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Negotiation of Development Agreements:
Municipal Perspective

Alan Bojorquez

Author Contact Information:
Alan Bojorquez
Bojorquez Law Firm, PC
Austin, TX

Alan@TexasMunicipalLawyers.com
512.250.0411
A. INTRODUCTION

Development agreements provide an opportunity for developers and municipalities to achieve the often-coveted win/win. Years ago, I’d describe this is a process of Give & Take, only to have a developer’s attorney chime in, “Sure, the property owners give, and the cities take.” When both parties are properly motivated, development agreements can achieve a balance. Because development agreements are negotiated instruments, they provide an alternative to the strict regulatory process.

B. 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.” Others may argue that cities have broad authority to contract under Local Government Code Sections 51.014, 51.053, and 51.051, and 51.072, which are general in nature. 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.

C. CURRENT LAW

1. 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).

2. Scope of Agreements. According to the new statute agreements can be executed to:

a. guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the city;

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;

1 Tex. Loc. Gov’t Code § 42.044(a).
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.\(^2\)

A sample checklist identifying the issues that might need to be addressed in a development agreement is included at the end of this document, as Section I.

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

   a. be in writing;
   b. contain an adequate legal description of the land;
   c. be approved by the city council and the landowner; and
   d. be recorded in the real property records of the county.

4. **Extensions.** The total duration of the original agreement and any successive renewals or extensions may not exceed forty-five (45) years.

5. **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.

6. **Vested Rights.** An agreement constitutes a permit under the “Vested Rights” or “Freeze” statute.\(^3\)

**D. MOTIVATIONS**

1. **Developers.** Those seeking a Development Agreement may be the property owner, future owner, developer, or developer/builder. The motivations I have seen the most often are:

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\(^2\) Tex. Loc. Gov’t Code § 212.172.

\(^3\) Tex. Loc. Gov’t Code Chapter 245.
a. **Predictability**: to have the entitlements secured. They want to vest under LGC 245, and also have contractual limitations on what rules the city will impose.

b. **Variances**: to have special exceptions made from the general rules. Some cities are more inclined to approve specific deviations from the ordinances if the city can increase its overall oversight of the project. Development agreements also allow the parties to more comprehensively negotiate mitigation measures to offset or compensate for the effects of variances.

c. **Annexation**: to be brought into the city limits. There are developers who realize advantages to being in the city limits, but do not want their projects to be subject to the blanket regulations. Other developers want to negotiate when annexation will occur.

d. **Flexibility**: Much like a Planned Development District (PDD, or Planned Utility Development), a development agreement allows the parties to take a more creative, flexible approach to designing the development.

e. **Utilities**: More and more municipalities are wanting to have a say in the design of the project in exchange for agreeing to annex and/or provide utility service to the project.

f. **Economic Development**: It is increasingly common for development agreements to accompany contracts that provide some form of financial assistance to the project, such as tax abatements, sales tax reimbursements, property tax refunds, or the creation of a special district such as a Public Improvement District (PID).

2. **Municipalities.** City officials typically want to stand by their Codes of Ordinances and stick to the rules, but can sometimes be persuaded to negotiate development agreements. Common motivations for city officials include:

a. **Increased Regulation**: While the statute will not allow a city to enforce zoning in the ETJ, it can get very close. Development agreements allow the parties to contractually agree to the imposition of city regulations that are typically viewed as only applicable in the city limits. Common examples include rules covering historic preservation, exterior design, landscaping and tree preservation, drainage, and outdoor lighting. Ultimately, the goal is usually to have a higher-quality development than would otherwise occur out in the ETJ.

b. **Annexation**: Cities may be motivated to plan growth through a series of agreements detailing when properties will be brought into the city limits, and negate (or minimize) future legal disputes.

c. **Facilitate Growth**: Even if a city is agreeing to defer annexation, through development agreements cities can help ensure that when annexation eventually occurs, the property was developed to standards that allow it to fit into the city. In a sense, development agreements enable cities to master plan out into the ETJ.
d. **Utilities:** Most utility operations function best with a broad, steady customer base. Development agreements can be a means of providing for future customers to fund the utility.

e. **Infrastructure:** Sometimes cities receive new public infrastructure from projects constructed pursuant to development agreements.

f. **Goods / Services:** It may be that the project that will be built and operated under the development agreement is viewed by the city as an amenity to city residents. Perhaps it will provide shopping opportunities or professional services that are in short supply.

3. **Both Parties.**

a. **Avoid Litigation:** When faced with the prospect of going to court over a permitting dispute, development agreements offer both sides a chance to settle.

b. **But For:** According to Reid Wilson and Jim Dougherty:

   “A core principle is the concept that ‘but for’ the agreement, the development would either not occur at all or would occur with a different form.”

E. **TAKINGS**

1. **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, regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality . . . .”

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.

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2. **Application to Agreements.** When a municipality proposes taking an action covered under the Act, the municipality is required to prepare a written TIA.⁷ “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.⁸

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.⁹ 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.

3. **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 rights granted under the Act by executing some type of waiver.¹⁰ One downside to including such a waiver in the agreement is that it draws the property owner’s attention to the issue.

F. **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

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⁸ 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).
¹⁰ The Hood County Subdivision Regulations and the Smith County Subdivision Regulations both contemplate waiver of rights under the Act.
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.\(^\text{11}\)

1. **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.”\(^\text{12}\) 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.\(^\text{13}\) It is also based on the necessary function of police power in government,\(^\text{14}\) 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.\(^\text{15}\) 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.\(^\text{16}\)

2. **Contract Zoning.** More specifically than above, courts routinely frown upon quid pro quo exchanges of zoning. Contract zoning occurs when the municipality bargains with the landowners to create a bilateral agreement through which the municipality will confer favorable zoning in exchange for the landowner agreeing to use (or not use) the land in a certain way. The reason this approach is illegal is because zoning is a *legislative function*, zoning power may not be abdicated by contract or bargain. *Super Wash, Inc. v. City of White Settlement*, 131 S.W.3d 249 (Tex.App.--Fort Worth, 2004) (regarding a fence requirement), citing *City of Arlington*, 844 S.W.2d at 878; *City of Farmers Branch v. Hawnco, Inc.*, 435 S.W.2d 288, 291 (Tex.Civ.App.-Dallas 1968, writ ref'd n.r.e.).

3. **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

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\(^{11}\) 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.

\(^{12}\) *City of Brenham v. Brenham Water Co.*, 4 S.W. 143, 149 (Tex. 1887).

\(^{13}\) *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.).

\(^{14}\) 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”).

\(^{15}\) *Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (Tex. 1982).

\(^{16}\) *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).
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.

G. 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, as a land planning tool, development agreements are a common tool, and the development agreement process of each city will continue to be refined.

H. TIPS

1. Process: Determine in advance what the process and procedures will be for negotiating, drafting, considering and approving development agreements. Also give thought to how they will be amended in the future. Will other agreements or approvals be processed concurrently with the development agreement (e.g., 380 Economic Development Agreements, PID Agreements, TIF/TIRZ Agreements, Public/Private Partnership Agreements, etc.)? What is the timing for plats and other permits? It’s wise to adopt an ordinance providing for matters such as standards, approval authority, notice and hearings.

2. Players: Have a sense of who should be involved. Will this be a staff-driven process? Will there be a committee? At what point do electeds get involved? Are you requiring the developer to meet with the neighbors in advance? How do other political subdivisions, agencies and utility providers feel about this project? Do the people you are dealing with actually have a legal interest in the property or the owner’s permission to negotiate? Does the corporate entity you’re talking to actually exist?

3. City Expenses: Will the taxpayers bear the city’s costs of doing this deal, or will the city require the developer to front the city’s expenses related to professional services (architects, engineers, lawyers, planners, etc.).

4. Land Use: You can agree to how the land can be used (including design specifications), but it is unwise to specify the zoning district or obligate the city to confer specific zoning at some point in the future. It is recommended that you avoid making promises in the agreement about what zoning districts will be designated.

5. Notice & Hearings: If your development agreement includes land use provisions similar to zoning, consider satisfying the same notice and hearing requirements that are in LGC Chapter 211 for rezoning.

6. Other Sources: I recommend this excellent paper, “Development Agreements: Basics and Beyond”, by Reid C. Wilson and James L. Dougherty, Jr., UT Land Use Conference 2012.
I. CHECKLIST

Items to be addressed for Development Agreements

Procedural:

☐ 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, Sidewalks, Trails
- Taxation
- Utilities (Gas, Electricity, Cable, Telephone)
- Watershed Protection
- Water & Wastewater (including creation of MUD or PID)

**Documentation:**

- Agreement
- Concept Plan
- Metes and Bounds Description of the Land
- Parks & Recreation Plan
- Traffic Impact Analysis
- 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)