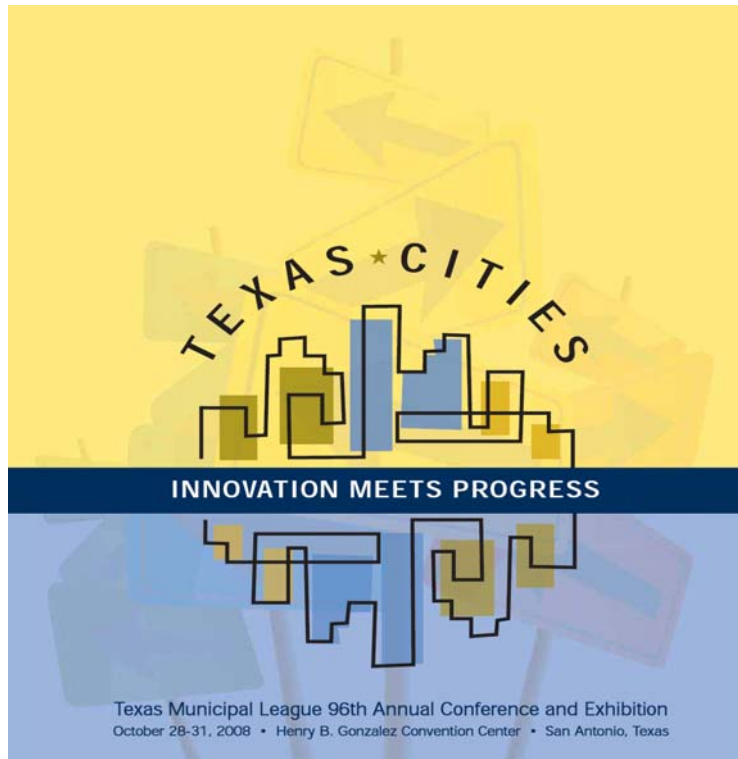


**Texas Municipal League  
96<sup>th</sup> Annual Conference and Exhibition**



**Cutting Edge Economic Development Tools**

**Presented at the Texas City Attorneys' Association  
Semi-Annual Meeting  
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**by  
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**BACKGROUND, EDUCATION AND PRACTICE**

Peter G. Smith was born on September 4, 1952, in Providence, Rhode Island. He pursued his preparatory and legal education at Texas Tech University obtaining his B.A. in 1974 and J.D. in 1976. He is a member of Delta Theta Phi, Pi Sigma Alpha (Political Science Honorary), the State Bar of Texas, and the State Bar of Texas Property Tax Committee.

Mr. Smith holds memberships in various professional associations including: Texas Municipal League, Texas City Attorneys Association, Texas Association of Assessing Officers, and Texas Association of Appraisal Districts. He is a member of the Advisory Board of the Institute for Local Government Studies, Center for American and International Law and frequently lectures and authors articles on ad valorem taxation, land use and municipal law.

Mr. Smith is a partner in the law firm of NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P., Dallas, Texas, with areas of expertise in economic development, ad valorem taxation, and municipal, administrative and zoning law. The law firm of NICHOLS, JACKSON, DILLARD, HAGER & SMITH, L.L.P. is a Dallas-based full-service law firm specializing in municipal law. The firm was initially formed in 1895, making it one of Texas' oldest and most respected law firms. The firm serves as counsel for municipalities, political subdivisions and appraisal districts throughout the State. The firm's primary area of specialization has been the representation of Texas municipalities and political subdivisions in all matters.

For more than twenty-two years, Mr. Smith has represented cities and all other types of political subdivisions in all types of matters. His experience includes trial and appellate litigation with emphasis on municipal law, civil rights, employment discrimination, zoning, land use, eminent domain and public official liability, and is an approved liability defense counsel for the TML Intergovernmental Risk Pool. Currently, Mr. Smith is City Attorney for the Cities of Richardson, Coppell, DeSoto, Allen, Farmers Branch and Sachse. He is also general counsel for several economic development corporations and for the Dallas, Tarrant and Williamson County Appraisal Districts and the Denton County Transportation Authority.

## Chapter 380 Texas Local Government Code

### General

The most underutilized and overlooked economic development incentive available to local government in Texas is Chapter 380 of the Texas Local Government Code<sup>1</sup>, which provides express statutory authority for municipalities to provide economic development incentives consisting of loans and grants of city funds, use of city personnel, facilities and services with or without charge for economic development.<sup>2</sup>

For example, a city may use Section 380.001 as authority to purchase or lease real property and improvements to a business to promote economic development, to provide financing for the purchase or lease of property, to waive or reduce impact or other development fees, to provide grants equivalent to a refund of sales tax or property taxes or to provide the equivalent of Freeport Exemption, to provide funding for infrastructure or provide financing for the same, or to provide personnel, equipment and facilities for economic development projects.

In providing an economic development incentive pursuant to Section 380.001, the city contracts with the grant recipient to condition the incentive upon the creation of new jobs, construction of improvements, continuation of operations for a stated period, or other considerations of benefit to the community. The city may also make the grant subject to the satisfaction of certain development standards or other land use controls. The city will generally require recapture of the grant or loan amount if the recipient does not fulfill the conditions of the grant. Any grant or loan must be approved by the city council, and should be included in the city budget or funded through a budget amendment, by bonds, or by other authorized proceeds.<sup>3</sup> Some cities include in their budget a specific allocation for Section 380.001 grants and have sometimes issued bonds for such purposes.<sup>4</sup>

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<sup>1</sup> Texas Local Government Code Section 380.001(a) provides that “the governing body of a municipality may establish and provide for the administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development to stimulate business and commercial activity in the municipality.”

<sup>2</sup> Chapter 381 of the Texas Local Government Code provides similar authority for counties.

<sup>3</sup> Although Section 380.001 does not expressly authorize a city to finance an economic development incentive through the issuance of bond debt, a home rule city can derive such authority from its charter. A home rule city may issue bonds to the extent provided in the city’s charter assuming that the bonds have been first authorized by voters in an election held on the issue. If the city charter is silent, a home rule city must find other statutory authority that allows the issuance of bonds or debt to finance the economic development incentive. A general law city, however, may not issue debt without specific statutory authority. A general law city can only fund economic development programs through current city funds unless otherwise authorized by specific legislation.

<sup>4</sup> Home rule cities, in providing economic development incentives, are subject to city charter limitations. Although home rule cities are authorized to take any action not prohibited by the Texas Constitution or statutes, the city charter may restrict such programs. General law cities are limited by state law and therefore must rely on a specific statute that authorizes the action. However, Section 380.001 should provide such authority. Any bonds issued for economic development purposes require voter approval.

Providing Section 380.001 economic development incentives through contracts with the recipients provides a useful tool a city may use to regulate growth and ensure quality construction and development in the community. An economic development incentive or grant, however, must comply with Article III, Section 52-a of the Texas Constitution, which provides the constitutional authorization for public funding of economic development.<sup>5</sup>

### **Constitutional Authorization**

Section 380.001 is the enabling legislation for Article III, Section 52-a of the Texas Constitution which Texas voters approved in 1987, and then amended in 2005. Section 52-a provides:

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

Section 52-a did not authorize the legislature to create statewide economic development programs, but instead authorized the legislature to delegate such responsibilities to counties, municipalities, or other political subdivisions. Section 52-a envisioned that a county, municipality, or other political subdivision could issue bonds to pay for its economic development program. Section 52-a was intended by the legislature, and by the voters adopting it, to create exceptions to the pre-existing constitutional prohibitions on the lending of public credit. *See* Tex. Att’y Gen. Op. No. JM-1227 (1990)<sup>6</sup>; House Research Organization’s Special

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<sup>5</sup> Texas Constitution Article III, Section 52-a provides that the promotion of economic development constitutes a public purpose.

<sup>6</sup> In reference to a project in which the City of Marlin contractually agreed with the Texas Department of Commerce to reimburse the Department a pro rata portion of the Department’s loan to a private entity if the private entity failed to provide the jobs it represented it would provide in its application to the Department, the Texas Attorney General opined that the legislature and the voters intended Section 52-a to create exceptions in the lending of public credit,

Legislative Report, 1987 Constitutional Amendments and Referendum Propositions, August 17, 1987 (specifically mentioning the provisions of Article III, §§ 51 and 52, and Article XI, § 3, as constitutional impediments that § 52-a was intended to overcome); *see also* Texas Legislative Council Information Report No. 87-2, Analyses of Proposed Constitutional Amendments and Referenda Appearing on the November 3, 1987 Ballot; (Sept. 1987); Tex. Att’y Gen. Op. No. GA-0529 (2007) (Tex. Const. art. III, § 52-a and Texas Local Government Code § 380.001 authorized a city to make a loan to a private developer to fund a private housing project).

Section 52-a expanded the constitutional definition of “public purpose” to include economic development and diversification, elimination of unemployment and underemployment, stimulation and growth of agriculture, and the expansion of state transportation and commerce. Tex. Att’y Gen. Op. No. JM-1255 (1990). However, Section 52-a did not change the requirements that public resources and powers be used for “the direct accomplishment of a public purpose” and that transactions using such resources and powers contain sufficient controls “to insure that the public purpose be carried out.” The author of House Bill 3192, which proposed Section 380.001 of the Local Government Code, stated before the House Committee on Urban Affairs that this enactment would be the enabling legislation for Article III, Section 52-a. *Hearings on H.B. 3192 before the House Comm. on Urban Affairs, 71st Leg.* (May 15, 1989) (testimony of Representative McCollough, author) (copy on file with House Committee Coordinator). By enacting Section 380.001, the legislature authorized municipalities to perform any of the functions that Article III, Section 52-a permitted the legislature to delegate. Section 380.001 of the Local Government Code implements Article III, Section 52-a, and is therefore constitutional. *See* Tex. Att’y Gen. Op. No. DM-185 (1992).

### **Types of Incentives**

Neither Section 380.001 nor Article III, Section 52-a specify the kind of incentives that a municipality may include in a program to promote state or local economic development. The legislature did not expressly prescribe the contents or limits of an economic development program. In testimony before the Senate Committee on Intergovernmental Relations, the author of Senate Bill 1820, a companion bill to House Bill 3192, stated that the bill would authorize cities to establish loan programs and to use municipal personnel for the purpose of attracting new businesses to the area and assisting existing businesses to expand. *Hearings on S.B.1820 before the Senate Comm. on Intergov’tal Relations, 71st Leg.* (May 18, 1989) (testimony of Senator Carriker, author) (copy on file with Senate Staff Services); *see also Id.* (testimony of Bob Hart, City Manager for City of Georgetown) (indicating Georgetown’s interest in establishing direct lending program).

The statute literally allows a municipality to make loans and grants of city funds, personnel, facilities, property and equipment with or without charge. The types of incentives are discretionary with a city so long as (1) a public purpose is served, (2) the city has established an economic development program; (3) the incentive is funded by current revenue or authorized

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but did not by itself authorize a municipality to lend credit; it authorized the legislature to enact laws that do so. Thus, the Texas Attorney General concluded the legislature had to enact enabling legislation to authorize the proposed transaction between the Texas Department of Commerce and the City of Marlin.

debt, and (4) the incentive is in compliance with applicable charter and statutes. The legislature intended Article III, Section 52-a and Section 380.001 to authorize a municipality to implement a range of programs designed to promote economic development. Although a Chapter 380 agreement should be funded by current revenue or other authorized debt, the agreement does not have to provide that the funding be paid from current revenue or other specified source. Following the 2005 amendment to Section 52-a, the financial commitment by a municipality under an agreement pursuant to Chapter 380 (and for a county under Chapter 381) that does not contain a pledge of property taxes or financed through bonds is not a debt under the Texas Constitution, and, therefore, payments from annual appropriations or an annual funding-out clause is not required in the contract. Developers may insist that such provisions be included in the agreement, but it is not necessary. Developers should nonetheless ensure that the city has sufficient funding available to provide the grant. One way to provide such assurance is the inclusion in the incentive agreement of an annual appropriation provision that requires the city to annually appropriate funds for the grant(s).

A municipality that institutes a program to promote state or local economic development pursuant to Section 380.001 must comply with other constitutional requirements. While Section 52-a expanded the definition of “public purpose” to include economic development and diversification, elimination of unemployment and underemployment, stimulation and growth of agriculture, and the expansion of state transportation and commerce, a municipality must determine that use of public funds and resources is for the direct accomplishment of a public purpose and that transactions using public funds and resources contain sufficient controls to ensure that the public purpose is carried out. A municipality may not simply give away public funds or property. The municipality must take contractual steps to ensure that the public purpose of economic development is carried out.

### **Guidelines**

In the same way a city adopts tax abatement guidelines, in establishing a Chapter 380 program, cities may adopt guidelines, policies or programs which describe the available economic development incentives and the criteria for eligibility. The program may be administered by city personnel or by contract with another entity such as the local chamber of commerce or a Section 4A or 4B Development Corporation. The statute does not address how the program is to be administered, but the program guidelines should be specific enough to include the conditions and safeguards discussed herein.

The Chapter 380 economic development program may be general or specific. A general program provides flexibility in the types of development eligible for consideration. A specific program limits the types of incentives available and the eligible businesses or developments since the conditions which an applicant must satisfy are also limited. Though there is no prescribed content for a city’s economic development program, such programs may, and often do, contain the following elements: maximum duration/number of years the incentive is to be conveyed; the maximum amount or limit of the incentive; limits on the geographical area or identification of certain zoning districts in which the economic development may be located; the levels of sales tax the must be created; the number, type(s) and kind(s) of jobs to be created; requirements to employ local residents; requirements to contract with minority or women-owned

businesses; limits of development to certain types of industry or commercial activity; environmental restrictions; description of required capital or infrastructure improvements; description of required level of investment; and required development standards. Cities often include Chapter 380 program guidelines in their tax abatement guidelines. Also, the city is not required to have a specific stand-alone economic development program or guidelines, but may rely instead on the provisions of the specific Chapter 380 agreement with the developer/prospect to serve as the program guidelines.

### **Contract Terms**

As noted before, there are no statutorily required terms or conditions for Chapter 380 agreements so long as the incentives satisfy the previously cited criteria. In providing an economic development incentive pursuant to Section 380.001, a city may condition the incentive as indicated above or along other lines required by the city. To ensure that an agreement is seen as a qualifying Chapter 380 economic incentive agreement, the agreement should generally contain one or more of the following terms:

1. A reference to the fact that the agreement is entered under the authority of Chapter 380, Texas Local Government Code and Texas Constitution Article VIII, Section 52-a;
2. A reference to the adopted economic development guidelines (whether external or internal to the agreement);
3. A reference to job creation or retention, sales tax generation, added tax base, construction or development of specific project or other public consideration for the incentive;
4. A provision conditioning the payment of the incentives on achieving milestones or performance standards;
5. A selected method of incentive payment – loan, grant, grant equivalent to tax abatement, Freeport or grant based on percentage of sales tax of property taxes;
6. The kind, number and location of proposed public and private improvements;
7. A provision requiring the developer to provide access to and authorize inspection of the property to ensure compliance with the agreement;
8. Limits, controls or restrictions of the use of the property to a specific development goal;
9. Provisions for the recapture of the grant or incentive if the recipient breaches or defaults in the performance of the agreement;
10. Annual written certification that recipient is in compliance with the agreement;

11. Authority to terminate or modify the agreement if recipient fails to comply with the agreement;
12. Minimum taxable values or generation of sales tax;
13. Minimum term of occupancy or continued operations within a city;
14. Occupancy by specific tenant, business, or activity or type thereof;
15. Provisions requiring the creation and maintenance of employment positions;
16. A description of required deed restrictions and/or land use controls that can bolster enforcement of the development purposes.

### **Recapture**

The statute does not require a recapture or claw back of the incentives if there is an uncured default. However, Chapter 380 agreements generally provide for a variety of recapture provisions in the event of default. The city should have the right to seek reimbursement of the incentives that are provided if the business does not fulfill its obligations. The recapture of incentives for a breach must be significant enough to deter the recipient from breaching its contractual obligations and/or relocating to another jurisdiction that has offered greater incentives. In the absence of significant liquidated damages, there is no incentive for a business to continue to comply with the terms of the agreement and fulfill its obligations to promote economic development once the incentive has been paid/conveyed. Although Chapter 380 itself does not require recapture, newly-enacted Texas Government Code, Chapter 2264 does require recapture under the circumstances discussed below.

### **Undocumented Workers**

House Bill 1196, effective September 1, 2007, amended the Texas Government Code to add Chapter 2264 to provide restrictions on the use of public subsidies. The new law is intended to ensure that public funds are not used to encourage illegal immigration into the state by prohibiting any taxpayer-subsidized job, creation grant or tax abatement given to any business entity in Texas from violating federal immigration law.

A “public subsidy” is defined to include tax abatement, incentives provided through Texas Local Government Code Chapter 380 and 381 agreements, and incentives provided by 4A and 4B Development Corporations. The definition of “public agency” under the statute includes municipalities, counties, school districts, and any other political subdivision. The definition does not expressly include 4A and 4B Development Corporations; however, other provisions of the statute are specifically applicable to 4A and 4B Development Corporations. Thus, 4A and 4B Development Corporations must comply with the new law.

The new law requires certain statements in any application for a public subsidy and the inclusion of recapture provisions in any agreement that provides a public subsidy. A public



agency, state or local taxing jurisdiction, or economic development corporation must require a business that submits an application to receive a public subsidy to include in the application a statement certifying that the business, or a branch, division, or department of the business, does not and will not knowingly employ an undocumented worker. The statement must state that if, after receiving a public subsidy, the business, or a branch, division, or department of the business, is convicted of a violation under 8 U.S.C. § 1324a(f), the business shall repay the amount of the public subsidy with interest, at the rate and according to the other terms provided by an agreement under Texas Government Code, Section 2264.053, not later than the 120th day after the date the public agency, state or local taxing jurisdiction, or economic development corporation notifies the business of the violation.

In light of the above, any agreement used by local governments or 4A and 4B Development Corporations for providing a public subsidy as defined by statute must include a provision for the repayment of the public subsidy with interest in the event the business violates 8 U.S.C. § 1324a(f). An example of such a provision is as follows:

**Employment of Undocumented Workers.** During the term of this Agreement, the Company agrees not to knowingly employ any undocumented workers as defined in Tex. Govt. Code Sec. 2264.001. If convicted of a violation under 8 U.S.C. § 1324a(f), the Company shall repay the amount of the Grants and any other funds received by the Company from the City as of the date of such violation not later than 120 days after the date the Company is notified by the City of a violation of this section, plus interest from the date the Grant was paid to the Company, at the rate periodically announced by the Wall Street Journal as the prime or base commercial lending rate, or if the Wall Street Journal shall ever cease to exist or cease to announce a prime or base lending rate, then at the annual rate of interest from time to time announced by Citibank, N.A. (or by any other New York money center bank selected by the City) as its prime or base commercial lending rate. The payment of interest shall be as if it had been accruing from the date the Grants were paid to the Company until the date the Grants are repaid to the City.

A public agency, local taxing jurisdiction, or economic development corporation may bring a civil action to recover any amounts owed to the public agency, local taxing jurisdiction, or economic development corporation, as applicable under the new law. The public agency, local taxing jurisdiction, or economic development corporation, as applicable, may also recover court costs and reasonable attorney's fees incurred in an action to recover the public subsidy. The new law provides that a business is not liable for a violation by a subsidiary, affiliate, or franchisee of the business, or by a person with whom the business contracts.

### **Examples of Chapter 380 Grants**

Chapter 380 is not limited in the types of incentives that may be provided. A city's ability to be imaginative and innovative are its only limits SO LONG AS a public purpose is served by the project for which the incentives are granted. Examples of the types of incentives provided under the authority of Chapter 380 include:

- Funding for the renovation of shopping centers or other business facilities conditioned on the generation of a certain level of sales tax revenue with the sales tax revenue to be used to be used to fund the grant.
- Use or loan of city personnel, equipment, and facilities for private commercial enterprise economic development project.
- Sale or lease of city-owned land or buildings to businesses at below market rates.
- Grants equivalent to refund/rebate of sales tax or property taxes to offset the absence of Freeport Exemption or tax abatement, which can exceed ten years of abatement.<sup>7</sup>
- Construction of roads, sewers, site or building improvements, or other infrastructure improvements or funding for the same.
- Waiver, reduction or credit against impact fees, parkland dedication fees, building inspection, or other fees associated with construction and development.
- Funding for business acquisition of real property, improvements, equipment, fixtures, and job training.
- Rent subsidies and/or rent deposit guarantees.
- Water/sewer charge rebates.
- Funding for relocation expenses, landscaping or other amenities.
- Funding for advertising, promotion, marketing, travel, travel expenses, billboards, or advertisements for business.
- Funding or directly providing training and education for specific businesses or companies.
- Master lease agreement to lease all or portion of buildings constructed until or as the building is leased up.
- Grants for development of hospital and medical office facilities.
- Home improvement incentives.<sup>8</sup>

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<sup>7</sup> A City or County may not rebate or refund property taxes or sales taxes but may provide grants equivalent to a percentage or stated amount of such taxes.

<sup>8</sup> The provision of quality housing stock including the redevelopment of existing housing stock promotes economic development in the provision of housing for corporate executives and a qualified trained work force.

Business and local government entities familiar with Section 380.001 can be innovative in the use of Chapter 380 to provide incentives to offset the absence of Freeport Exemption or tax abatement. A progressive and innovative approach to economic development through Chapter 380 will allow local government to effectively compete for new business or expansion of existing facilities when tax abatement, Freeport Exemption or other means are not available, and control and regulate the specific development.

#### **USE OF CHAPTER 380 FUND SALE OR EXCHANGE OF LAND FOR DEVELOPMENT**

Often, an economic development project requires the acquisition of land. The power of eminent domain may not be used for economic development purposes. Nonetheless, the city may acquire real property in the open market and transfer to the property to the end user. Generally, subject to limited exceptions, land owned by a city may only be sold at auction or pursuant to notice and competitive bidding, and then only at fair market value according to approval obtained by the city. TEX. LOC. GOV'T CODE § 272.001.<sup>9</sup>

The exceptions include: land the city wants developed by an independent foundation; streets or alleys owned in fee or used by easement or acquired for such purposes; land that cannot be used independently because of its size, shape or lack of access to public roads; and land that is located in a reinvestment zone that the city desires to have developed under a project plan adopted by the city for the zone (Tax Increment Reinvestment Financing Zone or “TIRZ”). Therefore, if a business wanted to expand its operations, but needed the city to abandon an existing street or alley or needed an adjacent, otherwise undevelopable strip of land, the city could do so in a direct private sale without competitive bidding and notice. A city may also exchange land or other real property interest originally acquired for streets, rights-of-way or easements for other land to be used for streets, rights-of-way, easements or other public purposes. Thus, the city could in a private transaction exchange such property with a business for other land to be dedicated for streets, rights-of-way, easements or used for other public purposes.<sup>10</sup>

#### **How a City May Convey Land for Development Without Competitive Bidding**

A city may convey property that it wants developed to an independent foundation without going through competitive bidding. What constitutes an “independent foundation” is not defined. The chamber of commerce, a 4A or 4B Development Corporation or even a non-profit corporation formed by the city may function as an independent foundation.

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<sup>9</sup> Section 253.009 of the Texas Local Government Code allows a city to convey real property to a 4A or 4B Development Corporation that has been conveyed by gift to the city or as part of a settlement and that is adjacent to an area designated for development by the 4A or 4B Development Corporation. *See also* Tex. Att’y Gen. Op. No. MW-46 (1979).

<sup>10</sup> Streets or alleys owned in fee or used as easements or narrow strips of land can be sold to the abutting property owners without payment of the fair market value for the property.

In order to accomplish the transaction, the selected entity serving as the independent foundation can sell or convey the land to a business prospect without having to comply with the notice and competitive bidding requirements; however, the contract of sale must include provisions requiring the business prospect to develop the land in accordance with city specifications. The independent foundation can sell or convey the property in a private transaction to the business prospect with or without payment of the fair market value. The independent foundation must pay the city the fair market value; however, the city could use Chapter 380 to provide a loan or grant to the independent foundation to fund all or a portion of the purchase from the city or provide a Chapter 380 grant to fund all or a portion of the developer's acquisition of the property from the independent foundation. The city may also convey real property that is located within a TIRZ in a private sale on any terms. If the city owns real property within a TIRZ, it may sell the real property without auction or competitive bidding and for any price if the real property is for a project.

### **Use of Texas Local Government Code, Chapter 380 Agreements to Provide the Equivalent of Tax Increment Financing**

Cities and developers may avoid the administrative process, statutory restrictions and bureaucracy of a tax increment financing zone (TIRZ) established by Tax Code, Chapter 311 through the creation of a "zone by contract" with a developer that provides for the use of the incremental increase in property tax from real property and/or personal property and/or sales tax from the defined area for the contractually-defined projects.

School districts normally do not participate in a TIRZ, so the TIRZ players are usually the city and county. Pursuant to Texas Local Government Code, Chapter 381, a county may contract with the city and the developer for a Chapter 380 TIRZ-like zone. The advantages of creating such a "zone by contract" include:

- The Chapter 380 created zone is not subject to the TIRZ restrictions or limitations and state reporting requirements
- No board of directors is required
- The agreed contribution from the incremental increase in property tax and/or sales tax for the Chapter 380 created zone would not be restricted to public improvements or projects as defined by the TIRZ statute
- Any Chapter 380-type project or incentive could be funded
- The city could establish guidelines for specific types of projects within the Chapter 380 zone which would qualify for incentives from the incremental increase in property tax and/or sales tax from the Chapter 380 created zone.
- None of the other TIRZ statute restrictions or limitations would apply.

No extra powers or authority are lost from not creating a TIRZ other than the right to sell real property for a TIRZ project in a private sale without competitive bidding or auction as required by Texas Local Government Code Section 272.001. However, the city may use the process described above for selling or exchanging real property through an independent foundation without competitive bidding or auction. There is no loss of eminent domain powers from not creating a TIRZ as a result of the adoption of Government Code, Chapter 2206, which restricts the use of eminent domain to acquisition of property for traditional public purposes and prohibits the use of eminent domain for economic development purposes, except for very specific limited instances for low and moderate-income housing. One note: cities may no longer condemn property and assemble tracts of land within a TIRZ or otherwise for a developer except for public improvements.

### **The Village at Allen and the Allen Event Center<sup>11</sup>**

The Village at Allen and the Allen Event Center<sup>12</sup> first began with an initial request from the developer, MG Herring Group, for economic development incentives for infrastructure to support the development of the Village at Allen, a retail lifestyle development consisting of retail, office, hotel and restaurant uses to be situated on 186 acres of land along the southeast corner of US 75 Central Expressway and Stacy Road in the City of Allen. The Village at Allen is positioned to be a cornerstone in a dynamic shopping, dining and entertainment destination. The 186-acre development will feature 1,000,000 square feet of large format retail, specialty shops and restaurants. The Village at Allen will be one component of a 400-acre mixed-used development in both the City of Allen and the Town of Fairview.

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<sup>11</sup> The Village Development Agreement maybe viewed and downloaded at <http://www.njdhs.com/CM/Custom/TOCArticles.asp>.

<sup>12</sup> The Village Project is a Chapter 380 created artificial TIRZ.

## Village at Allen



The Village at Allen and The Village at Fairview, separated by Stacy Road, will have a combined total of more than 3,000,000 square feet of commercial space. The development includes a 225 room Courtyard by Marriott within the Allen portion of the project to be constructed and operated by John Q. Hammons Hotels, which has constructed several hotel/conference center projects in the DFW area through private/public partnerships, including the Mesquite Rodeo, the Richardson Renaissance Hotel at Galatyn Park as well as Grapevine, Frisco and others. The Village at Allen will also feature the 7,500 seat Allen Event Center, and 500,000 square feet of office. The Event Center is a multi-purpose arena capable of hosting sporting, civic and entertainment events containing approximately 160,000 square feet of space, a minimum of 9,000 seats with 7,500 fixed seats, at least 24 luxury suites and a second sheet of ice under roof in an adjacent facility.

## Allen Event Center



After the initial incentive negotiations began between MG Herring Group and Allen, Global Entertainment<sup>13</sup> approached the city about the development of a multi-purpose Event Center to become the home for a minor league hockey team in the Western Professional Hockey League and which would also serve as a destination entertainment venue for Allen. Global Entertainment's facility management group is a full service facility management company that is a single-source for the total package of operational services required to successfully manage and operate a multi-purpose events center. Management includes food and beverage operations, ticketing and marketing. Global, through its affiliated companies and its relationship with several contractors and architects, proposed to deliver an Event Center complete with luxury suites fully equipped for a guaranteed maximum price.

Initially, the estimated cost of the Event Center posed a problem. Allen did not have sufficient funding available to support the Village at Allen project *and* undertake the cost of a

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<sup>13</sup> Global Entertainment Corporation, is engaged in sports management, arena and related real estate development, facility and venue management and marketing, venue ticketing and branded licensing. Global markets small to mid-sized communities throughout the United States for the development of multi-purpose events centers. The Central Hockey League (operated by Western Professional Hockey League, Inc.) opened its sixteenth season of play in October 2007 with more than fifteen teams. According to Global, fan attendance continues to grow as the Central Hockey League leads all North American "AA" leagues in average attendance.

\$55 million multi-purpose Event Center at the same time. As a result, the MG Herring Group stepped up to the table in a true private-public partnership to provide the necessary difference in funding for the Event Center.<sup>14</sup>

At the outset, Allen negotiated a total incentive amount with MG Herring Group that the City was willing to contribute as an economic development incentive for the Village at Allen project. The city quickly realized - as all developers and municipalities should - that it sometimes takes a variety of economic development tools and players to support these types of capital intensive projects. Public-private partnerships require financial participation from different funding sources. Allen initially elected to provide a Chapter 380 agreement to provide funding for the Village at Allen through the generation of sales tax from the Village. In addition, the Allen Economic Development Corporation (the "AEDC"), a Section 4A Development Corporation, elected to issue debt secured by 4A sales tax revenues, to provide funding for infrastructure for the Village.<sup>15</sup>

Allen desired the type of entertainment destination venue in the City proposed by Global and approached the developer with the Event Center concept. There were two possible locations in Allen at which the Event Center could be located. The developer, however, wanted the Event Center to be located in the Village at Allen. As a result, the developer and the City had to determine a mechanism to finance the cost of the Event Center.

Allen did not want to finance the entire cost of the Event Center, but did agree to request the AEDC to issue sales tax revenue bonds in the principal amount of \$15 Million for infrastructure for the Village. Allen also requested the Allen Community Development Corporation (the "ACDC")<sup>16</sup> issue sales tax revenue bonds in the principal amount of \$32 million for a portion of the guaranteed maximum price for the Event Center to provide funds for jointly financing the design, construction and acquisition of the Event Center and the supporting infrastructure to be owned by the City. The AEDC and the ACDC, each entered into a project funding agreement with the City under which the City will receive the funding from the sale proceeds of the AEDC and ACDC bonds and manages the AEDC and ACDC portion of the Village and the Event Center projects and distribute such funds on behalf of the AEDC and the ACDC.

Allen's agreement to approve the AEDC and ACDC's funding was conditioned on the developer's agreement to finance the remaining costs (with reimbursement of the funding solely from the generation of sales tax from the development), and the developer's donation of fifteen acres of land to the City without cost. After the City expends the ACDC bond funds for the

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<sup>14</sup> The MG Herring Group has developed more than thirty major shopping centers and regional malls in the United States and Mexico, totaling more than twenty four million square feet of retail space. The company currently has more than four million square feet of retail and mixed-use projects under development.

<sup>15</sup> The AEDC is restricted under the Development Corporation Act, for retail projects to provide economic development grants for infrastructure necessary to promote or develop new or expanded business enterprises. TEX. REV. CIV. STAT. Art. 5190-6.

<sup>16</sup> The ACDC is a Section 4B Sales Tax Development Corporation established under the Development Act of 1979. The Event Center and supporting infrastructure are authorized projects for the ACDC under the statute.



construction of the Event Center, MG Herring will provide the additional funding up to \$40 million. The developer successfully secured its financing for the Village at Allen and secured a separate loan of up to \$40 million from its lenders to finance its obligations for the Event Center. The developer agreed to convey the fifteen acres for the Event Center by a deed which contains a reversion if the City does not timely construct or complete the Event Center. Global is required to pay the cost of the Event Center in excess of the guaranteed maximum price.

As a result, the development agreement for the Village at Allen involved several financing and reimbursement techniques. The developer constructs the infrastructure for the Village and for the Event Center. The development agreement provides for

- the City's purchase of the infrastructure upon completion through installment payments
- the developer's donation of the fifteen acres of land for the Event Center;
- exchange of right-of-way necessary for the project
- reimbursement for the Event Center loan through the generation of sales tax from a defined area known as the "Benefited Area."

In essence, the development agreement established an artificial TIRZ (which was called "the Benefited Area" in the development agreements) from which the City reimburses the developer for the Event Center loan through grants measured by the sales tax receipts and property tax receipts from the Benefited Area for a period of twenty years. As noted earlier in this paper, the Benefited Area operates much in the same manner as a TIRZ in which the City contributes property taxes and municipal sales tax. If the Benefited Area does not produce sufficient property tax and sales tax for the grants in the funds advanced by the developer for the Event Center, there is no recourse against the City. In other words, the developer is only repaid the Event Center loan funding if the development generates the necessary revenue for the reimbursement grants.

With respect to the construction of the Event Center, the City contracted with Global and its affiliates to deliver the Event Center for a guaranteed maximum price. Global will manage and operate the Event Center, provide construction management services and deliver the necessary furniture, fixtures and equipment necessary for the Event Center. Because the City wanted to control the project and ensure the Event Center was delivered on time and below budget, the City elected to contract directly with a construction company to deliver the Event Center for guaranteed maximum price and directly with the architect that Global normally uses for the development of event centers. Under its agreement with the City, Global is responsible for the costs of the Event Center in excess of the guaranteed maximum price. Global is also required through its management agreement with the City to secure a ten-year lease of the Event Center with a Central Hockey League team.

The Village and Event Center project require extensive infrastructure. The Event Center infrastructure consists primarily surface parking and two multi-level parking garages for the use

of the patrons of the Event Center with a combined total of approximately 2050 parking spaces to be constructed by the developer and conveyed to the City following completion of construction. Pursuant to agreements with the developer, the City's use of the parking areas is subject to the reservation of spaces within one of the parking garages for the hotel pursuant to separate agreement and the reservation of fifty percent of the spaces within the other garage during the work week for office tenant. The City also has a 99 year lease/easement pursuant to a separate agreement for the parking spaces on top of the developer's retail space.

The developer agreed to design, or cause to be designed, the reversal of the northbound on and off ramps from U.S. Highway 75 to Stacy Road as well as the improvement and the expansion of the northbound and southbound frontage roads of U.S. Highway 75 south of Stacy Road. TXDOT is responsible for the construction of the US Highway 75 Ramp Reversal Project. The City is required to obtain the necessary right-of-way for these improvements or modify the number of lanes of pavement to fit within the existing right-of-way. The developer agreed at its sole cost to design and construct Allen Station Parkway from Stacy Road to where Allen Station Parkway has been constructed north of Exchange Parkway as a four-lane divided thoroughfare with turn lanes including all landscaping, signage, signalization, utilities and other required improvements. The developer agreed, at its sole cost, to design and construct Village Drive from Allen Station Parkway to the U.S. Highway 75 frontage road as a four-lane divided roadway plus turning lane and including a railroad grade crossing, all landscaping, signage, signalization, utilities, and other required improvements. The City was required and did enter into a railroad crossing agreement with Dallas Area Rapid Transit for a grade crossing. The developer agreed to cause the existing utilities, including but not limited to electric, telecommunications, cable television, and telephone, on the south side of Stacy Road adjacent to the Village to be placed under ground. The developer also agreed to construct certain off site drainage improvements.

AS noted above, the agreed purchase price for the infrastructure will be paid in installments. The obligation of the City to make each installment payment is subject to the prior occurrence of each of the following conditions:

- The developer shall provide the City evidence reasonably satisfactory to the City that the plans for the infrastructure comply with all applicable laws
- Each contractor, laborer and supplier that has furnished labor and/or materials in connection with the completed aspects of the infrastructure must execute a waiver of lien or a lien subordination agreement in favor of the City
- The City shall have received a title report dated within five (5) days of the installment payment date showing no state of facts objectionable to the City including, but not limited to, a showing that no claim for mechanics' or materialmen's liens has been filed against the infrastructure
- The City shall have received a request for payment of an installment of the purchase price in such form and containing such information as the City may reasonably

require, executed by the developer stating, among other things, that all work required at the stage of construction when the installment is requested has been done

- There shall be no breach of a material term or condition of the development agreement related to the infrastructure
- The infrastructure shall not have been materially damaged or destroyed by casualty
- The developer shall execute and deliver to the City a special warranty deed and bill of sale conveying to City the infrastructure then constructed.

An amount equal to five percent (5%) of the purchase price is retained by the City and is paid as the final installment, provided that no lien claims are then filed against the infrastructure; all punch list items are completed, the City has received a completion certificate executed by the developer and the engineer, the City's inspector has determined that the infrastructure has been completed in accordance with the approved design and construction plans, the City has been provided evidence that no mechanics or materialmen's liens or other encumbrances have been filed against the infrastructure, and the developer delivers or assigns to the City all warranties and applicable maintenance bonds.

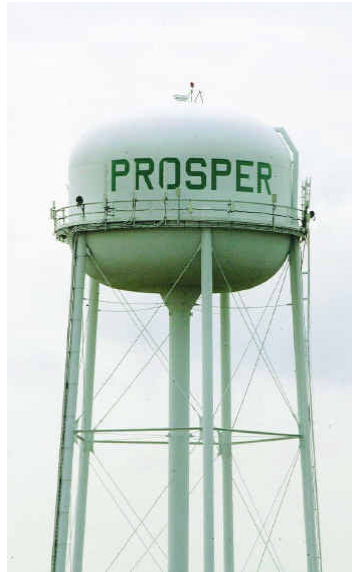
To accomplish this significant development for the City of Allen, the development of the Village at Allen and the Allen Event Center required funding from the developer, the City, the ACDC and the AEDC. The project is a true example of how a private-public partnership can work. If the Village at Allen is successful, the developer will be repaid. The risks of success have been equitably allocated between the developer and the City such that the risk of loss is minimized for all concerned.

### **TIRZ Backed by PID Bonds**

Because of the delay in accruing sufficient tax increment to pay the developer and/or the costs of TIRZ projects, new innovative financing means are being utilized to make TIRZ's more attractive to a city that must issue debt to pay the costs of infrastructure. One method is to impose a public improvement district pursuant to Chapter 372 of the Texas Local Government Code on all or a portion of the TIRZ zone that would, in essence, assess the entire costs of the TIRZ projects against the land within the TIRZ, said assessments to be collected from the landowners in the event there is a shortfall in the Tax Increment to pay debt service for the project costs. In such way, the developer, in essence, is guaranteeing the payment of any debt payment shortfalls if the TIRZ is not performing sufficiently to generate enough tax increment to pay the debt service for bonds or other instruments issued by the City to pay for the project costs the TIRZ incurred.

## The Town of Prosper

The Town of Prosper got its start at the turn of the 20th century as a railway whistle stop.

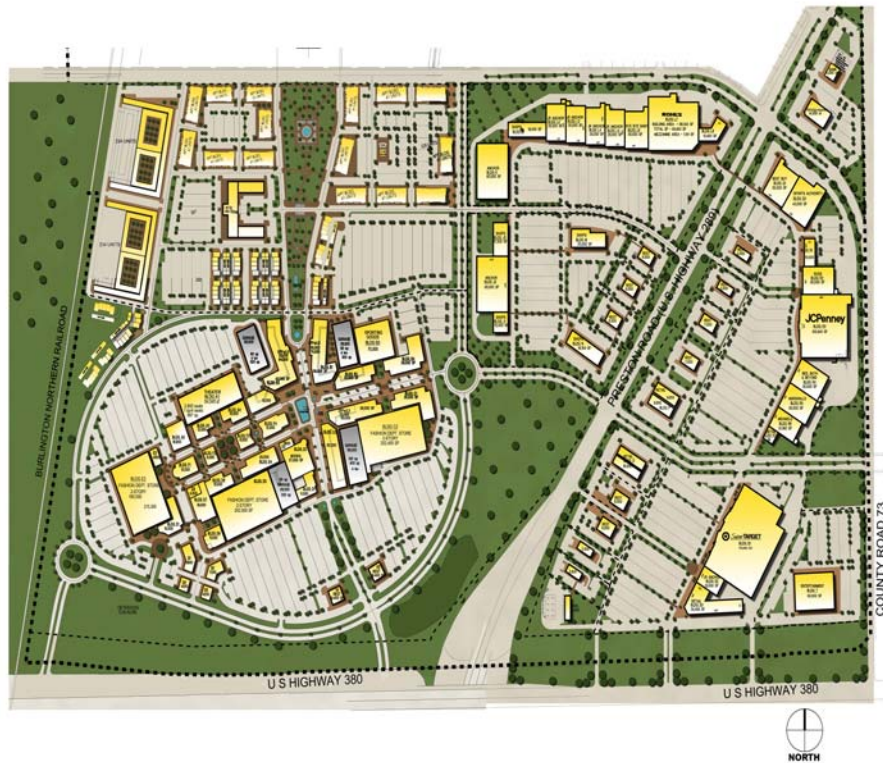


Prosper has grown from a farming community into a small city, and the Gates of Prosper project will generate even more development. The Town is the next crossroads for suburban mixed-use development. Prosper is one of the fastest-growing communities north of Dallas. In 1970, the farming community had only about 500 residents. At the start of 2007, the Town had a population of more than 6,000 with an average household income of almost \$103,000 and an average home price in excess of \$280,000.

In April 2008, Dallas Cowboys owner Jerry Jones, through Blue Star Land Company, entered into a development agreement with the Town which calls for the creation of a tax increment financing zone backed by a public improvement district for the 500-acre "Gates of Prosper" town center complex. Blue Star Land Company teamed up with developer Lincoln Property Company to market this urban-style "town center" complex located at the intersection of Preston Road and U.S. Highway 380 in north Collin County.

The Preston-380 intersection is projected to be one of the next biggest retail and commercial districts at the edge of Dallas' north suburban growth. Blue Star Land owns all four of the prime development corners. The Gates of Prosper will include 2.5 million square feet of retail space, office space, apartments and condominiums, plus a new municipal center for Prosper. Lincoln Property Company expects the first 500,000 square feet of retail space to open in 2011. This project will establish a new enhanced development standard for the Town. The Town anticipates that utility and road construction will begin early next year. The entire development has been projected to cost almost \$500 million.

The Gates of Prosper project is just one of two large mixed-use developments planned for Prosper.<sup>17</sup>



 <b>O'BRIEN &amp; ASSOCIATES, INC.</b> ARCHITECTURE • INTERIORS • PLANNING 8000 HARVEST HILL ROAD • SUITE 100 • DALLAS, TEXAS 75230 • 972-708-9100 • FAX 972-708-4838 www.obrienand.com	<b>PROSPER TOWN CENTER</b> PROSPER, TEXAS <b>BLUESTAR</b>	<b>SP-29</b> SCALE: 1"=200' • JOB# 2005 • ISSUE DATE: 08/05/07 APPROVED BY: _____ DATE: _____ <small>THIS PLAN IS THE PROPERTY OF O'BRIEN &amp; ASSOCIATES, INC. AND IS NOT TO BE REPRODUCED OR TRANSMITTED IN ANY FORM OR BY ANY MEANS, ELECTRONIC OR MECHANICAL, INCLUDING PHOTOCOPYING, RECORDING, OR BY ANY INFORMATION STORAGE AND RETRIEVAL SYSTEM, WITHOUT THE WRITTEN PERMISSION OF O'BRIEN &amp; ASSOCIATES, INC.</small>
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### Gates of Prosper Project<sup>18</sup>

As noted above, the developer intends to develop approximately 500 acres of land located in the Town that is projected to be one of North Texas' largest "Town Center" multi-use projects including retail, office and residential uses. The developer intends to utilize new urbanism design to incorporate outdoor retailing, public plazas, civic spaces, landscaped parkland and a food retailing and specialty market area into an integrated first-class destination project. The developer plans to incorporate open space, civic and public areas, pedestrian-oriented plazas and multi-purpose gathering places using the principles of European town centers to create a "sense of place" that should be the future center of the Prosper community.

The development will require the construction and financing of the improvement of Preston Road from U.S. Highway 380 to First Street as a six lane divided highway, estimated not to exceed \$8,000,000, additional public streets, water, sewer and drainage facilities, urban park

<sup>17</sup> Just to the west at U.S. 380 and FM423, Ohio-based developer Forest City Enterprises is working on a 2,100-acre master-planned community with commercial and residential building.

<sup>18</sup> The Gates of Prosper Project Agreement is available for viewing and download at <http://www.njdhs.com/CM/Custom/TOCArticles.asp> .

sites, and other public infrastructure and improvements, all of which will enhance and benefit the Town and enable the use of the project site for retention, and expansion of business enterprises and residential uses within the area as well as attract high quality commercial and retail tenants.

The Town Council intends to create Public Improvement District No. 1 and adopt an assessment ordinance and levy and collect assessments within PID No. 1 for the purpose of financing the public improvements. In order to provide funds to amortize the bonds issued to finance the Preston Road improvements and other public improvements within the development, the Town Council also intends to create a Tax Increment Reinvestment Zone and designate a portion of the Town's real property taxes, a portion of the Town's one percent sales tax and - by contract with the Prosper Economic Development Corporation - a portion of the Town's 4A sales tax to be pledged for TIRZ projects in an amount sufficient to amortize the bonds. The actual cost of the Preston Road improvements in excess of \$8,000,000 will be paid by the developer without reimbursement from the Town or from the TIRZ. Collin County is expected to participate in the TIRZ and contribute at least fifty percent (50%) of its Tax Increment to the Tax Increment Fund.

The Town intends to issue public improvement district (PID) bonds secured by a pledge of PID assessment revenues and available TIRZ revenues (including any investment earnings from such funds except any amounts held to pay any arbitrage on the bonds). The PID bond proceeds will be used to finance the costs of designing, constructing, and acquiring land for the public improvements. The amount of the PID bonds to be issued is to be the amount necessary to finance (i) the cost of the Preston Road improvements, plus (ii) a maximum of \$56,000,000 in costs of all other public improvements, plus (iii) the amount of any required reserves, capitalized interest during construction, and costs of issuance. The bonds will collectively be tax increment, special assessment, and other revenue bonds that are issued by the Town in one or more series, in form and substance mutually approved by the Town and the developer

The developer has dedicated land to the Town for a water tower and has agreed that upon issuance of the first series of bonds to dedicate to the Town the land required for the public improvements and for the Town's Town Hall, for parks, and for other related municipal uses, including exclusive public easements across privately-owned land.

The developer intends to establish an entity to be a contractor that will (i) provide professional, architectural and engineering services to design the public improvements; (ii) provide services as general contractor for the design and construction of the public improvements and (iii) execute a series of construction agreements with the Town for the public improvements which will be constructed in phases as the project is constructed. The Town will designate the contractor as the Town's general contractor for the design and construction of the public improvements. The contractor, in the construction agreements, will agree (i) that all amounts payable to the contractor by the Town shall be payable solely and exclusively from the proceeds of bonds and from no other funds of the Town, (ii) that the maximum amount of the actual costs of designing, constructing, and acquiring land for the public improvements (other than the Preston Road improvements) payable by the Town will not exceed \$56,000,000 and the maximum amount of the actual costs of designing, constructing, and acquiring land for the Preston Road improvements payable by the Town will not exceed \$8,000,000; and (iii) that the

developer will pay from private funds any and all costs of designing, constructing, and acquiring land for the public improvements (including the Preston Road Improvements) that may be incurred above such amounts. The construction of the public improvements will be coordinated with the construction of any private improvements related to the development.

The term of the TIRZ expires in 2045; however, the developer/contractor will have until 2023 to enter into one or more construction agreements for the public improvements, by which date the bonds for such public improvements must be issued. In other words, the TIRZ will continue beyond 2023 to provide the TIRZ revenue for payment of the bonds that are issued but have not matured prior to 2023. Pursuant to the project agreement with the developer, any public improvements for which a construction contract has not been entered into, and for which a bond has not been issued, by 2023 will not be funded by the Town.

For the purpose of establishing a fund to provide economic incentives to attract certain retail tenants to the development, the Town and the developer have entered a Chapter 380 Agreement. As part of the agreement, the Town intends to designate the necessary amount of the Town's municipal sales and use tax collected within the TIRZ boundaries, up to a maximum of 60% of the sales taxes generated, to fund such Chapter 380 incentives. The Town's contribution will not include the percentage of the Town's municipal Sales and Use Tax contributed by the Town to the TIRZ Revenues. The payment of the amount the Chapter 380 funds to be used as incentives under the agreement will not exceed \$25,000,000 plus accrued interest at the rate of 6%.

Additionally, the Town has agreed to waive certain impact and development fees as consideration of the dedication of the Town Center site and for other consideration. The waiver of impact fees will not apply to public improvements for which the developer/contractor has or is to be paid pursuant to the construction agreement(s). The Town has also agreed as part of separate Chapter 380 agreement to essentially rebate or repay Town rollback taxes imposed for any of the project site.

This project is truly an example of how a TIRZ project can proceed without, or with at least minimal, risk to the municipality. If there is ever a short fall in the TIRZ revenues under the Project Agreement, the PID assessments are collected from the land owners and are applied to any TIRZ revenue shortfall to pay the debt service for the PID bonds. In this instance, the developer has, in essence, guaranteed the payment of any debt payment shortfalls if the TIRZ is not performing sufficiently to generate enough tax increment to pay the debt service for the PID bonds or other instruments issued by the Town to pay for the public improvement costs the TIRZ has incurred. This is a true private/public partnership that allows all involved to win.