

A Tale of Three Cities

TEXAS CITY ATTORNEY'S ASSOCIATION
2014 Summer Conference
June 18-20, 2014
Isla Grand Beach Resort, South Padre Island

Presented by:



J. Grady Randle
Christopher L. Nichols
Timothy B. Kirwin
Catarina G. Cron
Byron L. Brown
820 Gessner Rd., Suite 1570
Houston, Texas 77024
Telephone: 281/657-2000
Facsimile: 832/476-9554
<http://www.jgradyrandlepc.com>



BIOGRAPHIES:

J. Grady Randle

Grady bleeds green and gold having graduated from Baylor University with a degree in Real Estate in 1980 and a law degree in 1983. It is rumored that he minored in sarcasm. Unlike Scott Houston, Grady did not study law in Argentina, however, he did shoot 3,000 doves in one day down there. A 7th generation rancher, he figuratively, but not literally, cut his teeth learning how to castrate and dehorn cattle, a talent he has called on frequently while representing cities. After having "hung up his boots" and put on his wing tips, Grady has successfully tried and argued numerous cases throughout Texas Trial Courts, Appellate Courts and the Texas Supreme Court and gave it the "good ole college try" before the 5th Circuit. After 31 years of practice, Grady is too tired and impatient to list any other accomplishments and spends his time representing cities at least 45 miles from his office because he loves Houston traffic and generally feels quietly smug about Baylor's Heisman trophy winner as opposed to that young pup 90 miles south.

Christopher L. Nichols

Chris grew up in a small northeast Texas town nestled deep behind the piney curtain but escaped to the big city of Waco where he earned a Bachelor of Arts degree from Baylor in Psychology with a minor in argumentation and rhetoric (that's private school lingo for "Speech"). Having outgrown Waco after four years, Chris expanded his horizons to the big city of Lubbock where earned a law degree from Texas Tech in 2001. It should be noted that he has an extensive collection of tools that can remove red dirt from anywhere. Chris has been putting up with Grady (see above) for over seven years during which time he has counseled local Texas cities in all areas of municipal law. Chris is currently the City Attorney for Oak Ridge North and is admitted to the practice of law in Texas, the U.S. District Court for the Southern District of Texas, the U.S. Court of Appeals for the Fifth Circuit, and the U.S. Supreme Court. When not lawyering, Chris works on his Scott Houston impressions by incorporating the word "dude" in every sentence.

Timothy B. Kirwin

Timothy Kirwin graduated from the University of Houston Law Center in 2006 and went to work for the City of Missouri City as Assistant City Attorney and Municipal Court Prosecutor. Mr. Kirwin spent 3 years with the City before moving to the private sector with the Randle Law Office. Mr. Kirwin is the City Attorney for the Village of Surfside Beach and the City of Hardin. He received the Houston Business Journals 40 under 40 Award in 2012 and has held the TCAA merit certification in Municipal Law since 2009. In addition to his City Attorney work, Mr. Kirwin serves as Associate Municipal Court Judge for the City of Hedwig Village. While Mr. Kirwin has NOT received the Texas Bar Government Lawyers Section "Outstanding Government Lawyer of the Year of Award" like Scott Houston, Mr. Kirwin can hula-hoop and throw a yo-yo at the same time. Checkmate Mr. Houston!

Catarina G. Cron

Catarina graduated from Trinity University in Washington, DC, which includes among its alumni the "celebrated" Kathleen Sebelius, 21st U.S. Secretary of Health and Human Services, with a degree in Political Science. She studied law in England (but never learned to speak the language) and the Netherlands (where she never inhaled) before receiving her law degree from St. John's University in New York where she was a member of the Criminal Justice Journal. She was also a visiting student at the University of Texas at Austin where she was a member of the American Journal of Criminal Law. She recently completed a LLM in Energy, Environmental and Natural Resources law at the University of Houston. Catarina is currently an Associate with Randle Nation, where she provides advice to a number of cities on all areas of municipal law, including how to obtain presale codes for Austin City Limits tickets. Prior to joining "the Nation", Catarina was the Director of Environmental Issues to the Harris County Judge. In 2011, Catarina received the Houston Business Journal's "40 under 40" award and the League of Women Voter's "Rising Star" award. She currently serves as a member of the Board of Directors of the Spay Neutering Assistance Program. Catarina is licensed to practice law in Texas and New York. She plans to obtain degrees in Physics and Theology in the near future and continue the expansion of her Scott Houston bobble-head collection.*

Byron L. Brown

Byron earned a degree in criminal justice from the University of Texas at San Antonio while aspiring to become a Special Agent with the FBI. However, after graduating and learning how many sit-ups were involved, he decided to become a lawyer instead. With a law degree conferred upon him by the University of Houston Law Center, Byron joined Randle Law Office before the ink on his license had dried; and, despite having just celebrated his first anniversary at Randle Law Office, he has worked on a panoply of municipal issues. When he is not working, he enjoys binge watching concluded television series on Netflix and hunting ammo. One day, Byron aspires to write an intellectual paper, say on annexation or something of the sort, and then repurpose it with a new cover page every few years and claim it as new material.

WE



* The thing about the bobble-head collection is really true. Kinda creepy..

DISCLOSURE

Portions of this paper have been previously published, distributed or presented at various professional seminars or conferences by their respective authors or other presenters. The authors of this compilation claim no copyright to subject matter contained within quotations of portions of court decisions or material subject to a prior copyright. The authors' interpretation, summaries and comments are respectively their own. Quotations from various court decisions may omit internal references to other cases, footnotes or related punctuation.

This paper is solely intended for the general education and information of the reader, and should not in any way serve or substitute for legal advice. No attorney-client relationship is created by obtaining, reading or interpreting the information in this paper. Readers needing advice on specific legal matters pertaining to specific factual scenarios should seek engage their own legal counsel of choice.

A Tale of Three Cities

I've been rich and I've been poor; rich is better.¹

I. Introduction - Defining economic development and its scope.

Our goal for this paper is two-fold: (1) to identify some of the lesser known economic development tools in the proverbial toolbox and to discuss how we have used them with our municipal clients, and (2) to take a fresh look at more frequently used economic development tools and explain how they may be more creatively used. Within that construct, it is also important to define exactly what economic development is and the scope with which it can be applied.

First - what is economic development? Dan Gorin, who is an Economist/Policy Analyst on the Board of Governors of the Federal Reserve System, once characterized economic development as the intent to induce capital investment in a jurisdiction where investment might not otherwise take place.² While this definition probably would apply to anyone who thinks about the topic of economic development in their respective city, for the purpose of this paper, we suggest that economic development is

¹ Mae West, on economic development (not really, but why else attract economic development?)

² Dan Gorin, "Economic Development Incentives: Research Approaches and Current Views," *Federal Reserve Bulletin*, vol. 94, 2008.

not just the inducement of new investment in our cities using whatever combination of incentive packages available.

Second, economic development can be more than just new investment - it can be economic *reinvestment* that yields new tax dollars, it can be economic *retention* that retains existing tax dollars, it can be economic *mitigation* that identifies lost tax dollars that are not being reported and rendered properly, it can even economic *redirection* through the use of creative land use regulations. In other words, economic development is not just a city's ability to attract that new big box retail store or restaurant chain, but it is also a city's ability to rejuvenate its existing tax base and direct its (re)development.

We understand that not every tool discussed in this paper will be useful in your respective cities, nor is every tool discussed here. Every city has its own unique strengths and for some cities that neighbor one another, those strengths may be more similar than different. Some cities have healthy tax bases, some have attractive geographic locations, while others are able to benefit from the synergy of their neighbor's explosive growth. Whatever your strength, your city's economic development program should create an environment that maximizes its strengths by leveraging them to achieve the greatest possible success.

In that vein we have taken the approach, as studies have shown that if the information in story form can be related to a personal experience of the listener, it is more likely to be retained. Consequently and with a play on the title of Charles Dicken's famous book "A Tale of Two Cities" we hope to relate some "quaint and curious volumes of forgotten lore" (to through in some Edgar Allen Poe) for economic development stories we have experienced in three cities in Texas but not Paris or London. With that, we begin our discussion with the residential sector.

II. Residential Economic Development.

A quick glance through the Texas statutes or even an internet search engine provides many economic development tools for a city to utilize for attracting and retaining new commercial, retail, and industrial business. A city that desires to attract new residential development into the city's corporate limits or its extraterritorial jurisdiction (ETJ), or to rehabilitate existing residential structures, does not have the same arsenal of economic development tools it does for attracting business enterprises. This part of the paper is dedicated to providing information regarding a unique law that allows certain cities and special districts to potentially increase their tax base. Additionally, a unique look at an old

law provides a city with the framework necessary to revitalize its housing stock. Finally, this discussion paper will detail a real world example of how the use of developments agreements can attract new residential development and lend our insight on what not to do.

A. Reimposing sales and use tax on residential use of gas and electricity.

It is almost a given that cities are always interested in new ways to collect more sales tax dollars, but rarely (if ever) do cities think about this in the context of residential sales and use taxes. Generally, state law prohibits the imposition of a local sales and use tax on the residential use of natural gas and electricity. However, there are approximately 144 Texas cities that may be eligible to *reimpose* a sales and use tax on the residential use of natural gas and electricity.^{3,4}

1. **Eligibility and procedure.** To be eligible to reimpose a local sales and use tax on the residential use of natural gas and electricity, the Tax Code provides that the "governing body of a municipality that has adopted the taxes authorized by this chapter before May 1, 1979, and in which residential use of gas and electricity is exempted within the municipality, may reimpose the taxes on gas and electricity for

³ See Appendix "A" for a list of Texas cities that may be eligible to reimpose this tax according to the Texas Comptroller of Public Accounts.

⁴ See 34 Tex. Admin. Code §3.378; Tex. Tax Code § 321.105.

residential use by ordinance adopted by a vote of the majority of the membership of the governing body and entered in the municipal minutes.”⁵ No election or public hearing is required to reimpose this tax.

It should be noted that both the Tax Code and the Texas Administrative Code provides procedures for adopting this tax. However, Texas Administrative Code uses the language “majority vote of the membership of the governing body” when detailing the number of council members that must approve the reimposition. Since the language does not state the “majority of the governing body present” at the meeting in which such vote occurs a city that desires to reimpose the tax should ensure that a “majority vote of the membership of the governing body” passes such ordinance and not simply a majority of the governing body present at the meeting when the ordinance is considered and adopted.⁶

If the ordinance passes, the City Secretary shall forward the ordinance by registered or certified mail to the Texas Comptroller.⁷ Once the Comptroller receives the ordinance, one (1) whole calendar quarter must elapse before the reimposition of the tax becomes effective.⁸ Thereafter, the reimposition of

⁵ Tax Code §321.105.

⁶ 34 Tex. Admin. Code § 3.378(b)(2)(D).

⁷ *Id.*

⁸ *Id.*

the tax shall apply to each regular monthly billing period after the reimposition becomes effective.⁹ Notwithstanding the whole calendar quarter waiting period, it should be noted that if the reimposition of the tax becomes effective during a regular monthly billing period, the tax cannot be collected for that month, but instead shall be collected the next billing period month.¹⁰

2. Possible results and benefits from the reimposition of the tax. For one Type-A general law city that recently reimposed the sales and use tax on approximately 1,100 homes, the city expects to collect approximately \$20,000 in revenue from electricity sales and use tax during the next fiscal year. One direct benefit to reimposing the sales and use tax base is the city might then not have to raise property taxes to increase its bottom line. Later down the road if the city decides to discontinue collecting this tax by repealing the reimposition ordinance, it must notify the Texas Comptroller of its repeal.¹¹ Moreover, since the law specifies that the votes of the city council members be recorded in the minutes, we recommend a record vote be taken much like when the city adopts a budget and the minutes that reflect the vote be sent to the Texas Comptroller along with the ordinance.

⁹ *Id.* § 3.378(b)(2)(E).

¹⁰ *See id.* §§ 3.371-.379.

¹¹ *See* Appendix "B" for a sample ordinance reimposing the sales and use tax.

3. **Special districts.** In addition to the specific cities previously identified that may reimpose the tax, the legislature has authorized certain special districts to impose such tax as of 2010.¹² Under Section 321.1055 of the Texas Tax Code, a fire control, prevention, and emergency services district or crime control and prevention district that is located in all or part of a city that imposes such a tax on residential use of natural gas and electricity may impose such a tax as well on "receipts from the sale, production, distribution, lease, or rental of, and the use, storage, or other consumption within the district of, gas and electricity for residential use."¹³

Using a procedure similar to that used by those eligible cities identified herein, the special district shall pass as an order or resolution, provide a copy of such order or resolution to the Texas Comptroller as well as the applicable gas and electrical providers, and publish the order or resolution to impose the tax.¹⁴ It should be noted that the special district's ability to collect the tax is directly tied and dependent upon the city's collection of the tax. If the city either does not collect such tax or ceases to collect such tax in the future,

¹² See Tex. Tax Code § 321.1055.

¹³ *Id.*

¹⁴ *Id.*

then the special district's ability to collect the tax terminates as well.¹⁵

Sixteen (16) special districts have imposed the tax, but there are approximately twenty (20) special districts that are still eligible to impose the tax and have not. We have provided a copy of the list of the eligible special districts that are authorized to impose such tax as determined by the Texas Comptroller with the paper.¹⁶

B. A new look at old law: revitalizing a city's property tax base.

Almost every city in Texas and across the country witnessed an uptick in foreclosures, abandoned homes, and substandard structures over the last few years. The amount of property tax a city collects is tied to the value of the home, and a decrease in home values affects the city's bottom line.

One city we work with is taking a look at the ways to use an old law to rehabilitate depressed residential properties through the use of Chapter 373 of the Texas Local Government Code, also referred to as the Texas Community Development Act of 1975.

Chapter 373 is broad in its scope as residential, commercial, industrial, and community facilities are all on the

¹⁵ *Id.*

¹⁶ See Appendix "C" for a sample resolution imposing the sales and use tax. See Appendix "D" for a list of Special Districts that may be eligible to reimpose this tax according to the Texas Comptroller for Public Accounts.

table for redevelopment. Moreover, the city's ability to provide aid and participate in the redevelopment process is also broad and sweeping in that a city may partner with public, private, for-profit, and not-for profit entities to achieve community redevelopment goals.

1. Adopt a Program First!

First, a city is required to formally adopt a community development program which is the power that allows a city to do what it desires to do within the framework of the chapter.¹⁷ Chapter 373 provides 18 ways in which the city may utilize the redevelopment process which include the following:

- acquisition of real property;
- acquisition and construction of public improvements;
- municipal code enforcement initiatives;
- demolition and rehabilitation;
- rehabilitation of privately owned properties;
- mobility assistance;
- payments for losses of rental income;
- disposition, by sale, lease, donation, or otherwise, of real property acquired or the retention of the property for public purposes;
- provision of public services not otherwise available if the services are designed to

¹⁷ See Tex. Loc. Gov't Code § 373.005.

improve the community's public services and facilities;

- payment of the nonfederal share required in connection with a federal grant-in-aid program;
- payment of the cost of completing certain federally funded projects;
- relocation payments;
- activities necessary to develop and implement a program;
- payment of program administrative costs;
- certain activities that are conducted by public or private entities if the activities are necessary or appropriate;
- grants;
- assistance to private, for-profit entities to carry out a project; and
- rehabilitation or development of housing under Section 17 of the United States Housing Act of 1937.

2. **Case example.** Using the enumerated list above, and specifically employing the sections highlighted, a city desires to rehabilitate blighted residential homes with the goal being to return the structure to a habitable state, protect the health, safety, and welfare of neighboring inhabitants, reduce the need for code enforcement initiatives, increase property values, and reduce crimes such as trespass and graffiti. The city proposes to acquire the property, rehabilitate it, and properly dispose of it. With respect to the 18 powers

identified above, a city must always comply with the following requirements discussed below.

Chapter 373 allows a city to acquire real property with the caveat that such acquisition cannot result from the city's use of its condemnation powers. Section 373.077 provides in pertinent part as follows:

Sec. 373.007. LIMITATION ON MUNICIPAL POWERS; EFFECT ON URBAN RENEWAL. (a) This chapter does not grant a municipality the power of condemnation to rehabilitate or remove buildings or to acquire real property for the purpose of resale.

As a practice tip, for any transaction where the city will be acquiring real property, we recommend incorporating language where the parties explicitly agree that the city is not acquiring the real property by virtue of its condemnation power.

Presently, the city we are working with is in the early phases of drafting its program guidelines for adoption by the city council. But before the hammers begin to swing, the city must adhere to several procedural steps to ensure compliance with state law. According to Section 373.006, the city must also:

- identify the blighted or slum areas;
- adopt an ordinance or resolution which provides for a plan in which citizen comments are solicited regarding the community redevelopment program;

- conduct public hearings regarding the community redevelopment program, which such hearings shall occur before the 15th day before the date the city council considers adoption of the community redevelopment program; and
- adopt the community redevelopment program via ordinance or resolution.

3. **Considerations of the City.** Adopting a program is one thing; implementing it is another. A city that desires to undertake this type of community redevelopment must be cognizant of several realities. First, the city will need funds to pay for the acquisition and eventual rehabilitation of the property. Acquisition will likely involve all the customary steps in purchasing real property including opening title, dealing with relators, and closing. Second, the city will need to address whether city staff or outside contractors will perform the rehabilitation work. Third, the city must decide how best to dispose of the property once it has been rehabilitated.

4. **Identifying "areas" in need.** The statute requires the city to identify blighted areas in need of redevelopment. Large cities may not have an issue with identifying and pinpointing an area in need of city assistance and redevelopment initiatives, but how do small cities identify such? For example, a Type-A general law city which is one square

mile in total size may have several blighted structures distributed throughout the city but not a real pocket where the problem is concentrated. Can city council identify the entire city, a particular street, or a particular subdivision as a blighted area in order to "establish community development program areas in which community development activities, building rehabilitation, or the acquisition of privately owned buildings or land is purchased"?¹⁸

Chapter 373 does not define "area" or provide a requirement for how large or small an area must be for proposed redevelopment. Smaller cities must think carefully about how to define the "area" that will be targeted to receive the benefit of the city's redevelopment program.

5. **Public hearing or hearings?** The law provides that the city must conduct "public hearings" regarding the community redevelopment program and requires that two public hearings must occur before the 15th day before the date of its final adoption by the city council adopts the program.; although the plural form of the word "hearings" is used in the statute, there is no requirement that they be separated by a specific number of days. Therefore, the hearings could conceivable be held on the same day, one following another, in order to meet

¹⁸ Tex. Loc. Gov't Code § 373.006.

the two (2) public hearings requirement for the community redevelopment program. Nevertheless, both public hearings must be set before the 15th day before city council adopts the program.

6. **What about immunity?** One issue that city attorneys will need to address when utilizing Chapter 373 is immunity. Texas Civil Practices and Remedies Code, Section 101.0215(a)(34) defines community development and urban renewal activities undertaken by a city under Chapter 373 as governmental functions, but no waiver of immunity for such activities is provided.¹⁹ A recent case out of the Court of Appeals, Fourth District, highlights the effect on a city that failed to follow the statute and lost on its plea to the jurisdiction.²⁰ In this case, a monument in the City of Rio Grande was in need of repair.²¹ The city argued that the repair work constituted park maintenance, a government function under the Texas Civil Practices and Remedies Code Section 101.0125 (a)(13), for which no waiver of immunity from suit is provided. The city argued in the alternative that the repair work constituted community development or urban renewal activities under Texas Civil Practices and Remedies Code, Section

¹⁹ See Tex. Civ. Prac. & Rem. Code § 101.0215(a)-(b).

²⁰ See *City of Rio Grande City v. Herrera*, 2013 Tex. App. LEXIS 335 (Tex. App.—San Antonio Jan. 16, 2013, pet. denied).

²¹ *Id.* at *2.

101.0215(a)(34).²² The Court held that there was a fact dispute as to whether or not the monument could be classified as a park and whether the city's governmental or propriety functions were triggered.²³ Moreover, because the city's Economic Development Corporation and not the city itself, contracted with the repair company to perform the work, the city did not retain its immunity from suit under 101.0125. The Court stated, "The Code requires a municipality to undertake these community development or urban renewal activities to constitute a governmental function. However, in its briefing and during oral argument, the City's counsel stated Noel Garcia was retained to stabilize the monument by the City of Rio Grande City Economic Development Corporation, not by the City. Therefore, we hold the City has failed to conclusively establish, as a matter of law, that the monument's repair constitutes a governmental function." Accordingly, the court held that the trial court correctly denied the city's plea to the jurisdiction.²⁴ The cautionary tale here is that a city must strictly adhere to the procedural requirements set for by Chapter 373 or risk losing its immunity.²⁵

²² *Id.* at *13.

²³ *Id.*

²⁴ *Id.* at *13-14 (internal citation omitted).

²⁵ *Cf. E. Houston Estate Apts., L.L.C. v. City of Houston*, 294 S.W.3d 723 (Tex. App.-Houston [1st Dist.] 2009, no pet.) (holding that the City of Houston did comply with the procedures set forth by Texas Local Government

The community development plan model is not just applicable to a residential model, and is discussed in the industrial context in Section IV of this paper.²⁶

C. Extraterritorial development agreements under Texas Local Government Code Section 212.172: attracting new residential development through public-private cooperation.

Development agreements between a city and developer are not a new or unique economic development tool, but there are some new ways cities can use these agreements to attract new residential development, provide for stable regulations, and ensure quality development. This portion of the paper focuses primarily on developments agreements authorized by Section 212.172 of the Texas Local Government Code, their application, and drafting tips for the unwary.

1. **Case example.** Consider a city that is positioned geographically such that new residential development is pouring into the city and its extraterritorial jurisdiction (ETJ). Over the past few years, the city has executed half a dozen or so development agreements with residential developers and has about that same amount in various stages of negotiations now. Many of

Code, Chapter 373, when adopting a Community Development Program under such chapter, and thus the City retained its immunity from suit). In *E. Houston Estate Apts., L.L.C.*, the City of Houston contracted with an apartment owner to rehabilitate housing units and to provide for certain amount of affordable housing. The City's revenue source for such rehabilitation came from the federal government's HOME program.

²⁶ See Appendix "E" for examples of an Ordinance calling public hearings to consider a community development plan, the public notice, and an Ordinance authorizing the creation and adoption of a community development plan.

these agreements cover several hundred acres of master-planned development; therefore, as large portions of the city's ETJ is dedicated to these large scale developments, it is crucial that the city place safeguards in these agreements to ensure viable, long term development. Our experience, both good and bad, has yielded some of these drafting tips for development agreements.

2. **Drafting tips.**

a. ***Ensure that the city's subdivision and sign ordinances are current.*** The city in this case, recently re-wrote both its subdivision and sign ordinances. The prior ordinances were outdated and left the city exposed to development it did not desire. In re-writing these cornerstone ordinances, the city brought stakeholders to the table. City staff and its legal counsel, a member of city council, a member of the planning commission, and developers met in committee meetings to discuss, debate, and formulate a draft of these two ordinances for city council approval.

Having members of the development community participate was extremely valuable. The concerns raised by the development community in drafting regulations helped to address concerns early on and allowed the city and the developers to come to a solution that both sides felt comfortable with recommending to the city council.

As the subdivision and sign ordinances are applicable to the city's ETJ and incorporated into the development agreements, having this public-private dialogue made entering into these agreements much easier.

Developers may not like certain city regulations, but they do desire consistent, understandable regulations. And while there will never be 100% agreement regarding regulations, having developers participate in the ordinance process shuts down potential complaints later.

b. *Discuss exactions with the developer early.*

Sophisticated developers understand the need to mitigate the impact of the development being proposed; however, the city should meet with developers early on in the planning process and early in the drafting of the development agreement(s) to ensure that both parties are on the same page regarding city exactions.

Texas Local Government Code Section 212.904 addresses how a city is to address exactions. The city engineer is to make an individualized determination of the developer's portion of the costs which may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development. The problem with this statute deals with timing. The statute is vague as to when the city must undertake such analysis. If a preliminary plat is submitted and

the city requires certain dedications (exactions), the city will have very little time between plat submittal and acceptance or disapproval by the city to make such determinations. A recent case highlights the many exactions that a city may make on a developer and the level of analysis that must go into each. In *Mira Mar Dev. Corp. v. City of Coppel*, 421 S.W.3d 74, (Tex.App.-Dallas 2013, no pet. h.), the city required eleven exactions from the developers. Failure by the city to follow the requirements of Section 212.904, left the city exposed and compensating the developer for a taking. The Court addressed each exaction and found whether or not the city made an individualized determination that the exaction was roughly proportionate to the proposed development. There were several city exactions that the Court found to be a compensable taking.²⁷

This case is a good example of "how to" and "how not to" conduct an exaction analysis as well as a good example of how to conduct an appeal of the city's exaction determination.

At the development agreement process, the city and developer can work out all exaction issues. In fact, the amount of exactions asked by the city is rarely an issue with developers, but when it is an issue it can potentially be a major sticking point.

²⁷ See *Mira Mar Dev. Corp. v. City of Coppel*, 421 S.W.3d 74, (Tex. App.-Dallas 2013, no pet. h.)(discussing the existence of an essential nexus and rough proportionality as to each of the eleven exactions).

Either way, we recommend that development agreements contain language that the developer consents to all city exactions and that such are roughly proportionate to the proposed development.

c. *Municipal utility district consent conditions.*

The city in this example does not have adequate water or wastewater facilities to serve new development. Developers often ask the city for the consent to form a Municipal Utility District (MUD) in the city's ETJ. In order to create a MUD in the city's ETJ, the city's consent is required, but if the city fails to give its consent, there is a mechanism for the MUD to be created anyway in the ETJ.²⁸ The city is statutorily restricted somewhat in what consent conditions it can place on a non-city service district, but such restrictions are not applicable to city service districts. Either way, the city should use all the power granted to place favorable restrictions on the MUD creation. For example, the statute allows the city to place the following consent conditions on the MUD:

that the district construct all facilities to serve the land in accordance with plans and specifications which have been approved by the city. The city may also provide in its written consent that the city shall have the right to inspect all facilities being constructed by a district. The city's consent to the inclusion of land in the

²⁸ See Tex. Water Code § 54.016.

district may also contain restrictions on the terms and provisions of the district's bonds and notes issued to provide service to the land and conditions on the sale of the district's bonds and notes, if the restrictions and conditions do not generally render the bonds and notes of districts in the city's extraterritorial jurisdiction unmarketable. The city's consent to the inclusion of land in a district may restrict the purposes for which a district may issue bonds to the purposes of the purchase, construction, acquisition, repair, extension and improvement of land, easements, works, improvements, facilities, plants, equipment and appliances necessary to:

(1) provide a water supply for municipal uses, domestic uses and commercial purposes;

(2) collect, transport, process, dispose of and control all domestic, industrial or communal wastes whether in fluid, solid or composite state; and

(3) gather, conduct, divert and control local storm water or other local harmful excesses of water in the district and the payment of organization expenses, operation expenses during construction and interest during construction.²⁹

d. Anticipate commercial development through a strategic partnership agreement. While most of the development in the case example deals with residential development, almost all development contains some commercial acreage. The city will want to reach the sales tax dollars in the ETJ. The development agreement should contain language that anticipates the need to

²⁹ *Id.* § 54.016(e).

capture sales tax dollars at some future date and leverage assistance from the developer to create a partnership between the MUD and the city memorialized in the form of a strategic partnership agreement.³⁰ Section 43.0751(k) provides as follows, "A municipality that has annexed all or part of a district for limited purposes under this section may impose a sales and use tax within the boundaries of the part of the district that is annexed for limited purposes." As an incentive to carve out commercial space within the proposed development, cities often reimburse a portion of the captured sales tax. Here is sample language used successfully in a development agreement:

Section 4.02 Limited Purpose Annexation. The Developer agrees that, upon the request of the City, the Developer shall facilitate an agreement with MUD ### to enter into a strategic partnership agreement (the "Strategic Partnership Agreement") in accordance with Section 43.0751 of the Texas Local Government Code (the "Act") and this Section 4.02. The Strategic Partnership Agreement shall provide that (i) tracts used for commercial shall be annexed by the City for limited purposes; and (ii) the City shall impose a sales and use tax within such commercial tracts pursuant to subsection (k) of the Act."

Cities develop a reputation quickly as to whether they work well or not with the development community. We have worked for cities that truly strive to work with developers and take their

³⁰ Tex. Loc. Gov't Code § 43.0751(k).

concerns into account when drafting ordinances and development agreements. We have also worked with cities that are less team oriented. The city can get the developer to agree to many provisions that benefit the city when working in a cooperative environment.

III. Commercial & Retail Economic Development & Retention.

A. Chapter 380 agreements for revenue, performance, and reimbursement.

Local Government Code Chapter 380 offers perhaps the most versatile of all modern economic development tools. Its beauty lies in its simplicity and its brevity. Consisting of only three sections, Chapter 380 affords municipalities great latitude to make loans or grants of public money or to provide city staff, facilities, or services at below market value or at no cost at all.

This discussion focuses on the main provision of Chapter 380, which applies to all municipalities for the purpose of economic development within the municipality.³¹ However, Chapter 380 contains additional provisions, beyond the scope of this discussion, which apply only to certain municipalities for the purpose of economic development within the state.³²

³¹ Tex. Loc. Gov't Code § 380.001.

³² *Id.* § 380.002.

The main provision of Chapter 380 authorizes municipalities to establish and administer "one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality."³³ The municipality may either use city staff or contract with another entity to administer the program.³⁴ Furthermore, there are no restrictions on the source of funds used to establish and administer the program.³⁵

Since Chapter 380 prescribes only the purpose of the required program, and not the procedure for establishing or the process for administering it, the usefulness of Chapter 380 as a tool for economic development is limited only by the creativity of the municipality utilizing it—and other applicable law.

1. What other applicable law?

Because Chapter 380 essentially only regulates the purpose of economic development programs, a municipality establishing an economic development program need only concern itself with the regulations applicable to the specific functions of the program independent of the program itself.

³³ *Id.* § 380.001(a).

³⁴ *Id.* § 380.001(b).

³⁵ *See id.* § 380.001(b)(3).

For example, if a municipality enters into a Chapter 380 agreement providing for a grant or loan by the municipality, the grant or loan expenditure must be in strict compliance with the municipality's budget.³⁶ If an agreement requires expenditure to occur after final approval of a budget not providing for the expenditure, then the expenditure must meet the public necessity requirement for an emergency budget amendment or it cannot be made until the adoption of the next annual budget.³⁷

Not only are there these and potentially other regulations applicable to the *expenditure* of program funds, there are also certain regulations applicable to the *source* of program funds.³⁸ For example, general law municipalities are not able to issue debt to fund an economic development program, and home-rule municipalities may do so only if their charter so provides. However, there are few regulations applicable to funding economic development programs which leaves plenty of room for ingenuity.

2. The other side of the 380 coin.

³⁶ See *id.* § 102.009(b).

³⁷ See *id.* § 102.009(c).

³⁸ Section 380.002(c), Local Government Code, limits the source of funds granted under the provisions that are beyond the scope of this discussion, as noted *supra*. See Tex. Loc. Gov't Code § 380.002(c) ("The funds granted by the municipality under this section shall be derived from any source lawfully available to the municipality under its charter or other law, other than from the proceeds of bonds or other obligations of the municipality payable from ad valorem taxes.").

Under Section 380.001(b)(3), the governing body may also "accept contributions, gifts, or other resources to develop and administer a program." Pursuant to this provision, some municipalities have included in contracts germane to other economic development tools, such as tax abatement agreements, terms requiring the other party to make one or more Chapter 380 economic development contributions to the city. Such contributions may be incidental to the contract, perhaps forming a part of the consideration, or they may be material to the contract, perhaps by providing consistency and predictability over an otherwise dynamic contract term.³⁹ Even more fanciful funding options are possible because Section 380.001 does not forbid the use of any particular resource; it merely authorizes the use of contributions, gifts, or other resources to develop and administer a program. One such other resource could be the municipality's taxes.⁴⁰

3. There's one for you, nineteen for me.

One of the local economic development purposes authorized by Chapter 380 is "to stimulate business and commercial activity in the municipality."⁴¹ Since municipalities may fund programs with nearly any resource, a program to achieve this purpose can

³⁹ See, e.g., Sec.IV.D.2., *infra*.

⁴⁰ Note that a municipality may only levy taxes in accordance with its budget. Tex. Loc. Gov't Code § 102.009(a).

⁴¹ Tex. Loc. Gov't Code § 380.001(a).

be made practically self-sustaining if the business and commercial activity generates tax revenue.

Let's say a municipality has a somewhat commercially depressed area, poised for economic development. Using the tools provided by Chapter 380, the municipality may establish a program to reimburse a developer for a portion of its costs incurred in priming the area for business and commercial activity. These are commonly referred to as 380 Economic Development, Performance and Reimbursement Agreements. If the developer is having trouble securing an anchor tenant because the surrounding storefronts are in disrepair or are otherwise unappreciated, a grant by the municipality to help rejuvenate the area would almost certainly meet the purpose requirement prescribed by Chapter 380 because it would attract a higher caliber of tenants and would therefore stimulate business and commercial activity in the municipality. The municipality would thereafter benefit from the increase in property taxes resulting from the increase in property value, and possibly also from an increase in sales tax revenue.

On that point, although a developer may have no preference for either office or retail tenants, a municipality would likely prefer a retail tenant, the receipts of whom would generate additional sales tax for the municipality. Therefore, to pique

the developer's interest in attracting retail tenants, the municipality may grant to the developer, in the form of a reimbursement, a portion of the sales tax generated from the developer's property. Assistance from the Texas Comptroller of Public Accounts may be needed to distinguish the sales tax generated by the property from the sales tax generated elsewhere in the municipality, and the agreement should provide for such logistics.

By using the Chapter 380 economic development agreements described above, a municipality can simultaneously encourage economic development in an area generally, and commercial activity in an area specifically. Also, by aligning the developer's interest in generating sales tax with that of the municipality, the municipality can ensure that the developer will seek tenants that are not only the most creditworthy, but also the most commercially productive.⁴²

Additionally, the usefulness of granting tax revenue as an economic development tool is not limited to municipalities desiring to attract commercial activity, as such a program may also be used to encourage industrial activity to locate within a municipality, such as a Sriracha plant (further discussed below). However, offering to grant a portion of the sales tax

⁴² See Appendix "F" for examples of performance based 380 Economic Development Agreements that employ the use of targets for sales tax reimbursement.

generated by an industrial development would do little to attract such development because industrial developments generally conduct few sales, if any, within the municipality which would generate sales tax, but there is still the use tax.

4. Samneric⁴³ - Direct Tax Permits and Payments.

Often referred to as the sales and use tax, the sales tax and the use tax are actually two separate and distinct taxes, each of which are imposed upon the occurrence of two different sets of circumstances, i.e., sale and use.⁴⁴

The Texas Tax Code generally presumes that use occurs at the same location that the sale is consummated.⁴⁵ Therefore, the Tax Code generally requires the seller to collect both taxes at the time of sale, which are then eventually disbursed to the municipality where the sale occurred.⁴⁶ However, if done correctly, a sale that occurs in one municipality for use in another municipality can apportion the sales and use taxes appropriately between the two. This requires that the purchaser obtain a direct payment exemption permit (if they qualify),⁴⁷

⁴³ In William Golding's *Lord of the Flies*, two characters, identical twins Sam and Eric, are so closely associated with one another that they are eventually referred to together as one - "Samneric." See WILLIAM GOLDING, *LORD OF THE FLIES: A NOVEL* (Penguin Books 2006) (1954).

⁴⁴ See Tex. Tax Code § 321.103 (imposing a tax on the "sale at retail of taxable items within the municipality"); Tex. Tax Code § 321.104 (imposing a tax on the "use, storage, or other consumption within the municipality of taxable items purchased, leased, or rented from a retailer").

⁴⁵ See Tex. Tax Code § 321.205 (determining the incidence of the use tax).

⁴⁶ See *id.* §§ 151.052, .103.

⁴⁷ See *id.* § 151.419(b)(3).

which essentially makes the purchaser, rather than the seller, responsible for allocating the taxes.⁴⁸

The incidence of the use tax imposed on an industrial developer generally occurs where the taxable item is first used or consumed by the developer after transportation. Therefore, an industry that uses or consumes taxable goods in the process of manufacturing, refining, or being otherwise industrial generates taxes that may be allocated to the municipality where such activity takes place, and a portion of that tax can therefore be granted to the developer under a Chapter 380 economic development agreement.⁴⁹

5. Ye long-awaited conclusion.

Chapter 380, Local Government Code, offers municipalities nearly limitless potential for economic development. Even when a municipality cannot fund an economic development program with cash on hand, the broad funding possibilities sometimes allow for funding of a project with the revenues the project itself generates. Although there may be reasons why another economic development tool is more appropriate in certain situations, they can often be combined with a Chapter 380 economic development program to create economic development that is greater than the

⁴⁸ *Id.* §§ 151.417, 321.205(d).

⁴⁹ See Appendix "G" for an example of a 380 Economic Development Agreement employing the use of a direct tax permit for use tax reimbursements.

sum of its parts. Chapter 380 may be a little trite, but it is far from being too old to learn new tricks.

B. Sales tax revenue enhancement, retention and redirection.

In the retail business, there is a concept known as "skrinkage" which represents the difference between recorded inventory and inventory on hand. In other words, retail skrinkage is the portion of your inventory that gets lost or is stolen.⁵⁰ In the same sense, cities experience a similar type of shrinkage when it comes to their tax revenue. While the concept could be analogized in the context of *ad valorem* property taxes and improper valuations, it is more effectively discussed in the sales tax realm.

During the "Great Recession," every tax dollar was key and even though most economic indicators now point to recovery - every tax dollar should still be key. So how do you enhance your sales tax revenue without necessarily raising taxes (assuming you are not already at your two-cent cap) or generating more business? A number of companies have answered this question with sales tax auditing, analysis, and reporting consultation services.

⁵⁰ Smith, Charmayne. "What causes Inventory Skrinkage?" *Chron.Houstonchronicle*, n.d. Web.29 May 2014.

So how does this work? Well, first you have to identify an appropriate third-party vendor that provides the services you need. Some cities might simply want to capture all the sales tax to which they are entitled. Others might want to identify the "big players" in the community and work to increase foot traffic or to lure complimentary businesses. Whatever the need, the city must identify its objectives and find a vendor that can partner with the city to achieve those objectives.

Once a vendor is selected, that vendor can work to determine whether the city's businesses are correctly remitting their sales and use tax due to the city. The vendor can identify tax remittance and refund trends within the city. The vendor can also identify business that may be mistakenly reporting their taxes to other neighboring jurisdictions. This component could be especially important to clusters of cities that neighbor one another in Texas' metropolitan areas. The secondary benefit to implementing such an audit system is that a city can then accurately forecast its revenues for the upcoming fiscal year which is important for future planning and development.

Unfortunately, those cities that currently use the service are prohibited from disseminating their tax audit reports as they are subject to confidentiality agreements. However,

suffice it to say that cities that are using the service are realizing its benefit within six months of initiating the program. In terms of cost, it has been our experience that there is an annual fee plus a contingency percentage of the additional tax revenues generated by using service.

C. Using non-financial tools to influence economic development.

Have you ever been in a public meeting where someone posed the question "What can we do to promote economic development?" or "What can we do to encourage *Company X* to come to our city?" and the answer was "We don't have the money to offer economic development incentives." Of course you have. In fact, we all have been in the presence, or perhaps even a part of this or similar dialogue. However, there are methods to encourage economic development, especially economic *redevelopment*, that transcend the typical model where a governmental entity pledges tax dollars or grants a tax abatement to entice a business to relocate to its city. By way of example, consider the following regarding zoning regulations.

As city attorneys, we probably all have at one point or another read and referred back to the litany of articles that discuss in lengthy detail the origins of Texas zoning law. Therefore, such a discussion is beyond the scope of this paper. Suffice it to say, however, that zoning at its most basic level

is the police power a city exercises whereby it divides its corporate limits into districts and identifies uses for those districts that are acceptable and complimentary to one another. Taking the zoning concept a step further, more comprehensive zoning regulations regulate use, the architectural design of buildings and structures, and the density with which these buildings and structures can occupy a particular lot. But what about the concept of using zoning regulations to encourage the highest and best use of property, while still integrating uses that are complimentary to and desirable by the community? Beyond the basic zoning concepts, there are other sometimes lesser (and sometimes incorrectly) used zoning tools called special exceptions and specific use permits. Consider the following example.

1. **The developer's perspective.** A two-story commercial shopping center located along a busy interstate corridor is recently sold to a new owner. Even though the occupancy rate for the property is relatively low compared to other comparable properties in the area at the time of purchase, the new owner recognizes that the center is located in a desirable geographical location that is poised for significant growth and redevelopment. As a result, the new owner intends on making a significant financial investment in capital

improvements for the property in order to make it attractive to new tenants and competitive in the commercial leasing market. Once renovations are complete, the new owner plans to engage an aggressive real estate broker to market the property to prospective tenants. The developer's goal is to fill the space, raise the occupancy rate, and recoup the greatest and quickest return on investment possible. The city's zoning regulations currently allow both commercial retail and office as uses by right with no further restrictions or conditions.

2. **The city's perspective.** A two-story commercial shopping center located along a busy interstate corridor is recently sold to a new owner. Even though the occupancy rate for the property is relatively low compared to other comparable properties at the time of purchase, the city recognizes that the center is located in a desirable geographical location that is poised for significant growth and redevelopment. As a result, the city would welcome a new owner that would make significant capital improvements for the property in order to make it attractive to new tenants and competitive in the commercial leasing market. However, the city's goal is to fill the space with tenants that represent the highest and best use of the property as possible that would generate a healthy sales tax revenue stream for the city. The city realizes that its zoning

regulations currently allow both commercial retail and office uses by right with no further restrictions or conditions and interest in the soon to be renovated space is high for medical and other professional services that generate no sales tax revenue.

3. What would be a win-win for the developer and the city? The developer's and the city's characterization of the two-story shopping center are not all that different. Both parties agree that the property is in need of redevelopment and both parties agree that the property is in a geographically desirable location that could attract new tenants given the right circumstances. However, the city desperately needs to modify its current zoning regulations in order to promote the highest and best use of the center with sales tax generating businesses but how? The answer: the use of special exceptions.

Special exceptions are uses that the city's zoning commission recommends and the city council deems appropriate for a particular zoning district but that are subject to further review by the city's board of adjustment (or other reviewing board).⁵¹ In other words, special exceptions represent a zoning model that does not eliminate a particular use altogether because it may be undesirable under certain circumstances, but

⁵¹ JOHN MIXON, JAMES L. DOUGHERTY, JR. & BRENDA N. McDONALD, TEXAS MUNICIPAL ZONING LAW §§ 6.200, .305 (3rd ed. 2013); see also Tex. Loc. Gov't Code § 211.009.

instead allows for the use when it would be complimentary to the existing uses and appropriate given the city's goals, the current market conditions, or the public's welfare or interest. Special exceptions may also be more attractive tools because they are not variances, which require a hardship, nor are they specific use permits, which represent permanent amendments to the zoning code. In the above shopping center scenario, the city amended its zoning ordinance for its commercial district so that office and professional service uses were allowed as uses by right on the second floor of the two-story shopping center, but only allowed on the first floor by special exception. Consider the following sample zoning language employing the use of a special exception type regulation:

The following regulations shall apply to the C-1 Commercial Business District:

A. *Use regulations.* The following uses for buildings or premises shall be a use by right:

1. Bakery.
2. Dancehall and skating rink.
3. Restaurant, cafe, and cafeteria.
4. Moving picture house or theater.
5. Laundry and cleaning.
6. Beauty parlors and barber shops.
7. Stores and shops for the sale of products at retail only.

8. Wholesale in connection with any retail business otherwise permitted.

9. Offices uses, including but not limited to medical offices and clinics, and real estate offices on the second floor or above in a building or premises.

B. *Special exceptions.* The following uses for buildings or premises shall be a use permitted by special exception, subject to the granting of a special exception as prescribed in section 17 herein.

1. Hotel.

2. Office uses, including but not limited to medical offices and clinics, and real estate offices on the first floor in a building or premises.

3. Governmental buildings or facilities, safety services, and attendant operations.

4. Mobile food units, subject to all other applicable regulations.

After the shopping center renovations were complete and the city's new special exception regulations adopted, the city in this example soon began experiencing significant sales tax revenue increases month after month compared to previous year revenues. Moreover, the renovated center, combined with the increased occupancy of commercial retail tenants made neighboring properties attractive for redevelopment and lured other "destination" attractions.

IV. Industrial Economic Development.

A. "Spicing" up industrial development.

We now turn to industrial development that adds some "spice" to the paper. If a Texas city wanted to bring a Sriracha plant to Texas, how would they do it?

Huy Fong Foods operates a plant that manufactures Sriracha, the spicy Asian condiment beloved by many, in Irwindale, California.⁵² The plant is owned by the Tran family and the chief executive is David Tran.⁵³ The plant employs around 200 people.

In October, 2013 the City of Irwindale sued the factory over claims that the factory emits odors that cause asthma, coughing, choking and other related health problems.⁵⁴ The city won a partial, preliminary injunction⁵⁵ causing lovers of the hot sauce to begin hoarding bottles of the sauce and referring to the potential shutdown of the plant as the Srirachapocalypse.

The potential closure of the plant has become a national issue, in part because of its cult following and in part because cities and states are eager to lure economic development activities and jobs to their jurisdictions. Texas, with its

⁵² Tim Logan, *First Toyota, next Sriracha? Texans wooing California hot sauce plant*, LOS ANGELES TIMES, May 2, 2014.

⁵³ Jenn Harris, *Huy Fong Foods to start making Sriracha in Texas?* Los Angeles Times, January 7, 2014.

⁵⁴ Jenn Harris, *Judge orders partial shutdown of Sriracha plant*, LOS ANGELES TIMES, November 27, 2013.

⁵⁵ *Id.*

business friendly climate, has made its own pitch to have the Sriracha plant relocate to Texas along with its jobs.

It is unknown if the Tran family is seriously considering a move for the \$40 million dollar facility, which is heavily dependent on local supply routes for its success, but the owners are taking visits from interested parties looking to lure the plant away. Whether the plant decides to relocate will probably depend on whether the city of Irwindale and the Tran family are able to come to an agreement regarding odors and nuisance law and what sort of package another jurisdiction offers the Sriracha plant to move. The question this section examines is what economic development tools are available to municipalities to entice a Sriracha plant (or really any other plant) to Texas.

B. The Toyota Experience.

According to the Office of Governor Rick Perry, approximately sixty companies have moved to Texas since July of 2012.⁵⁶ One notable recent example was the Toyota headquarters located in Torrance, California. The exact deal that lured the \$300 million project from California has not been announced but is expected to include \$40 million dollars from the Texas Enterprise Fund and some combination of local incentives from

⁵⁶ Jerry Hirsch and David Undercoffer, *Toyota to move jobs and marketing headquarters from Torrance to Texas*, LOS ANGELES TIMES, April 27, 2014.

the City of Plano that probably includes a tax abatement, cash, and waivers in building and construction fees.⁵⁷

Shortly after the move was announced, Governor Perry's office issued a press release that said, "the company cited a number of factors in choosing a location for its new headquarters, including the TEF investment, Texas' low taxes, smart regulations, fair courts and skilled workforce as factors in its decision."⁵⁸ A Los Angeles Times article about the move attributed the choice in relocation to several factors. The article said, "Toyota chose Plano because of its Central Time Zone location, proximity to airports serving all parts the U.S. and Japan, its cost of living, education opportunities and cultural offerings," and cited the chief executive of Toyota's North America region as the source for their list.⁵⁹

The Toyota move is impressive, but if a municipality does not have the full weight of the Governor's office and Enterprise Fund behind an economic development effort, how does that municipality duplicate the Texas miracle on a smaller scale? For instance, how would a municipality attract a project, say a

⁵⁷ Jerry Hirsch, *3,000 Toyota jobs to move to Texas from Torrance*, LOS ANGELES TIMES, April 28, 2014.

⁵⁸ Office of Governor Rick Perry, *Gov. Perry Announces Toyota Moving North American Headquarters to Plano, Generating 4,000 jobs* (2014).

⁵⁹ Jerry Hirsch, *3,000 Toyota jobs to move to Texas from Torrance*, LOS ANGELES TIMES, April 28, 2014.

Sriracha plant, that produces five percent of the jobs of a Toyota Headquarters?

C. Acquiring a Site, and Other Tools for Luring Business.

The first issue a municipality should think about in luring a new business is a potential site for the business. In the case of a Sriracha plant it is important to consider the reasons the plant has to relocate - namely health effects caused by the odor emitted from the plant. In this regard a municipality should consider an appropriate site where the population would not suffer from relevant health effects as well as relevant zoning and other land use regulations.

Once a site has been identified the property must be acquired. In a perfect world, the company who is relocating would be so eager to relocate that they would acquire the property themselves. However, this rarely happens. In actuality the municipality should consider acquiring the property for later conveyance as an economic development incentive. There are several methods municipalities may use to accomplish the conveyance of land.

If the municipality has either a 4A or 4B corporation the proceeds from those taxes can be used to acquire land.⁶⁰ The use of proceeds from a 4A corporation are the more restrictive of

⁶⁰ Tex. Loc. Gov't Code Ann. § 501.101.

the two, but for the purposes of land acquisition either structure is sufficient. The use of 4A and 4B money for economic development purposes has been written about extensively and is outside the scope of this paper, but should be mentioned as a possible tool because if these are available they are ideal methods for acquiring a site for a Sriracha plant.

One of the most popular methods for attracting businesses by municipalities are tax abatements. There are six steps for granting tax abatements. First, a municipality must adopt a resolution indicating that it will participate in tax abatements.⁶¹ Second, the municipality must adopt tax abatement criteria and guidelines.⁶² Third, the municipality must designate an area as a "reinvestment zone."⁶³ This is done by providing notice of and holding a public hearing about the municipality's intent to designate an area a reinvestment zone and then adopting an ordinance.⁶⁴ Fourth, the municipality must deliver written notice of the intent to enter into the agreement and a copy of the proposed agreement to each taxing jurisdiction where the property is located at least seven days before the abatement is granted.⁶⁵ Fifth, the agreement must be approved by a majority vote of the city council at a regularly scheduled

⁶¹ Tex. Tax Code Ann. § 312.002(a).

⁶² *Id.*

⁶³ *Id.* § 312.201.

⁶⁴ *Id.* §312.201(d).

⁶⁵ *Id.* § 312.2041.

meeting.⁶⁶ Finally, other taxing entities may choose to enter into a tax abatement agreement as well.⁶⁷

Perhaps the most mystical and powerful tool municipalities have for economic development are 380 agreements. Chapter 380 of the Texas Local Government Code authorizes cities to "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 economic development.⁶⁸ The text of the actual law is short, but it is extremely broad and can be used in a number of creative ways, particularly in acquiring land. Essentially, the language of the statute permits a municipality to provide loans and grants of municipal funds and the use of municipal personnel, facilities and services at below market prices or without charge. However, the use of the word "including" before "programs for making loans and grants" has been used to create economic development programs outside of using 380 agreements to make grants or loans, which will be explained below.

When a municipality is considering a 380 agreement for less than fair market value of whatever they are providing, they first have to ensure the incentive serves a public purpose. If

⁶⁶ *Id.* § 312.207.

⁶⁷ *Id.* §§ 312.206(a), .402(b).

⁶⁸ Tex. Loc. Gov't Code Ann. § 380.001.

the incentive is the provision of land the municipality must comply with several requirements of the Local Government Code. Chapter 273 of the Local Government Code lists purposes for which a municipality may acquire property.⁶⁹ Noticeably absent from that list is acquiring property for economic development purposes.

Municipalities must also comply with Chapter 272 of the Local Government Code which governs how real property may be sold or transferred. The general rule is that municipalities must advertise property and accept competitive bids for the sale or exchange of that property.⁷⁰ Chapter 272 does list some exceptions to the sale by bid requirement. For our purposes numbers 4 and 6 are the most relevant:

1. Narrow strips of land, or land that because of its shape, lack of access to public roads, or small area cannot be used independently under its current zoning or under applicable subdivision or development control ordinances;⁷¹

2. Streets or alleys owned in fee or used by easement;⁷²

⁶⁹ *Id.* § 273.001.

⁷⁰ *Id.* § 272.001(a).

⁷¹ *Id.* § 272.001(b)(1).

⁷² *Id.* § 272.001(b)(2).

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, rights-of ways, easements, or other public purposes including transaction partly for cash;⁷³

4. Land that the political subdivision wants to have developed by contract with an independent foundation;⁷⁴

5. A real property interest conveyed to a governmental entity that has the power of eminent domain;⁷⁵

6. City 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;⁷⁶

7. A property interest owned by a defense base development authority established under Chapter 378 of the Local Government Code;⁷⁷ or

8. Land that is owned by a municipally owned utility⁷⁸

⁷³ *Id.* § 272.001(b)(3).

⁷⁴ *Id.* § 272.001(b)(4).

⁷⁵ *Id.* § 272.001(b)(5).

⁷⁶ *Id.* § 272.001(b)(6).

⁷⁷ *Id.* § 272.001(b)(7).

These are by no means the only requirements of Chapter 272, but the most relevant ones for this discussion.

Another method of procuring land by a municipality is Chapter 373 of the Local Government Code, also known as the Texas Community Development Act of 1975. The act is a rather amorphous and strange set of regulations in which the authors have only discovered a couple of instances of municipalities utilizing its benefits since its inception. The chapter does specifically provide for the "acquisition of real property"⁷⁹ and the "disposition, by sale, lease, donation, or otherwise, of real property acquired under this chapter, or the retention of the property for public purposes."⁸⁰ In other words, it permits municipalities which comply with its regulations to buy and sell or donate real property.

D. Scenarios utilizing economic development laws.

The question then becomes how do all the statutes work separately and together to provide the necessary economic development incentives and the ability under the law to attract a Sriracha plant, or other industrial project, and then provide the necessary land. Several scenarios are examined below that

⁷⁸ *Id.* § 272.001(k).

⁷⁹ *Id.* § 373.005(b)(1).

⁸⁰ *Id.* § 373.005(b)(8).

illustrate how a municipality might structure economic development deals utilizing these statutes.

The municipality in these scenarios is a fairly small municipality of around 5,000 inhabitants. It possess a great deal of industry and a large tax base and is mindful of attracting the types of economic development projects that will in turn attract other projects, as well as attracting big retail projects that will add to its tax base and provide citizens with nearby options to shop.

1. **Scenario One: acquiring land for future development.**

In scenario one there is a large parcel of land in the municipality. The parcel of land is undeveloped property on a major thoroughfare within the municipality in which the municipality hopes that one day will be lined with some large retail projects. The municipality does not have a particular project lined up for the parcel of land, but would like to acquire it at present for future development before it is purchased for a land use that is not preferable to the municipality.

How does the municipality acquire the land without running afoul of Chapter 273 of the Local Government Code which does not permit a municipality to acquire land for economic development purposes? The answer in this instance was to use Chapter 373 of

the Local Government Code and create a Community Development Program to acquire the property. Some of the stated purposes of the chapter are to "encourage, promote and facilitate the more rational use of land,"⁸¹ the "expansion and improvement of the quantity and quality of community services essential for the development of viable urban communities,"⁸² and to encourage, promote and facilitate the "alleviation of physical and economic distress through the stimulation of private investment and community revitalization."⁸³

The municipality in question complied with the procedural requirements of the statute and now owns the land and will be able to control the use of that land. Likewise, a municipality could use this statute to acquire property for an economic development project. There is some debate whether this would be the best method for acquiring land for something like a Sriracha plant because the legislation seems to favor residential or mixed use projects, but the limited use of the statute to date does not suggest that a manufacturing facility would be excluded.

2. Scenario two - providing for infrastructure improvements for the site.

⁸¹ *Id.* § 373.002(b)(5).

⁸² *Id.* § 373.002(b)(4).

⁸³ *Id.* § 373.002(b)(9).

In scenario two the municipality has a company who desires to build a new facility within the municipality's corporate limits. In order to build the facility, which will create a number of jobs, the company desires a tax abatement for the property taxes and a number of significant infrastructure improvements to facilitate access to the project.

The solution the municipality and the company came to involved a combination of tax abatements and 380 agreements. The maximum amount of time a tax abatement may be granted in Texas is ten years⁸⁴ and the amount of the abatement is limited to the improvements made on the property.⁸⁵ Abatements may be granted for shorter periods of time. Ordinarily, when a tax abatement is granted the amount of the abatement is graduated, but there is no requirement in statute that it be structured this way. In this instance the municipality granted a 100% abatement of taxes for ten years.

The company was willing to finance the infrastructure improvements they were seeking for the facility, and the way this was accomplished was through a creative use of a 380 agreement. Ordinarily, 380 agreements are used to provide grants or loans by the municipality, but the words of the statute do not limit the ability of 380 agreements to be a

⁸⁴ Tex. Tax Code Ann. § 312.204.

⁸⁵ *Id.*

mechanism to facilitate payments or loans *from* a municipality. 380 agreements may also be used to facilitate payments *to* a municipality.

In the present scenario the municipality and the company were able to estimate what the taxes from the tax abatement should be over the ten years of the abatement. The company then made a payment in lieu of taxes ("PILOT") in the amount of the tax abatement savings to finance the infrastructure improvements. The arrangement calls for the payments in equal amounts over the ten years.

As a practical matter the way this would work would be that if the total tax due under the abatement would have been twenty million dollars the PILOT payments would total two million dollars per year for ten years. This structure has several advantages to both the municipality and the company. First, the company gets the needed infrastructure improvements to make their economic development project successful. Second, the company is able to have greater certainty in their tax planning. Third, the municipality may prefer a PILOT payment as opposed to taxes because the PILOT payment does not affect their rollback rate or effective tax rate.

3. **Scenario three - giving municipal owned land to a company.**

Another scenario occurs when the municipality already owns the property and would like to transfer the property to a company. A simple sale of the property is often not possible because of the notice and bid requirements of the Local Government Code, particularly when the municipality desires to convey the property for less than fair market value. Again, the tax abatement and 380 agreement are useful tools.

In this scenario the company wanted to build a new office facility on land the municipality already owned. The municipality wanted to ensure the property went to the company for their economic development project so complying with the notice and bid requirements was not feasible. In addition, the municipality was willing to convey the property for less than fair market value in order to ensure the project came to fruition.

One exemption to the notice and bid requirements for the disposal of real property in the Local Government Code is when a municipality is permitted to convey real property to an independent foundation when they desire to have that property developed.⁸⁶ Once the property is conveyed to an independent foundation the foundation is no longer bound to the requirements of the Local Government Code regarding notice and bids and is

⁸⁶ Tex. Loc. Gov't Code Ann. § 272.001(b)(4).

also able to receive less than fair market value for the property.⁸⁷ If a municipality desires to give the property to a company the municipality could simultaneously execute a 380 agreement to allow the company funds to pay for the property.

The way the agreement in this scenario would be structured would be as follows: the municipality would convey the property to an independent foundation for an agreed upon price. For this example one million dollars could be the property price. The municipality simultaneously executes a 380 agreement with the company who wishes to purchase the property for one million dollars. The company then uses the one million dollars to pay the independent foundation for the property. This sort of agreement can be executed at one time so that no money has to physically change hands at the closing. It is also worth noting that the statute does not define the term independent foundation. In this scenario a chamber of commerce was used as the independent foundation. Likewise, if a municipality already owned property it could convey that property to a Sriracha plant using this method for less than fair market value or without cost.

⁸⁷ *Id.* § 272.001(a)-(b).

V. Closing remarks.

The tools discussed above are by no means the only economic tools available in Texas to rejuvenate a city's tax base and provide incentives to businesses to relocate to Texas or to expand existing facilities. Of course many of the factors which companies cite as reasons to relocate are out of the direct control of municipalities. Municipalities have limited control over the overall tax burden in the state and have limited control over the overall cost of living for people residing in the state. Likewise, municipalities have limited control over providing a skilled workforce to companies seeking to relocate.

What municipalities can provide in terms of economic development are the economic incentives and improvement programs available under Texas law as well as a willingness to use such incentives and programs creatively and aggressively to attract economic development projects and enhance redevelopment of every type.

For a more in depth discussion of the tools discussed in this paper, and others, the Attorney General has published several economic development handbooks on its website almost two hundred pages in length that represents a synopsis of the economic developments laws. While these publications, the most recent being "Economic Development 2013", are an excellent

resource, they should not be a substitute for your own research and investigation.