Development Agreements
&
Conservation Developments

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OLD LAW

Prior to 2003, municipal lawyers often disagreed on the ability of municipalities to enter into development agreements. Some contracts purport to be authorized by Local Government Code Section 42.044, which authorizes contracts with landowners in ***Industrial Districts***. This statute allowed a municipality to designate an "industrial district" within "the meaning customarily given to the term but also includ[ing] any area in which tourist-related businesses and facilities are located."[1] Objections were occasionally raised when this statutory mechanism was used to justify agreements covering large residential developments rather than building industrial facilities or tourist businesses.

NEW LAW

Authority

During the Spring 2003 Session, the Texas Legislature enacted House Bill 1197, which clarifies the authority of municipalities to enter into agreements with property owners in the extraterritorial jurisdiction (ETJ).

Scope of Agreements

According to the new statute agreements can be executed to:

(1) guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the city for a period not to exceed 15 years;

(2) extend the city's planning authority over the land by providing for a development plan to be prepared by the landowner and approved by the municipality under which certain general uses and development of the land are authorized;

(3) authorize enforcement by the city of certain municipal land use and development regulations (e.g., zoning and building codes) in the same manner the regulations are enforced within the municipality's boundaries;

(4) authorize enforcement by the city of land use and development regulations other than those that apply within the municipality's boundaries, as may be agreed to by the landowner and the municipality;

(5) provide for infrastructure for the land, including:
   (a) streets and roads;
   (b) street and road drainage;
   (c) land drainage; and
   (d) water, wastewater, and other utility systems;

(6) authorize enforcement of environmental regulations;

[1] Tex. Loc. Gov't Code § 42.044(a).

(7) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties;

(8) specify the uses and development of the land before and after annexation, if annexation is agreed to by the parties; or

(9) include other lawful terms and considerations the parties consider appropriate.[2]

A sample checklist identifying the issues that might need to be addressed in a development agreement is included as Exhibit A.

Process for Agreement
To comply with the new statute, an agreement must:

(1) be in writing;
(2) contain an adequate legal description of the land;
(3) be approved by the city council and the landowner; and
(4) be recorded in the real property records of the county.

Extensions
The parties to an agreement may renew or extend it for successive periods not to exceed fifteen (15) years each. The total duration of the original agreement and any successive renewals or extensions may not exceed forty-five (45) years.

Binding Nature of Agreement
The agreement between the city council and the landowner is binding on the city and the landowner and on their respective successors and assigns for the term of the agreement.

Vested Rights
An agreement constitutes a permit under the "Vested Rights" or "Freeze" statute.[3]

TAKINGS

TIAs
Agreements might contain components that invoke the Texas Private Real Property Rights Preservation Act (the "Act"). The Act does not apply to municipalities except as set out in Texas Government Code § 2007.003(a)(3), which provides:

> This chapter applies only to the following governmental actions: . . . (3) an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule,

[2] Tex. Loc. Gov't Code § 212.172.
[3] Tex. Loc. Gov't Code Chapter 245.

> regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality . . . ."[4]

Guidelines prepared by the Office of the Texas Attorney General ("Guidelines") indicate that coverage of the Act is further limited to situations where: (1) private real property is affected; (2) the private real property is the subject of the governmental action; and (3) the governmental action restricts or limits the owner's right to the property that would otherwise exist in the absence of the governmental action.[5]

Application to Agreements

When a municipality proposes taking an action covered under the Act, the municipality is required to prepare a written TIA.[6] "A governmental action requiring a takings impact assessment is void if an assessment is not prepared" and the private real property owner may bring suit for a declaration of the invalidity of the governmental action. [7]

The definitions found in the Act do not shed any light on whether a Chapter 212 development agreement between a municipality and the owner of private property located in the ETJ constitutes an "action that enacts or enforces an ordinance, rule, regulation or plan" (as described in 2007.003(a)(3)). Likewise, no case or opinion addresses the meaning of these terms under the Act. [8] The fact that the Agreement, in part, relates to annexation might arguably exclude the Agreement from the Act's requirements but again, no case or opinion discusses the issue.

Analyzing the facts under the additional applicability factors set out in the Guidelines, one may conclude that the agreement affects private real property, the private real property is the subject of the agreement, and the agreement will restrict or limit the owner's right to the property that would otherwise exist in the absence of the agreement.

In sum, based on the plain language of the Act, the approval and execution of the agreement ***may*** be an action to which the Act applies thus triggering the TIA requirement. Because the private property owner could escape his/her obligations under the agreement by bringing suit to void the agreement, the most conservative course of action is for the City to conduct a TIA.

Waiver Option

If the City wants to avoid conducting the TIA, it might consider having the property owner ***expressly waive*** the TIA requirements as part of the Agreement. Although the Act does not address waiver, there is evidence that certain counties are allowing developers to relinquish

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[4] Tex. Gov't Code § 2007.003(b).

[5] *See* Office of the Texas Attorney General, Private Real Property Rights Preservation Act Guidelines, n. 21, *available at* http://www.oag.state.tx.us/AG_Publications/txts/propertyguide.shtml (Dec. 30, 2004).

[6] *See* Tex. Gov't Code § 2007.043.

[7] *See id.* at § 2007.044; *see also Bragg v. Edwards Aquifer Auth*., 72 S.W.3d 729, 734 (Tex. 2002) (Holding the Act creates two causes of action in favor of a property owner: (1) a statutory cause of action for a taking and (2) a cause of action based on governmental action taken without preparing a TIA).

[8] See Tex. Att'y Gen. ORD-2839 (2002).

rights granted under the Act by executing some type of waiver.[9] One downside to including such a waiver in the agreement is that it draws the property owner's attention to the issue.

To view a sample TIA form prepared by the attorneys of Allison & Bass, go to:

www.county.org/resources/legal/pdf/CountySubdivisionRegulationSourcebook.pdf

OPPOSITION

Development agreements are not always popular with special interest groups, particularly environmentalist and neighborhood associations. One assertion is that government should not ***legislate by contract***. Those who oppose development agreements often urge that any governmental entity must be free at all times to change the law to protect health, human life, and the public welfare. It has been said that the constitutional protections against government takings provides landowners compensation for regulatory harm, but does not tie the hands of the government to protect human welfare. Another point of criticism leveled toward the practice of entering into development agreements is the notion that the agreements circumvent the normal procedures for variances, and thus eliminate some of the procedural protections afforded citizens.[10]

Legislation by Contract

It has been argued that, for more than a century, it has been "universally conceded" that municipal powers cannot be "bargained or bartered away…. Municipalities have no power . . . to make contracts . . . which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.[11] This fundamental principle is based in part on the prohibition against irrevocable or uncontrollable grants of special privileges and immunities under Article I, § 17 of the Texas Constitution.[12] It is also based on the necessary function of police power in government,[13] and the constitutional right to a republican form of government under Article I, § 2 of the Texas Constitution, which guarantees that government acts through public officeholders elected by the majority of voters[14]

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[9] The Hood County Subdivision Regulations and the Smith County Subdivision Regulations both contemplate waiver of rights under the Act.

[10] For a more thorough and coherent reading of arguments against development agreements, the author refers you to the Plaintiff SOS Alliance's *Brief Regarding the Development Agreements in Support of its Motion for Partial Summary Judgment and in Opposition to Defendant's Cross Motions for Partial Summary Judgments*, Cause No. 02-1748, in the 207th Judicial District of Hays County, Brad Rockwell, Deputy Director/Attorney at Law.

[11] *City of Brenham v. Brenham Water Co*., 4 S.W. 143, 149 (Tex. 1887).

[12] *Bowers v. City of Taylor*, 24 S.W.2d 816, 817 (Tex. Comm'n App. 1930); *Gay Investment Co. v. Texas Turnpike Authority*, 510 S.W.2d 147, 149 (Tex. Civ. App. – Dallas 1974, writ ref'd n.r.e.).

[13] *See Texas & New Orleans RR Co. v. Miller*, 128 S.W. 1165, 1173 (Tex. Civ. App. 1910, ref'd) (if abdication of police power were allowed under the constitution, "it would simply result . . . in the destruction of the principle functions of government"), *aff'd* 221 U.S. 408 (1911); *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) (legislature cannot contractually restrict its discretionary exercise of police power because "*salus populi supreme lex*").

[14] *Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (Tex. 1982).

The substantive legal concern raised by some agreement opponents is that the contractual provisions represent an unconstitutional delegation of legislative authority to a private party.[15]

Procedural Bypass
Those who challenge the legality and wisdom of development agreements sometimes raise concerns regarding the process by which the agreements are created and approved. Development agreements can be used as a means of circumventing the typical, standard permitting process utilized by the municipality. Development agreements can also address issues regarding variances or waivers requested by the developer. These agreements are not necessarily required to satisfy the normal public notice and hearing procedures, unless specifically required to do so by local municipal rules.

Many of the procedural concerns can be addressed in a municipal ordinance establishing a locality's self-imposed requirements for public notices and hearings. A draft of what as considered in Dripping Springs is attached as Exhibit B.

CONSERVATION DEVELOPMENTS[16]

An Innovative Option
Conservation developments exchange density for the permanent preservation of large tracts of open space. Clustering lowers infrastructure costs for developers by reducing the lengths of roads and utilities.[17]

This option provides for the following:

- Increased preservation of natural terrain & ecosystems
- Clustering of dwelling units to preserve open space
- Provision of community amenities in open space areas
- Increased housing density to better utilize central water & sewer systems
- Density bonuses to the developer for preserving open space
- Encouragement to avoid "cookie-cutter" housing patterns
- Sense of community for residents
- Contributes to the conservation of groundwater & surface water
- Contributes to the conservation of native wildlife and flora

[15] *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000); Texas Boll Weevil Eradication Foundation, Inc., 952 S.W.2d 454 (Tex. 1997).
[16] This section was heavily influenced by the research and writings of ***Walter Brown***, former City Councilman of Wimberley, former P&Z Commissioner of Austin, former Marketing Director of Faulkner Construction, and former Land Planning Consultant for City Hall Solutions, LLC. Walter passed away October 7th in San Marcos. Walter had expertise with Conservation / Cluster Developments. He was originally slated to give a portion of this presentation.
[17] *Rural by Design*: Maintaining Small Town Character, Randall Arendt, (1994) p. 287.

It differs from the currently-adopted Subdivision Ordinance, as well as the proposed new Subdivision Ordinance, in the following ways:

- Provides for smaller lots in residential clusters
- Provides open space amenities for residents as a central requirement
- Provides intensity bonuses for developers who preserve additional open space
- Includes provisions for management of open space lands
- Seeks to preserve the rural character of the area
- Allows for clustered town home and small commercial development

Key Features:

- Assures large percentage of the gross site will be preserve in perpetuity in its natural, undeveloped state.
- Provides increased flexibility to the developer with respect to location and sizing of lots

CONCLUSION

Legislation enacted in the 2003 Legislative Session clearly grants municipalities the statutory authority to enter into development agreements, including regions located in the ETJ. Like Planned Development Districts (aka, PDDs, or Planned Unit Developments, PUDs), development agreements can provide the government and the property owner the opportunity to be flexible and address development issues in a comprehensive manner. However, the statute is less than complete regarding procedural matters and silent on issues regarding the delegation of legislative authority. Nonetheless, it is likely that as a land planning tool, development agreements will soon be used with more frequency, and the development agreement process will continue to be refined. Development agreements can be an effective means of negotiating plans for Conservation (aka, "Cluster") Developments.

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- Andrew Backus, Friendship Alliance

Exhibit A

CHECKLIST

of items to be addressed
for Development Agreements

Procedural:

- ☐ Desired Completion Date: When should the agreement be ready for execution?
- ☐ Parties: Are all of the necessary parties privy to the agreement?
- ☐ Drafters: Who is responsible for preparing the verbiage?
- ☐ Participants: Who will be involved in negotiating the agreement?
- ☐ Stakeholders: What interest groups and third parties should be included?
- ☐ Intergovernmental Relations: What public agencies must be in the loop?
- ☐ Notification: What forms of public notification are required?
- ☐ Hearings: How many public hearings must be conducted?
- ☐ Approvals: Which authorizations will be approved at what point (e.g., prior to, simultaneously with, or after execution of the agreement)?
- ☐ Modifications: How will the agreement be amended or revised over time?
- ☐ Compliance: How will the contractual and regulator provisions be enforced?
- ☐ Assignment: To what extent are the rights and obligations transferable?
- ☐ Vested Rights: To what degree will certain regulations freeze?

Substantive:

- ☐ Annexation
- ☐ Building Codes
- ☐ Drainage

- ☐ Economic Development
- ☐ Exterior Design Standards
- ☐ Energy Conservation
- ☐ Fencing
- ☐ Fire Protection
- ☐ Impervious Cover
- ☐ Landscaping
- ☐ Land Uses
- ☐ Lighting
- ☐ Lot Sizes
- ☐ Open Space / Parkland
- ☐ Rights-of-Way
- ☐ Signage
- ☐ Site Clearing / Brush Removal
- ☐ Streets
- ☐ Taxation
- ☐ Utilities (Gas, Electricity, Cable, Telephone)
- ☐ Watershed Protection
- ☐ Water & Wastewater (including creation of MUD or PID)

Documentation:

- ☐ Agreement
- ☐ Buffer Zones Plan
- ☐ Concept Plan

- ☐ Metes and Bounds Description of the Land
- ☐ Water Conservation Plan
- ☐ Water Quality Plan
- ☐ List of Requested Variances

Financial:

- ☐ Administrative Fees
- ☐ Facilities Expansion Fees
- ☐ Impact Fees
- ☐ Miscellaneous Fees
- ☐ Platting Fees
- ☐ Permit Fees
- ☐ Professional Services Fees
- ☐ Variance Fees
- ☐ Taxes
- ☐ Escalator (future fee / rate adjustments or increases)

Exhibit B

Sample Ordinance

City of Dripping Springs Code of Ordinances

VOLUME: 2

ARTICLE 15: DEVELOPMENT

CHAPTER 5: DEVELOPMENT AGREEMENTS

SECTION 1. ENACTMENT PROVISIONS

1.1. Popular Name
This Ordinance shall be commonly cited as the "Development Agreement Ordinance."

1.2. Purpose
This Ordinance establishes the process and standards by which the City may negotiate, formulate, consider and adopt Development Agreements

1.3. Scope
This Chapter applies to all property within the city limits and the extraterritorial jurisdiction ("ETJ").

SECTION 2. DEFINITIONS

2.1. General
Words and phrases used in this Chapter shall have the meanings set forth in this section. Terms that are not defined below, but are defined elsewhere in the Code of Ordinances, shall be given the meanings set forth in the Code. Words and phrases not defined in the Code of Ordinance shall be given their common, ordinary meaning unless the context clearly requires otherwise. When not inconsistent with the context, words used in the present tense shall include the future tense; words in the plural number shall include the singular number (and vice versa); and words in the masculine gender shall include the feminine gender (and vice versa). The word "shall" is always mandatory, while the word "may" is merely directory. Headings and captions are for reference purposes only.

2.2. Specific

Applicant: A person or entity who submits to the City a request for a Development Agreement, as authorized by this Chapter, and Texas Local Government Code Section

212.171, et seq., as may be amended. To be qualified as an Applicant under this Chapter, the person or entity must have sufficient legal authority or proprietary interests in the land to commence and maintain proceedings under this Chapter. The term shall be restricted to include only the Property Owner(s), or a duly authorized agent and representative of the Property Owner. In other jurisdictions, the term is sometimes referred to as the "developer", "subdivider," "builder," or a similar title.

City: The City of Dripping Springs, an incorporated municipality located in Hays County, Texas.

City Limits: The incorporated municipal boundary of the City of Dripping Springs.

P&Z: The Planning and Zoning Commission, an appointed advisory board of the City of Dripping Springs.

SECTION 3. PROCESS

3.1. Objectives

Development Agreements executed by the City pursuant to this Chapter may:

(a) guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the city for a period not to exceed fifteen (15) years;

(b) extend the city's planning authority over the land by providing for a development plan to be prepared by the landowner and approved by the municipality under which certain general uses and development of the land are authorized;

(c) authorize enforcement by the city of certain municipal land use and development regulations (e.g., zoning and building codes) in the same manner the regulations are enforced within the municipality's boundaries;

(d) authorize enforcement by the city of land use and development regulations other than those that apply within the municipality's boundaries, as may be agreed to by the landowner and the municipality;

(e) provide for infrastructure for the land, including:
    (1) streets and roads;
    (2) street and road drainage;
    (3) land drainage; and
    (4) water, wastewater, and other utility systems;

(f) authorize enforcement of environmental regulations;

(g) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties;

(h) specify the uses and development of the land before and after annexation, if annexation is agreed to by the parties; or

(i) include other lawful terms and considerations the parties consider appropriate.

3.2. Requirements for Agreement

An Agreement must:

(a) be in writing; and
(b) contain an adequate legal description of the land; and
(c) be publicly considered by the P&Z; and
(d) be subject to a public hearing; and
(e) be approved by the city council and the landowner; and
(f) be recorded in the real property records of the county.

3.3. Extensions

The parties to an agreement may renew or extend it for successive periods not to exceed fifteen (15) years each. The total duration of the original agreement and any successive renewals or extensions may not exceed forty-five (45) years.

3.4. Binding Nature of Agreement

The Agreement shall be binding on the City and the landowner and on their respective successors and assigns for the term of the Agreement. The Agreement may be considered a "permit" for purposes of compliance with Texas Local Government Code Chapter 245.

3.5. Expenses

The City may require the Applicant to reimburse the City, or place a sum in escrow, for payment of all of the City's expenses related to preparation of the Agreement, including administrative costs and professional services fees.

3.6. Notice

3.6.1. The Applicant must provide written notification of the first public hearing or public meeting of the P&Z at which the proposed Agreement will be considered.

3.6.2. General notice must be published in the form of an announcement in the City's official newspaper. Notice must be given not more than thirty (30) nor less than fifteen (15) days prior to the hearing/meeting.

3.6.3. Personal Notice must be provided to each property owner within three hundred (300) feet of the periphery of the land subject to the Agreement. Notice must be given not more than thirty (30) nor less than fifteen (15) days prior to the hearing/meeting. When delivering notice by mail, three (3) days shall be added to the prescribed time period. Property owners shall be those identified by the most recently approved property tax records of Hays County. Personal notice may be

served by:

(a) Hand delivery; or
(b) Registered or Certified US Mail; or
(c) Overnight Mail; or
(d) Such other manner reasonably calculated to provide notice as approved in advance by the City Administrator.

3.7. Approval

3.7.1. Following a public hearing, the P&Z shall consider the Agreement and make a recommendation to the City Council prior to final action by the City Council.

3.7.2. The City Council may take final action on the Agreement only after receiving a recommendation from the P&Z. For purposes of this Chapter, the minutes of a P&Z meeting may constitute a report.

3.7.3. Factors to be considered by the City in approving an Agreement include, but shall not be limited to:

(a) Public benefits; and
(b) Adequate environmental protection; and
(c) Burden on City's infrastructure; and
(d) Consistency with the City's Comprehensive Plan; and
(e) Conformance of the Agreement with the intent and purposes of City regulations; and
(f) Fiscal impact of the Agreement and resulting development on the City.

3.7.4. The City's approval of an Agreement shall take the form of an ordinance approved by the City Council directing the Mayor to execute the Agreement on behalf of the City.

3.7.5. The City Secretary shall be instructed to publish the Agreement in and among the official records of the City.

3.7.6. The Applicant shall be instructed to file the Agreement in and among the official records of Hays County.

SECTION 4. ENFORCEMENT

4.1. An Agreement must provide specific enforcement mechanisms to ensure compliance.

4.2. Among other remedies, the City may withhold development approvals in accordance with an Agreement in order to ensure compliance.

4.3. Among other remedies, the City is authorized to issue Stop Work Orders to halt construction in violation of an Agreement.