement communities, as defined in this section, are eligible. In order to apply, the city or county must have the business entity join in the application and provide much of the pertinent information. This fund may not be used to simply provide a “spec” building; it must be geared to assist a business that has committed to locate at the site.

How Funds May Be Used

Funds may be used for acquisition, construction or rehabilitation of real property. Projects must demonstrate project feasibility and financial capability. Refinancing is not an eligible use of proceeds. The minimum award is \$50,000 and the maximum is \$750,000. The award may not exceed 50 percent of the total project cost, and a minimum equity match of 10 to 33 percent of the total cost of the project is required to be made by the business.

The city or county must own the real property, and the involved business must pay a monthly lease payment to the community. The applicant returns payments to the state for use in a state revolving loan fund. The entire award must be repaid over a period of no more than 240 months

with no interest accruing. Leases usually contain an option for the business to purchase the property.

The Application Process

Cities and counties apply directly to the Texas Department of Agriculture for funding. The involved business joins in and provides much of the information for the application. In fact, there must be a business ready to commit, to participate in the program. Applications are accepted four times annually. Check with the Department of Agriculture for the specific deadline dates.

Applications are scored and reviewed by Department staff, who recommend the projects to be funded to the Commissioner of Agriculture for the final funding decision. The review process typically takes 60 to 90 days. Funds are made available upon completion of various contract conditions. For applications that are rejected, the appeals process simply involves requesting a reevaluation of the application. Additionally, eligible applicants may always reapply.

Main Street Improvements Program

The Texas Capital Fund Main Street Improvements Program is designed to foster and stimulate the development of small business by providing financial assistance for public infrastructure improvements within the central business district. This program encourages the elimination of slum or blighted areas. A maximum total of \$600,000 is available for this program. The minimum award is \$50,000, and the maximum award is \$150,000. Matching funds must be provided by the applicant.

Who May Apply

Non-entitlement cities that are designated as an official Texas Main Street City by the Texas Historical Commission may submit applications for proposed improvements. The improvements must directly support the revitalization of the Central Business District.

How Funds May Be Used

Funds for this program may be used for public infrastructure improvements such as sidewalks, streets and public utilities. They may not be used for architectural, engineering and design costs.

The Application Process

Applications are submitted annually. Contact the Texas Historical Commission (THC) or Texas Department of Agriculture (TDA) for the current deadline date.

Cities submit applications directly to the Texas Department of Agriculture for funding and scoring. After scoring, applications are then reviewed by staff, who recommend applications to be funded to the Commissioner of Agriculture for the final funding decision. The review process typically takes 90-120 days. Funds are made available upon completion of various contract conditions. For applications that are rejected, the appeals process simply involves requesting a re-evaluation of the application. Additionally, eligible applicants may always reapply.

Downtown Revitalization Program

The Texas Capital Fund Downtown Revitalization Program is designed to foster and stimulate the development of small business by providing financial assistance for public infrastructure improvements within the central business district. This program encourages the elimination of slum or blighted areas. A maximum of eight awards not to exceed a total of \$1,200,000 is available for this program. The minimum award is \$50,000, and the maximum award is \$150,000. Matching funds must be provided by the applicant.

Who May Apply

Non-entitlement cities that are **not** designated as an official Texas Main Street City by the Texas Historical Commission may submit applications for proposed improvements. The improvements must directly support the revitalization of the Central Business District.

How Funds May Be Used

Funds for this program may be used for public infrastructure improvements such as sidewalks, streets and public utilities. They may not be used for architectural, engineering or design costs.

The Application Process

Applications are submitted annually to the Texas Department of Agriculture (TDA) for the current deadline date. Applications are scored and reviewed by Department staff, who recommend applications to be funded to the Commissioner of Agriculture for the final funding decision. The review process typically takes 90-120 days. Funds are made available upon completion of various contract conditions. For applications that are rejected, the appeals process simply involves requesting a re-evaluation of the application. Additionally, eligible applicants may always reapply.

For further information or assistance on the TCF programs, please contact:
www.agr.state.tx.us/agr.

Texas Department of Agriculture
Rural Economic Development Division
1700 N. Congress Avenue
P.O. Box 12847
Austin, Texas 78711-2847
Phone Number: (512) 936-0273
Fax Number: (888) 216-9867
E-mail: finance@agr.state.tx.us
Toll-Free Rural Assistance Hotline
(877) 428-7848

Certified Retirement Community Program

The Texas Certified Retirement Community Program (CRC) is a new initiative from the Texas Department of Agriculture to help rural Texas communities encourage retirees and potential

retirees to make their homes in Texas communities that have met the criteria for certification by the department as a Texas Certified Retirement Community.

The Mission:

- Promote Texas as a retirement destination to retirees and potential retirees both in and outside Texas;
- Encourage tourism to Texas as a desirable retirement location and for the visitation of those who have chosen to retire in this state;
- Establish a certification program that is user friendly and informative; and
- Maintain a certification program that is reliable and trusted.

The Tools:

- Create a Web site to market each certified retirement community;
- Distribute certified community brochures;
- Direct inquiries to certified communities;
- Work with and support each certified retirement community to evaluate the qualities that make it a retirement destination; and
- Develop an event to showcase the benefits of retirement in Texas.

Who is Eligible?

Any community in Texas wanting to showcase itself as a retirement location and a tourism destination.

Benefits:

- Statewide marketing campaign to attract retirees and tourists;
- Positive economic and social impact to the community;
- Requires no tax abatements or incentives;
- A relocating couple has an economic impact of 3.7 factory jobs; and
- Wealth of brainpower available for community service and part-time employment.

How to Get Certified?

- Designate a board to serve as the community's official sponsor and resource team;
- Complete the application and satisfy the program requirements to become certified;
- Submit the fee, as required by statute, with application;
- Maintain the program standards to retain certification; and
- Re-certify and pay fee by the fifth anniversary date of initial certification.

For further information or assistance on the CRC program, please contact:

www.agr.state.tx.us/agr/

Texas Department of Agriculture
Rural Economic Development Division
GO TEXAN Certified Retirement Community Program
1700 N. Congress Avenue
P.O. Box 12847

Austin, Texas 78711-2847
Phone Number: (512) 936-0273
Fax Number: (888) 216-9867
E-mail: finance@agr.state.tx.us
Toll-Free Rural Assistance Hotline
(877) 428-7848

Texas Department of Housing and Community Affairs

The mission of the Texas Department of Housing and Community Affairs (TDHCA) is to help Texans achieve an improved quality of life through the development of better communities. TDHCA accomplishes this mission by administering a variety of housing and community affairs programs. A primary function of TDHCA is to act as a conduit for federal grant funds for housing and community services. However, because several major housing programs require the participation of private investors and private lenders, TDHCA also operates as a housing finance agency.

TDHCA's services address a broad spectrum of housing and community affairs issues that include homebuyer assistance, the rehabilitation of single family and multifamily units, rental assistance, the new construction of single family and multifamily housing, special needs housing, transitional housing, and emergency shelters. Community services include energy assistance, home weatherization, health and human services, child care, nutrition and emergency assistance.

Funding sources for the services listed above include the U.S. Department of Housing and Urban Development (HUD), U.S. Treasury Department, U.S. Department of Health and Human Services, and U.S. Department of Energy and State of Texas general revenue funds.

The following TDHCA programs focus on expanding and maintaining the supply of decent, affordable housing. Most of the following programs provide loans or grants to individuals and organizations interested in developing affordable housing or offering housing-related services.

HOME Investment Partnerships Program

The HOME Investment Partnerships (HOME) Program receives funding from the U.S. Department of Housing and Urban Development (HUD) and provides loans and grants to units of local government, public housing authorities (PHAs), community housing development organizations (CHDOs), nonprofit organizations, and for-profit entities, with targeted beneficiaries being low, very low, and extremely low income households. The purpose of the HOME Program is to expand the supply of decent, safe, and affordable housing for extremely low, very low, and low income households, and to alleviate the problems of excessive rent burdens, homelessness, and deteriorating housing stock. HOME strives to meet both the short-term goal of increasing the supply and the availability of affordable housing and the long-term goal of building partnerships between state and local governments and private and nonprofit organizations to strengthen their capacity to meet the housing needs of lower income Texans.

The HOME Program has three main components: Homebuyer Assistance, Owner-Occupied Housing Assistance, and Tenant-Based Rental Assistance (TBRA). Funds are also set aside for rental housing development and special purposes. TDHCA provides technical assistance to all recipients of HOME Program funding to ensure that participants meet and follow state implementation guidelines and federal regulations.

Set-Asides

Rental Housing Development Program

Awards for eligible applicants are to be used for the development of affordable multifamily rental housing. Owners are required to make the units available to extremely low, very low, and low income families and must meet long-term rent restrictions.

Rental Housing Preservation Program

Awards for eligible applicants are to be used for the acquisition and/or rehabilitation for the preservation of existing affordable or subsidized rental housing. Owners are required to make the units available to extremely low, very low, and low income families and must meet long-term rent restrictions.

CHDO Set-Aside

A minimum of 15 percent of the annual HOME allocation is reserved for CHDOs. CHDO Set-Aside projects are owned, developed, or sponsored by the CHDO, and result in the development of rental units or homeownership. Development includes projects that have a construction component, either in the form of new construction or the rehabilitation of existing units.

Set-Aside for Colonia Model Subdivision Loan Program

The intent of this program is to provide low-interest or interest-free loans to promote the development of new, high-quality residential subdivisions that provide alternatives to substandard colonias. The Department will only make loans to CHDOs certified by the Department and for the types of activities and costs described under the previous section regarding the CHDO Set-Aside.

Special Needs Populations

Subject to the availability of qualified applications, TDHCA has a goal of allocating 20 percent of the annual HOME allocation to applicants serving persons with special needs. All HOME Program activities will be included in attaining this goal.

Contact: For more information contact, TDHCA's HOME Division at (512) 463-8921.

Funding Source: HUD.

Type of Assistance: Loans and grants.

Recipients: Local service providers: units of local government, PHAs, CHDOs, nonprofits, and for-profit entities.

Targeted Beneficiaries: Households at or below 80 percent of the area median family income (AMFI).

Housing Trust Fund Rental Production Program

The Housing Trust Fund (HTF) receives funding from the State of Texas, unencumbered fund balances, and public and private gifts or grants. It is the only State-authorized program for affordable housing. The Housing Trust Fund is a statewide program that seeks to allocate funds to achieve a broad geographical distribution of affordable housing. Funds are available to non-profit organizations, units of local government, public housing authorities, community housing development organizations (CHDOs), and income eligible individuals and families. Eligible activities include acquisition, rehabilitation, and new construction of housing. The Rental Production Program will allocate awards as loans to eligible recipients for the provision of housing for very low and extremely low-income individuals and families. Eligible activities will include the financing, new construction, acquisition and/or rehabilitation of affordable rental housing developments. Funds will be distributed primarily in rural areas and will not be awarded to developments that have received a Housing Tax Credit award so that special emphasis is given to smaller proposed developments. Award amounts are limited to no more than \$250,000 per development.

Contact: The HOME Program Division at (512) 463-8921.

Funding Source: Appropriations from the State of Texas, unencumbered fund balances, and public and private gifts or grants.

Type of Assistance: Loans and grants.

Recipients: Units of local government, public housing authorities, for-profit entities, and non-profit organizations.

Targeted Beneficiaries: Households at or below 50% of the AMFI.

Housing Tax Credit Program

The Housing Tax Credit (HTC) Program receives authority from the U.S. Treasury Department to provide tax credits to nonprofits, for-profit developers, and syndicators or investors. The targeted beneficiaries of the program are very low and extremely low income families at or below 60 percent AMFI. The program's purpose is to encourage the development and preservation of rental housing for low income families, provide for the participation of for-profit and nonprofit organizations in the program, maximize the number of units added to the state's housing supply, and prevent losses in the state's supply of affordable housing.

The HTC program was created by the Tax Reform Act of 1986 and is governed by the Internal Revenue Code of 1986 (the Code), as amended, 26 USC Section 42. While the amount of credit per capita varies annually, for 2007 there is a ceiling of approximately \$43 million. Tax credits are also awarded to developments with tax-exempt bond financing and are made independent of the ceiling. TDHCA is the only entity in the state with the authority to allocate tax credits under this program. The state's distribution of the credits is administered by the Department's *Qualified Allocation Plan and Rules* (QAP) as required by the Code. Housing Tax Credits are allocated to each Uniform State Planning Region using a formula for urban/exurban and rural, developed by the Department, based on housing assistance need.

To qualify for tax credits, the proposed development must involve new construction or undergo substantial rehabilitation of residential units. The credit amount for which a development may be eligible depends on the total amount of depreciable capital improvements, the percentage of units set aside for qualified tenants, and the funding sources available to finance the total development cost. Pursuant to the Code, a low income housing project qualifies for residential rental occupancy if it meets one of the following two criteria: 20 percent or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 50 percent or less of AMFI, or 40 percent or more of the residential units in the project are both rent-restricted and occupied by individuals whose income is 60 percent or less of AMFI. Typically, 60 to 100 percent of a development's units will be set aside for qualified tenants to maximize the amount of tax credits the development may claim.

Contact: Multifamily Housing Division at (512) 475-3340.

Funding Source: U.S. Treasury Department.

Type of Assistance: Tax credits.

Recipients: Nonprofits or for-profit developers.

Targeted Beneficiaries: Households at or below 60% of the AMFI.

Multifamily Bond Program

The Multifamily Bond Program issues taxable and tax-exempt mortgage revenue bonds (MRBs) to fund loans to nonprofit and for-profit developers. The proceeds of the bonds are used to finance the construction, acquisition, or rehabilitation of multifamily properties, with the targeted beneficiaries being very low, low, and moderate income households. Owners elect to set aside units in each project according to TAC 34 Part 9 Chapter 190.2(d). Persons with special needs must occupy 5 percent of the units. Property owners are also required to offer a variety of services to benefit the residents of the development. Specific tenant programs must be designed to meet the needs of the current tenant profile and must be approved annually by TDHCA.

TDHCA issues tax-exempt, multifamily MRBs through two different authorities defined by the Internal Revenue Code. Under one authority, tax-exempt bonds used to create housing projects are subject to the state's private activity volume cap. The state will allocate 22 percent of the annual private activity volume cap for multifamily projects. Approximately \$447 million in issuance authority will be made available to various issuers to finance multifamily projects, of which 20 percent, or approximately \$89 million, will be made available exclusively to TDHCA. Issuance authority per individual projects is allocated through a lottery administered by the Texas Bond Review Board. TDHCA, local housing authorities, and other eligible bond issuers enter the lottery with applications for specific projects on behalf of project owners. Applications submitted to TDHCA for the private activity bond 2008 program year will be scored and ranked. Lottery numbers will then be assigned from the lowest to highest ranked application. Projects that receive 50 percent or more of their funding from the proceeds of tax-exempt bonds under the private activity volume cap are also eligible to apply for housing tax credits.

In addition to submitting applications through the lottery, TDHCA also accepts applications for a waiting list. Waiting list applications are still scored and ranked against one another, but are accepted on a monthly basis throughout the year. The reservations are issued on a first-come

first-served basis once all applications participating in the lottery have been reserved or withdrawn.

TDHCA may also issue tax-exempt MRBs to finance properties that are owned entirely by nonprofit organizations. Bonds issued under this authority are exempt from the private activity volume cap. This is a noncompetitive application process and applications may be received at any time throughout the year. In addition to the set-asides above, 75 percent of project units financed under the 501(c)(3) authority must be occupied by households earning 80 percent or less of the area median income.

Contact: the Multifamily Housing Division at (512) 475-3340.

Funding Source: Taxable and tax-exempt MRBs.

Type of Assistance: Loans.

Recipients: Nonprofits and for-profit developers.

Office of Colonia Initiatives Assistance Programs

The Department receives funding from federal and state sources to operate programs of benefit to residents of colonias. The Office of Colonia Initiatives (OCI) serves as a liaison for these programs. Visit OCI's Web site at www.tdhca.state.tx.us/oci.

Contract for Deed Conversion Initiative

This program facilitates colonia-resident property ownership by converting contracts for deed into traditional mortgages. The Department is required, through legislative directive, to spend no less than \$4 million per biennium on contract for deed conversions for colonia families earning less than 60 percent of AMFI. The Department strives to convert at least 400 of these contracts for deed into traditional notes and deeds of trust per biennium. Participants of this program must live in a colonia, and the property must be their principal residence. Pre- and post-conversion counseling is available, as well as funding for housing construction and rehabilitation.

Contact: TDHCA's HOME Program Division at (512) 463-8921.

Funding Source: HUD.

Type of Assistance: Loans

Recipients: Local service providers: units of local government, PHAs, CHDOs, nonprofits, and for-profit entities.

Targeted Beneficiaries: Households at or below 60% of the AMFI.

Texas Bootstrap Loan Program

This program is a self-help construction program, which is designed to provide very low income families an opportunity to help themselves in the form of sweat equity. All program participants are required to provide at least 60 percent of the labor that is necessary to construct or rehabilitate the home, and all applicable building codes must be adhered to under this program. A minimum of two-thirds of the available funding is set aside for owner-builders whose property

is located in an Economically Distressed Area Program (EDAP) county. The remainder of the funding will be available to Department funded Colonia Self-Help Centers and TDHCA certified non-profit Owner-Builder Housing Programs in the State of Texas. The remainder of the funding will be available to Department-certified nonprofit owner-builder programs statewide.

Contact: (800) 462-4251.

Funding Source: State funds.

Type of Assistance: Loans and grants

Recipients: Local service providers: units of local government, PHAs, CHDOs, nonprofits, and for-profit entities.

Targeted Beneficiaries: Households at or below 60 percent of the AMFI

Texas Emerging Technology Fund Overview

The \$185 million Texas Emerging Technology Fund is designed to help Texas grow the economy over the long-term by:

- Attracting top research talent to develop new technologies that will grow existing industries and develop new industries for Texas.
- Expediting the development and commercialization of new technologies by small Texas businesses.

The program will work through partnerships between the state, institutions of higher education and private industry to focus greater attention on research, development and commercialization of emerging technology.

The Emerging Technology Fund is dedicated to three areas:

Commercialization

The state provides funding to early stage companies in order to assist them in their development of emerging technologies, and assists them in obtaining angel or venture capital to ramp up their business activities. The commercialization section of the legislation established Regional Centers of Innovation & Commercialization around the state. These centers are concentrated on applied research and development activities, serving as an incubator role for start-up firms and encouraging expansion of existing companies resulting from commercialization of their developments. The centers are also designed to source deals and work with companies on their application for ETF funding.

Research Superiority

The state has helped and will continue to help Texas public universities attract highly renowned research teams from universities and institutions in other states. The top researcher will be world class with a history of developing commercially viable technology and moving it into the marketplace. Funds can be used for research and research capability acquisition, including:

salaries, benefits, travel, consumable supplies, operating expenses, capital equipment and construction or renovation of facilities.

For more information regarding the fund, please visit www.EmergingTechFund.com or call (512) 936-0100.

Texas Enterprise Fund Program

Program Objective

At Gov. Rick Perry's request, the 78th Texas Legislature established the Texas Enterprise Fund in 2003 to provide financial resources to help strengthen the state's economy. The Texas Enterprise Fund, the largest "deal closing" fund of its kind in the nation, continues to attract businesses and jobs to Texas.

Projects that are considered for the Enterprise Fund support must demonstrate a project's worthiness, maximize the benefits to the State of Texas and realize a significant rate of return of the public dollars being used for the economic development of Texas. Capital investment, job creation, wages generated, financial strength of the applicant, applicant's business history, analysis of the relevant business sector and federal and local government and private sector financial support of a project will all be significant factors in approving the use of the Enterprise Fund.

The Governor's Office works closely with local leaders to tailor incentive packages that best meet the needs of local communities and businesses. Recruiting new business and helping to expand existing business is a dynamic process.

If you have a project that can benefit from the Texas Enterprise Fund, an application must be submitted to the Office of the Governor, Economic Development & Tourism division, which provides information on how funds are to be utilized and how the proposed project meets the criteria of the program.

Contact Information:

Office of the Governor
Economic Development & Tourism Division
P.O. Box 12428
Austin, Texas 78711-2428
(512) 936-0101
(800) 888-0511
www.governor.state.tx.us/divisions/ecodev/ed_bank/tefund

www.texaswideopenforbusiness.com

Texas Enterprise Zone Program

The Texas Enterprise Zone Program is an economic development tool for local communities to partner with the State of Texas to promote job creation and capital investment with emphasis on distressed areas through incentives.

Enterprise Zone

An enterprise zone is a census tract block group that has 20 percent or more poverty rate based upon the decennial census federal poverty level information, a distressed county, a federally designated zone or renewal community. An enterprise zone is automatically a reinvestment zone for tax abatement and tax increment financing if a community chooses to designate it as such a zone.

Participation

Local communities may provide incentives such as tax abatement, fee waivers, one stop permitting, etc. to businesses inside a zone and to enterprise projects. In addition, communities may nominate a qualified business as an Enterprise Project. An enterprise project may be located inside or outside a zone area. Enterprise Projects outside a zone area have a higher threshold of hiring economically disadvantage or enterprise zone residents. Communities with a population of less than 250,000 may nominate up to four businesses for designation as enterprise projects during a state biennium. Under certain circumstances, such jurisdictions may receive up to two bonus projects based on availability. Communities with a population of 250,000 or greater have up to six designations available during the state biennium. These designations allow businesses to obtain state sales and use tax benefits on qualifying items for up to five years from the enterprise project designation date. Only 105 enterprise project designations may be granted during each state biennium. Any designations remaining at the end of a biennium may be carried forward to the next biennium.

Applications are accepted quarterly with the deadlines on the first working day of March, June, September, and December. Applications received **after 5:00 p.m** for each quarterly application deadline date will not be considered for that current round.

Quarterly Application Deadline	90-Day window	Designation Expiration
09/04/07	04/23/07	09/04/12
12/03/07	07/23/07	12/03/12
03/03/08	10/17/07	03/03/13
06/02/08	01/23/08	06/02/13
09/02/08	04/22/08	09/02/13
12/01/08	07/18/08	12/01/13
03/03/09	10/14/08	03/03/14
06/01/09	01/20/09	06/01/14

Benefits to Participation

Designated projects are eligible to apply for state sales and use tax refund on qualified expenditures. The level and amount of refund is related to the capital investment and jobs created at the site.

Level of Capital Investment	Maximum number of jobs allocated	Maximum potential refund	Maximum refund per job allocated
\$40,000 to \$399,999	10	\$25,000	\$2,500
\$400,000 to \$999,999	25	\$62,500	\$2,500
\$1,000,000 to \$4,999,999	125	\$312,500	\$2,500
\$5,000,000 to \$149,999,999	500	\$1,250,000	\$2,500
Double Jumbo Project \$150,000,000 to \$249,999,999	500	\$2,500,000	\$5,000
Triple Jumbo Project \$250,000,000 or more	500	\$3,750,000	\$7,500

Participation Requirements

- Communities may nominate projects, for a designation period up to five years, non-inclusive of a 90-day window prior to the application deadline. Employment and capital investment commitments must be incurred and met within this timeframe.
- Projects may be physically located in or outside of an Enterprise Zone. If located within a zone, the company commits that 25% of their new employees will meet economically disadvantaged or enterprise zone residency requirements. If located outside of a zone, the company commits that 35% of their new employees will meet economically disadvantaged or enterprise zone residency requirements.
- Under limited statutory provisions, an enterprise project designation may be granted for job retention.

Contact Information

Office of the Governor
Economic Development and Tourism
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936-0100
Fax: (512) 936-0520

Texas Heritage Trails Program:

A Regional Tourism Initiative

A combination of historic preservation and tourism, this economic development initiative encourages communities to partner to promote Texas' historic and cultural resources. These successful local preservation efforts, combined with statewide marketing of the areas as heritage regions, increase visitation to cultural and historic sites and bring more dollars to Texas communities, especially rural ones.

Since 1997, the program has revitalized local economies, increased visitation to cultural and historic sites and raised awareness of the importance of historic preservation to the tourism industry.

The latest information released February 2008 by the Governor's Office, Economic Development and Tourism indicates that 14 percent of the leisure travelers to Texas are heritage travelers garnering \$5.3 billion of the \$38.2 billion dollar leisure tourism industry. According to Travel Industry of America, Texas ranks second in the number of cultural and heritage travelers.

Heritage tourism in Texas promotes economic and civic vitality in communities and regions across Texas; creates jobs, increases property values, increases retail sales and generates tax revenues and builds stronger communities.

The Texas Historical Commission has a new publication that can assist your community in developing a local heritage tourism program. The *Heritage Tourism Guidebook* is available on the THC Web site or a hard copy can be requested.

For more information: (512) 463-6092 or visit www.thc.state.tx.us/travel

Texas Historical Commission Grant Writing Workshops

Sponsored by the Friends of the Texas Historical Commission, Inc. and the Texas Historical Commission (THC), the Texas Grant Writing Workshops are designed to improve your organization's chances of becoming grant recipients. The seminars cover all aspects of fund raising, including where to find funding, how to approach foundations and how to write convincing proposals.

Choose from two sessions:

Three-Day Workshop

This course covers the fundamentals of grant writing presented by two experienced and successful instructors. Use of the Regional Foundation Library resources under the guidance of the collection supervisor is also included with this course. Classes are limited to 25 participants.

Cost: (See Web link.)

Location: Regional Foundation Library (formerly the Hogg Foundation Library), Austin, TX

Date: To find out specific date and time information, please contact the Texas Historical Commission at (512) 463-6092 or visit the following Web link:

Web link: www.thc.state.tx.us/grantsincent/grawork.shtml

How to Register?

To register, complete the registration form found on the THC Web site and Email it to Mae Perkins at mae.perkins@thc.state.tx.us or fax it to (512) 463-5862. You may also mail your registration with payment to the address listed on the form located on the THC Web site.

Texas Industrial Revenue Bond Program: Issuance of Bonds by Development Corporations

The State of Texas Industrial Revenue Bond Program is designed to provide tax-exempt or taxable financing for eligible industrial or manufacturing projects as defined in the Development Corporation Act of 1979 (Act). The Act allows cities, counties, conservation and reclamation districts to form non-profit development corporations or authorities on their behalf. The purpose of a development corporation is to provide bond financing for eligible projects.

The development corporation acts as a conduit through which monies are channeled. Generally, bond debt service is paid by the business under the terms of a lease, sale or loan agreement. As such, it does not constitute a debt or obligation of the governmental unit, the development corporation or the State of Texas.

Participation

The development corporation issuing the bonds must pass a declaration of official intent resolution (tax-exempt only); a bond resolution approving the project; set the bond amount; and make findings required by the Act. In addition, the governmental unit must pass a resolution that approves the corporate resolution and the project. All terms of the bond sale are negotiated among the appropriate parties and documents are prepared by bond and legal counsels.

The development corporation submits an application to the Office of the Governor, Economic Development and Tourism Division and the Attorney General simultaneously. However, the Attorney General will not provide final approval until they receive an approval letter from the Office of the Governor, Economic Development and Tourism Division. Tax exempt bonds may be required to make an application to the Texas Bond Review Board to receive an allocation under the state's volume cap. Once all approval have been granted, the development corporation can issue the bonds and finance the project from the proceeds.

Contact Information

Office of the Governor
Economic Development and Tourism
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936-0100
Fax: (512) 936-0520
www.governor.state.tx.us/divisions/ecodev/ed_bank/irb_program

Texas Industry Development Loan Program

Program Objective

The Texas Industry Development (TID) loan program provides capital to Texas communities and eligible 501(c)3 corporations at favorable market rates. The program supports eligible tax exempt public purpose projects that will stimulate economic development within the community. TID Program loans are available with low cost, variable rate long term financing with the term of the loan not extending beyond the useful life of the assets and up to bond maturity in 2025.

Eligible Projects

Eligible projects must meet the project definition as outlined in the Texas Industry Development Program Guidelines, Development Corporation Act of 1979 and all appropriate state and federal regulations as applicable to the program. Examples of public projects include: public facilities (i.e. libraries, police and fire stations, community administration buildings); community infrastructure (i.e. water, wastewater, drainage, streets); remediation on public land/facilities, and public transportation.

Contact Information

Office of the Governor
Economic Development and Tourism
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936-0100
Fax: (512) 936-0520

Texas Leverage Fund

The Texas Leverage Fund, introduced in 1992 as a community driven program, allows Economic Development Corporations (“EDC”), established pursuant to Section 4A and/or 4B of the Development Corporation Act of 1979 (“Act”), to leverage the economic development sales and use tax to expand economic development through business expansions, business recruitment and exporting. The program offers favorable terms designed to give communities quick access to capital to finance their economic development projects. Program participants must comply with

the project eligibility requirements established by the Act and these guidelines which are intended to ensure the continuity of the program and to expedite the review process.

Use of Proceeds

- Economic development projects must comply with requirements as defined in Section 4A and 4B of the Development Corporation Act of 1979.
- Funds can be utilized for bridge financing.

Loans

- Terms: 5-year, 10-year, 15-year, with no pre-payment penalty.
- Variable rate equal to the federal discount rate plus 3 percent.
- Borrowing amounts up to \$5,000,000, based on the municipality's historical sales tax revenue.
- Collateral is a first lien on the Economic development sales tax.
- Funding available within 60 days.

Contact Information

Office of the Governor
Economic Development and Tourism
Texas Leverage Fund Program
P.O. Box 12428
Austin, Texas 78711-2428
Phone: (512) 936.0100
Fax: (512) 936.0520
Web site: www.governor.state.tx.us/divisions/ecodev/ed_bank/leverage_fund/

The Texas Main Street Program

Downtown Revitalization

The Texas Main Street Program is an effort to revitalize central business districts through rehabilitation of historic commercial structures, combined with efforts to attract new businesses and re-invigorate existing businesses in downtown areas. The Texas Historical Commission (THC) administers this program. Cities that are not selected for official Main Street designation may also receive limited assistance through the program by being designated a “provisional Main Street city” by the Texas Main Street Program.

Texas Main Street Cities

Every year, the THC selects up to five cities for official designation under the Main Street Program. The program provides each of these cities with professional assistance and supervision for design, restoration, economic development, marketing, promotion and other assistance regarding the designated target area. To participate in the program, these cities must hire a full-time manager to coordinate the city's efforts. During the first year, the Main Street Program provides start-up assistance, including training of the program managers. After a city is selected for official status in the Main Street program, a three-day assessment of the community is

performed and a resource manual is produced which offers recommendations to revitalize the downtown. The program then encourages increased local initiative and offers economic development and architectural design assistance throughout participation in the program.

In addition to working with the cities under 50,000 in population, the Texas Historical Commission also assists “historic commercial neighborhoods” or “manageable downtown areas” in cities with populations exceeding 50,000. Under the Urban Main Street Program, these more populated areas receive aid similar to that available to the smaller cities. A public/private partnership between city government and a selected nonprofit group administers the program in these areas.

Along with technical assistance, officially designated Texas Main Street cities that are also non-entitlement cities (cities that do not receive HUD Community Development Block Grant funds) are eligible to apply for the Texas Capital Fund Main Street Improvements Grant. The Texas Capital Fund Main Street Improvements grant is designed to foster and stimulate economic development in the downtown area by providing financial assistance to *non-entitlement* cities for public infrastructure improvements. This program aids in the elimination of slum or blighted areas. Details of the grant are as follows:

USE OF PROCEEDS

Awards may be provided for construction of the following public infrastructure in the downtown-designated Main Street area:

- Acquisition of land needed for public infrastructure improvements
- Water and sewer facilities/lines
- Road/street construction/improvements
- Natural gas line construction/improvements
- Electric, telephone and fiber optic line construction/improvements
- Traffic signals and signs
- Drainage
- Sidewalk construction/improvements
- Public parking lot construction/improvements
- Other construction activities required to eliminate architectural barriers for the handicapped

Building rehabilitation, machinery and equipment acquisition and working capital are not eligible uses of proceeds.

ELIGIBILITY

Projects must meet the national objective of aiding in the elimination of slum or blighted areas. Only a city designated as an official Texas Main Street city by the Texas Historical Commission may submit an application for proposed improvements. The improvements must directly support the revitalization of the city’s designated Main Street area.

TERMS

Minimum awards are \$50,000

Maximum awards are \$150,000

Matching funds must be provided.

For more information on the Texas Capital Fund-Main Street Improvements grant, please contact Robert Johnson at (512) 463-4315.

Provisional Main Street Cities

Even if a city is not selected to participate as an official Texas Main Street city, it may receive limited assistance from the program by electing to become a provisional Main Street city. To do this, a city must hire a full-time program manager and have that manager trained by the Texas Main Street Program. The city must also meet certain other program requirements. These cities receive limited assistance in the form of Main Street training sessions, limited Main Street staff visits, economic development technical assistance, merchandising and storefront window display assistance, and help in locating the necessary professionals for design, marketing, parking, and other issues.

Status as a provisional Main Street city must be followed by application for status as an official Texas Main Street city in the subsequent year.

Details of Application and Administration

Before applying:

- Contact Main Street managers in other cities and set up tours of those areas for your community leaders. Also, meet with community leaders of previously designated Main Street cities to find out how the program worked in their communities.
- Hold a town meeting in which Main Street managers from other cities show slides and tell how the program has worked in their cities. The managers should explain the level of commitment and hard work needed to participate in the program.
- Bring a group of leading citizens to the annual state Main Street/Texas Downtown Association conference held in November.

Application for Main Street Designation

Electronic application forms are available on the Texas Historical Commission Web site at www.thc.state.tx.us/. The city manager or other designated city staff should complete the program application from the Texas Historical Commission and submit it by the last working day of July. Requests for copies of the application can also be made by calling (512) 463-6092.

For More Information

The Texas Historical Commission, Main Street office is open weekdays from 8:00 a.m. to 5:00 p.m. You may also write to the program staff at the following address:

Texas Historical Commission
Main Street Program
P.O. Box 12276
Austin, TX 78711

- Each November, the Texas Historical Commission and the Texas Downtown Association hold an annual conference which includes valuable information about the Main Street program. Call or write the director of the Main Street Program for more information on this event.
- A final source of information about the Main Street Program is its coordinator. You can contact the Main Street coordinator by sending correspondence to the Texas Historical Commission or by calling (512) 463-6092.

Texas Preservation Trust Fund Grant Program

Texans have inherited a wide array of historic architecture and archeological sites that reflect the diversity of all those who have called Texas home. The most serious problem facing historic preservation in Texas is the rapid deterioration and destruction of thousands of Texas' historic and pre-historic sites. To meet this challenge, the 71st Texas Legislature established the Texas Preservation Trust Fund (TPTF) in 1989. This interest-earning fund of public and private money is administered as matching grants to qualified applicants for the acquisition, survey, restoration, preservation or for the planning and educational activities leading to the preservation of historic architectural and archeological properties and associated collections of the State of Texas. Competitive grants are awarded on a one-to-one match basis and are paid as reimbursement of eligible expenses incurred during the project.

Applications will be available early each year to public or private entities for projects involving eligible historic properties, sites or projects. There are two steps in the grant application process. First, all applicants are required to submit brief application forms for the Texas Historical Commission (THC) to review prior to each year's deadline. The THC will select the highest priority projects from the initial applications and invite those applicants to move forward to the second step. Successful applicants will continue the process by submitting detailed project proposals and budgets. Full project proposals will be considered by the Commission in the fall of each year. The exact timetable will be published on the THC Web site as grant cycles are announced.

The Texas Preservation Trust Fund Grant program is an opportunity to save and protect Texas' threatened historic structures and significant archeological sites. For additional information and to be placed on the grant application mailing list, please contact:

Texas Historical Commission
Architecture Division
P.O. Box 12276
Austin, TX 78711
(512) 463-6094
Web site: www.thc.state.tx.us.

Texas Historic Courthouse Preservation Program

The Texas Historical Commission (THC) announced in June 1999 that the Texas Legislature and Gov. George W. Bush had established, through House Bill (HB) 1341, the Texas Historic Courthouse Preservation Program. The program provides partial matching grants to Texas counties for the restoration of their historic county courthouses. The program began with a \$50 million appropriation for the grants, which were awarded in two rounds.

In 2001, legislators approved another \$50 million allocation to fund Round 3 grants. In 2003, the 78th Texas Legislature approved the sale of \$45 million in bonds to continue the program. In 2005, the legislature earmarked \$80 million for courthouses from the federal transportation enhancement program; however, these funds were not approved for use by the Federal Highway Administration. During the recent 80th Texas legislative session, \$62 million was appropriated for this program to fund Round 5 grants.

To participate in the grant program, counties must submit a Master Preservation Plan for preserving and maintaining their historic county courthouse. Once submitted, this plan will be reviewed and may either be accepted, with suggested changes made and resubmitted, or rejected. Upon final approval of the Master Preservation Plan, a grant application may be submitted.

The THC awarded in January 2008 matching grants for Round 5 totaling nearly \$56 million to 17 Texas counties to help preserve their historic courthouses. Additional funding has been set aside for program contingencies, emergency and potential planning work and will be allocated later to address specific projects' needs.

For additional information, please contact:
Texas Historical Commission
Architecture Division
P.O. Box 12276
Austin, TX 78711
(512) 463-6094
Web site: www.thc.state.tx.us.

Texas Water Development Board

Financial Assistance Programs

Federally Subsidized Programs

Clean Water State Revolving Fund (CWSRF) provides loans for wastewater related projects at interest rates lower than the commercial markets offer. The CWSRF also includes disadvantaged community funds that provide even lower interest rates for applicants meeting the respective criteria.

Drinking Water State Revolving Fund (DWSRF) provides loans at interest rates lower than the commercial markets offer to finance projects for public drinking water systems that facilitate compliance with primary drinking water regulations, or otherwise significantly further the health protection objectives of the Federal Safe Drinking Water Act. The DWSRF also has disadvantaged community funds that provide partial loan forgiveness and even lower interest rates for applicants meeting the respective criteria.

State Programs

Texas Water Development Fund (TWDF) is a state loan program that does not receive federal subsidies, and is a very streamlined program. The program includes loans for water supply, water quality enhancement, flood control and municipal solid waste. The TWDF enables the Texas Water Development Board (TWDB) to fund multiple eligible components in one loan.

State Participation enables the State to assume a temporary ownership interest in a regional project when the local sponsors are unable to assume debt for the optimally sized facility. The loan repayments that would have been required, if the assistance had been from a conventional loan, are deferred. The cost of the funding is repaid to the TWDB based upon purchase payments, which allows the TWDB to recover its principal, interest costs, issuance and related expenses; however, repayment is on a deferred timetable.

Water Infrastructure Fund (WIF) is a state loan program that offers subsidized interest rates on financial assistance for the planning, design and construction of State Water Plan projects. The 80th Texas Legislature (2007) appropriated funding to enable issuance of \$440 million in bonds for WIF to fund water plan projects through the current biennium. This amount is estimated to meet a portion of the water supply needs identified in the 2007 State Water Plan through 2020. Additional funds will need future state legislative authorization to meet the additional water supply needs through the 2060 planning horizon.

Rural Area Assistance

Rural Water Assistance Fund (RWAF) small rural water utilities with low cost financing for water and wastewater construction projects. The TWDB offers attractive interest rate loans with short and long-term finance options at tax exempt rates. Funding through this program gives an

added benefit to Nonprofit Water Supply Corporations, as construction costs qualify for sales tax exemption.

For more information regarding these and other financial assistance available, please visit the Web site below:

www.twdb.state.tx.us/assistance/financial/financial_main.asp

Financial Assistance For Special Needs:

- Agricultural Water Conservation Loan, Grant and Linked Deposit Program
- Colonia and Community Self-Help Program
- Economically Distressed Areas Program
- Federal Emergency Management Agency Flood Mitigation Assistance
- Groundwater District Loan Program
- Nonpoint Source Pollution Loan and Estuary Management Program (of the CWSRF)
- Regional Water Planning/Grants
- Water Research Grant Program

For more information on any of TWDB's financial assistance programs listed, please visit the Web site below:

www.twdb.state.tx.us/assistance/financial/financial_main.asp

The Certified Local Government (CLG) Program

A Local Government Initiative

The CLG Program is a federally-funded matching grant program that is offered to participating local governments by the National Park Service, and is administered in each state through their State Historic Preservation Office (SHPO). The Texas Historical Commission (THC) serves as the Texas State Historic Preservation Office. The CLG program is part of the THC's Community Heritage Development Division. The purpose of the program is to assist towns, cities, municipalities and county governments to develop and sustain a strong preservation ethic that influences zoning, permit and community development decisions.

Over 1,228 local governments participate in the program nationwide and are eligible to apply to their SHPO for small CLG subgrants representing a minimum of ten percent of the federal funds allocated to their State each year from the U.S. Congress toward local preservation efforts. In FY 2008, the total amount of funding CLGs received through subgrants was approximately \$4 million. Since 1985, more than \$40 million in federal funds has been allocated to the Certified Local Government program.

In Texas, CLG subgrants typically range from \$250 to \$30,000. Projects eligible for funding and the criteria used to select them are developed annually by the SHPO. Funding decisions are made

by the State not NPS. Among the kinds of activities funded are as follows: architectural, historical, archeological surveys; oral histories; nominations to the National Register of Historic Places; staff work for historic preservation commissions; design guidelines and preservation plans; public outreach materials such as publications, videos, exhibits, and brochures; training for commission members and staff; and rehabilitation or restoration of National Register listed properties. CLG subgrant applications are available in April and due in June summer each year.

To become a certified participating community, learn more about the benefits and requirements of the program please refer to the *Preserving Your Community's Heritage through Certified Local Government Program* handbook that is available on the THC Web site.

For more information or to request a CLG grant application, contact the CLG program state coordinator at (512) 463-5997 or visit www.nps.gov

Visionaries in Preservation Program

In the past, Historic Preservation was not normally associated with economic development. As communities mitigate market and workforce change, historic town centers and surrounding historic neighborhoods are now acquiring new markets.

Traditional communities that offer authenticity, quality and a genuine sense of history and place are becoming more desirable. When a community harnesses and reutilizes existing historic infrastructure a powerful economic engine is started. New residents attracted to historic communities invest and rehabilitate homes and businesses. A built-in market develops and its needs are met locally. Businesses are formed to meet this local market's needs. Industry takes notice of the quality of life afforded in the community and detects that a stable workforce is available, making the community or region more attractive to industry investment. Heritage tourism, new residents and associated investments help form part of a holistic approach to the community's tax base that utilizes already existing infrastructure and embedded history. The more a community plans with its historic and natural assets in mind the more desirable and economically viable it becomes.

The Texas Historical Commissions (THC) Visionaries in Preservation (VIP) program empowers Texas communities to shape the future of their historic preservation efforts through visioning and planning, and provides training and assistance tailored to achieve local preservation goals. Preserving a community's heritage doesn't just save a part of the past. Historic preservation is a vital part of a promising future. It creates new jobs, provides affordable quality housing, increases economic development and revitalizes downtown business districts. Importantly it re-instills pride in citizens, and reconnects social networks that help support communities. VIP helps communities develop a path to capture these benefits. The program is modeled after an innovative planning process known as "visioning." Visioning is a tool that brings a community together to develop a shared image of the future and form an action plan for achieving that vision. The process is based on four simple, yet often overlooked, questions: Where are we now? Where are we going? Where do we want to be? How can we get there?