

ECONOMIC DEVELOPMENT FOR TEXAS COUNTIES

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ECONOMIC DEVELOPMENT FOR TEXAS COUNTIES

A. Introduction

Texas is growing.¹ Our growth in recent years is the result of a variety of factors, but the increased activity in the energy industries cannot be disregarded as a significant cause. The growth has not been limited to cities. The unincorporated areas of some counties have grown dramatically in recent years. Indeed, some smaller, more rural counties have experienced and begun to address the problematic questions associated with growth -- including how to attract, enhance, and regulate preferred growth which improves the local economy and enhances the quality of life for the people.

The goal of sustained economic growth for Texas counties, however, carries with it unique and complex problems for county governance, including: state mandated revenue caps; unfunded state mandates; increased public demand for better infrastructure and services; rising costs; and limited authority to develop revenue to meet the people's needs.

To address these issues, a commissioner's court -- using its lawful authority, discretion and best business judgment -- should consider from time to time the tools available for economic development, including the statutes and related procedures historically viewed as relevant or applicable only to the more urban areas of the state. This paper discusses some of those tools for Texas counties -- and it shows you where to find the law.²

B. County Governance

County governance in Texas is different from that used by Texas cities, particularly home-rule cities. It is important to understand the differences. Some of the basic rules for county governance in Texas include the following:

- (1) As you know, the commissioner's court is the governing body of a county. It is a limited regulatory body and may regulate only those issues regarding county business that are expressly authorized or implied by the Texas Constitution or statutes.³
- (2) The powers and duties of a commissioner's court regarding county business include legislative, executive, administrative, and judicial

¹ The United States Census Bureau estimated the July 1, 2017 population of Texas to be 28,304,596, representing an estimated population increase of 3,159,035 from the Bureau's 2010 recorded census report of 25,145,561. U.S. CENSUS BUREAU, QuickFacts Texas (February 9, 2018).

² This paper focuses primarily on the economic development tools authorized for counties by Chapter 381 of the Texas Local Government Code (relating to economic development agreements and procedure) and Chapter 312 of the Texas Tax Code (relating to tax abatement agreements and procedure).

³ *City of San Antonio v. City of Boerne*, 111 S.W.3d 22, 27-28 (Tex. 2003); *Canales v. Laughlin*, 147 Tex. 169, 214 S.W.2d 451, 453-55 (1948); TEX. CONST. art. V, § 18.

functions coupled with an implied authority to exercise discretion to accomplish the purposes expressly authorized by law.⁴

(3) A county typically may not use its public resources to benefit a private interest; however, the lawful implementation and administration of an authorized county economic development program or agreement are exceptions to that rule.⁵

(4) Individual members of a commissioner's court have no authority to bind a county by their separate action. A commissioners court may act validly only as a body through a recorded vote at an authorized public meeting as shown by the official minutes.⁶

A county typically will have its own time-honored and unique ways of doing business. Some counties will have sufficient staff and other public resources to do the work. Typically (but not always) these counties will: (1) be larger in population and located near a metropolitan area; (2) have access to local legal counsel for civil matters, usually through the county attorney's office, criminal district attorney's office, or a local law firm; and (3) have sophisticated written policies and procedures. Other counties are different – they typically operate without many staff and have limited public resources to do the work. Typically (but not always), these counties will: (1) be smaller in population and not located near a metropolitan area; (2) have limited access to local legal counsel for civil matters because the local prosecutor's office typically does not perform legal services for the county's civil work, or because the commissioners court prefers not to spend much money on outside legal fees; and (3) not have many written policies or procedures.

But times are changing. The growth in Texas and the steady advancement of legislation allowing all counties to better attract, enhance, and regulate economic growth in the unincorporated areas have created changes in the way some smaller counties do their work, particularly regarding economic development and land development matters.

C. Chapter 381 Economic Development Agreements

1. General Considerations

⁴ *Commissioners Court of Titus County v. Agan*, 940 S.W.2d 77, 79 (Tex. 1997); *Canales*, 214 S.W.2d at 453-55.

⁵ TEX. CONST. art. III, §§ 50, 51, 52(a); TEX. CONST. art. VIII, § 3; TEX. CONST. art. XI, § 3; Op. Tex. Att'y Gen. No. GA-0078 (2003) at *3-*4 citing *Tex. Mun. League Intergovernmental Risk Pool v. Tex. Workers' Comp. Comm'n*, 74 S.W.3d 377, 383 (Tex. 2002) and *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W. 2d 717, 740 (Tex. 1995); see also Op. Tex. Att'y Gen. No. JC-0439 (2001) at *2 citing *Barrington v. Cokinos*, 161 Tex. 136, 338 S.W.2d 133, 139-40 (1960); Op. Tex. Att'y Gen. No. KP-0091 (2016) at *1-*3.

⁶ *Canales*, 214 S.W.2d at 453-55; *Hays County v. Hays County Water Planning Partnership*, 106 S.W.3d 349, 360-361 (Tex. App. -- Austin 2003, no pet.); TEX. GOV'T CODE Ch. 551 ("Texas Open Meeting Act").

Pursuant to article III, Section 52-a of the Texas Constitution, the Legislature is authorized to provide for the creation of programs and the making of loans and grants of public money for economic development.⁷ Chapter 381 of the Texas Local Government Code (“Chapter 381”), and primarily its Section 381.004 (“Section 381.004”), are the enabling statutes passed by the Legislature to give effect to this constitutional grant of power.⁸

To stimulate business and commercial activity, a county may use Section 381.004 to develop, implement, and administer a county economic development program:

- (a) for state or local economic development;
- (b) for small or disadvantaged business development;
- (c) to stimulate, encourage, and develop business location and commercial activity in the county;
- (d) to promote or advertise the county and its vicinity or conduct a solicitation program to attract conventions, visitors, and businesses;
- (e) to improve the extent to which women and minority businesses are awarded county contracts;
- (f) to support comprehensive literacy programs for the benefit of county residents; and
- (g) for the encouragement, promotion, improvement, and application of the arts.⁹

A county may engage in the following activities regarding the implementation and administration of a lawfully enacted county economic development program:

- (a) contract with another entity¹⁰ for the administration of the program;

⁷ TEX. CONST. art. III, § 52-a.

⁸ TEX. LOC. GOV’T CODE § 381.004; *see also Ex Parte City of Irving*, 343 S.W.3d 850, 854-855 (Tex. App. -- Dallas 2011, pet. granted, judgm’t vacated w.r.m.) citing Op. Tex. Att’y Gen. No. GA-0529 (2007) at *2 (discussing similar municipal statute [TEX. LOC. GOV’T CODE § 380.001] and concluding TEX. CONST. art. III, § 52-a created exceptions to constitutional prohibitions against lending of public credit or granting of public money to individuals, corporations, or associations).

⁹ TEX. LOC. GOV’T CODE § 381.004(b).

¹⁰ “Another entity” is defined to include the federal government, the State of Texas, a municipality, school or other special district, finance corporation, institution of higher education, charitable or nonprofit corporation foundation, board, council, commission, or any other person. TEX. LOC. GOV’T CODE § 381.004(a)(1); *see also* TEX. GOV’T CODE § 311.005 (providing broad definition of “person” to include all types of legal entities).

- (b) authorize the program to be administered on the basis of county commissioner precincts;
- (c) use county employees or funds for the program;
- (d) accept contributions, gifts, or other resources to develop and administer the program;
- (e) support a children's advocacy center that provides services to abused children;
- (f) enter into a tax abatement agreement pursuant to Chapter 312 of the Texas Tax Code ("Chapter 312"); and
- (g) make loans and grants of public money and provide the personnel and services of the county for authorized economic development programs.¹¹

Certain procedural steps must be accomplished by a county to formally enact and administer a Chapter 381 county economic development program. Commissioners court approval of the program should occur as a separate public meeting agenda item and recorded vote conducted prior to the vote on the actual economic development agreement, tax abatement agreement, or other economic development tool to be pursued by the County under Chapter 381 with a business prospect. Except for the creation of a tax abatement reinvestment zone ("Reinvestment Zone" or "Zone," discussed later), no public hearing is required to predicate the enactment of the Chapter 381 county economic development program. Some counties, however, may choose to hold a preliminary public hearing on the proposed Chapter 381 economic development program as a matter of transparency and convenience to the public.

Best practice typically involves the Chapter 381 economic development program being memorialized in a written order ("vote-order") executed by the commissioners court upon its approval through a recorded public vote. That vote-order approving the program should include: (a) the specific details of the program to establish that the grant of public resources by the county, or the donation of private resources to the county, serve an authorized public purpose; (b) an accurate legal description of the property to be the subject of the program; (c) the public purpose that will be accomplished by the successful administration of the program; and (d) the contract, audit, or other management controls to be required and performed under the program to ensure that the public purpose is accomplished or substantially achieved.¹² The Chapter 381

¹¹ TEX. LOC. GOV'T CODE § 381.004(c); *see also* TEX. LOC. GOV'T CODE § 81.032 (authorizing commissioners court to accept donation of labor or services, gift, grant, donation, bequest, or devise of money or other property on behalf of county for performance of function conferred by law on county or county officer).

¹² The Texas Constitution generally prohibits the use of a county's public resources to benefit a private party or property. *See* Note 5. An exception exists when: (a) the grant of public resources serves an authorized public purpose as determined by the legislative function of the commissioners court; and (b) sufficient controls are placed by the county on the transaction or project to ensure that the public purpose is accomplished. *See* Op. Tex. Att'y

economic development program must be approved by the commissioners court by a majority public vote recorded in the official minutes at a meeting scheduled and conducted in compliance with the Texas Open Meetings Act.¹³

The county's economic development program order should clearly state: (a) the worthwhile public purposes declared by the commissioners court as the reasons for the program establishment; and (b) that those public purposes will be obtained or substantially achieved by the successful enactment, implementation, and administration of the county's program.

Some of the worthwhile public purposes for establishment of a county economic development program, among other things, are the following matters -- which, if developed over time and during the life of a project, are important elements for increased economic opportunity: (a) increased local tax bases; (b) increased employment and wages; (c) increased wholesale and retail sales; and (d) a decrease in the number of families living in poverty.

The Legislature may appropriate unclaimed money received by the Texas Comptroller under Chapter 74 of the Texas Property Code for a county to use in the administration of a Section 381.004 economic development program.¹⁴ The county must request those funds from the State for the fiscal year of the request. The funds received may not exceed an amount equal to the value of the capital credits the Comptroller receives from an electric cooperative corporation on behalf of its members in the county, less anticipated expenses and claims.

If authorized by a majority vote of the qualified voters in a county-wide election, Chapter 381 allows a county to appropriate from the county's general fund an amount not to exceed five cents on the \$100 assessed valuation to advertise and promote the growth and development of the county. If the election measure passes, a board of development must be created by the county -- this board must devote its time and effort to advertising and promoting the growth and development of the county pursuant to the procedural rules of the statute. The funds appropriated to the board will constitute a separate fund to be maintained by the county (the "Board of Development Fund"), and the funds only may be used for board purposes.¹⁵

Under Chapter 381, the county also may engage in: (a) economic development projects authorized by federal law, including housing and community development programs.¹⁶

Gen. No. GA-0078 (2003) at *3-*4; Op. Tex. Att'y Gen. No. JC-0439 (2001) at *2 citing *Barrington*, 338 S.W.2d at 139; Op. Tex. Att'y Gen. No. KP-0091 (2016) at *1-*3.

¹³ TEX. GOV. CODE Ch. 551.

¹⁴ TEX. LOC. GOV'T CODE § 381.004(e).

¹⁵ TEX. LOC. GOV'T CODE § 381.002. The board has five members (serving without compensation) who must be appointed by the commissioners court for two year terms. Board vacancies must be filled by the court. Formal budget and claim approval regarding the Board of Development Fund are subject to approval by the court.

¹⁶ TEX. LOC. GOV'T CODE § 381.003.

2. Negotiating/Drafting the Agreement

A comprehensive list of all issues to consider when negotiating and drafting a Chapter 381 economic development agreement is difficult to make. All transactions are different. Certain issues may exist that are helpful in one factual context, while they may be incorrect or harmful to the county's interests if applied in another factual context. It is important, however, to consider a few general principles when negotiating and drafting a Chapter 381 economic development agreement, as discussed below.

If the other contracting party is a governmental entity, the formal requirements for an interlocal governmental agreement must be followed.¹⁷

The county should identify its specific transactional goals for the proposed agreement, typically analyzed in terms of the: (a) county's economic interests (including short and long term interests); and (b) realistic evaluation of project risk (including economic and litigation risk). The county representatives should try to know the other contracting party's representatives, counsel, and transactional goals. Viewing the agreement from the other side of the table will help the county identify potentially adverse issues, or resolve disputed negotiation issues between the parties.

The county representatives should know the law regarding the proposed agreement, including the legal issues important to consider at the drafting stage of the agreement. Along those lines, the following issues typically would be important to consider:

- (a) formal notice procedures regarding party performance;
- (b) sufficient descriptions of the term (chronological length) of the agreement, as well as the contract rights and obligations related to termination, default, remedies (at law and equity), and force majeure event issues;
- (c) selection of a choice of law standard;¹⁸
- (d) selection of venue for litigation;¹⁹

¹⁷ TEX. GOV'T CODE §§ 791.001-.035 (requirements for interlocal contracts between governmental entities); TEX. LOC. GOV'T CODE § 381.004(a)(1) (authorizing Chapter 381 agreement between governmental entities).

¹⁸ A county's ability to make a Chapter 381 economic development agreement is based on the express authority granted by Chapter 381 and other Texas statutes. The choice of law standard chosen by the parties for such an agreement should be Texas law. *See* Op. Tex. Att'y Gen. No. GA-0302 (2005) at *4.

¹⁹ *See e.g.* TEX. CIV. PRAC. & REM. CODE §§ 15.011 (mandatory venue rule -- suit for recovery of, interest in, partition of, to remove encumbrances from, recovery of damages to, or to quiet title regarding real property shall be brought in county in which all or part of property is located), 15.015 (mandatory venue -- suit against county shall be brought in that county).

- (e) selection of preferred alternative dispute resolution (“ADR”) remedies;²⁰
- (f) application of governmental immunity protection;²¹
- (g) application of indemnity, hold harmless, and defense protection;²²
- (h) statutory restrictions regarding public subsidies granted to businesses employing undocumented workers;²³

²⁰ See TEX. CIV. PRAC. & REM. CODE §§ 154.001-.073 (general ADR procedures); TEX. GOV’T CODE §§2009.001-.055 (ADR procedures for governmental bodies).

²¹ See *City of Dallas v. Albert*, 354 S.W.3d 368, 373-74 (Tex. 2011) (discussion of governmental immunity doctrine); *City of El Paso v. Heinrich*, 284 S.W.3d 366, 368-73, 375-77, 380 (Tex. 2009) (same issue); *Wichita Falls State Hospital v. Taylor*, 106 S.W.3d 692, 694, n. 3 (Tex. 2003) (governmental immunity [from suit and liability] protects counties and other political subdivisions); TEX. LOC. GOV’T CODE §§ 262.007 (limited immunity waiver and restricted damage recovery authorized for suit against county on written contract for engineering, architectural, or construction services or goods related thereto), 271.151-.160 (limited immunity waiver and restricted damage recovery authorized for suit against local government entity for written contract providing goods or services to that entity -- *but statute expressly states it is not applicable to county or unit of state government*).

²² See TEX. CONST. art. XI, § 7 (under unconstitutional debt rule, county contract for monetary obligation is void unless debt is reasonably contemplated to be satisfied from *current revenues* or fund then within immediate control of government entity, or unless provision is made for special tax levy and collection); *see also Dresser Industries, Inc. v. Page Petroleum, Inc.*, 853 S.W.2d 505, 508-09 (Tex. 1993) (valid indemnity provision must be “conspicuous” [through use of print font, color, or underlining] on face of contract to attract attention of reasonable person reading document); *Brown v. Jefferson County*, 406 S.W.2d 185, 187-88 (Tex. 1966) (county indemnity contract *is void* unless structured in accordance with aforesaid constitutional provision); TEX. LOC. GOV’T CODE § 271.903 (if contract for acquisition of real or personal property retains to governing body continuing right to terminate contract at expiration of each budget period, is conditioned on best effort of body to appropriate funds for contract payment, or both, then contract is commitment of *current revenues*); Op. Tex. Att’y Gen. No. GA-0176 (2004) at *2-*4 (discussing indemnity issues regarding county contracts).

²³ Pursuant to Chapter 2264 of the Texas Government Code, restrictions apply to a “public subsidy” granted by “public agency” (including a county, municipality, or public school district) to a business entity employing an undocumented worker for a project. “Public subsidy” under these statutes means a public program or benefit, or assistance of any type, designed to stimulate the economic development of the state’s economy or create or retain jobs the state, and specifically includes: grants; loans; loan guarantees; benefits relating to an enterprise zone; fee waivers; land price subsidies; infrastructure development and improvements designed to principally benefit a single business or defined group of businesses; matching funds; tax refunds; tax rebates; or tax abatements. The public agency (or a local taxing jurisdiction) shall require a business that submits an application to receive a public subsidy to include in the application a statement therein certifying that it does not and will not knowingly employ an undocumented worker. Further, the agreement between the parties providing the public subsidy must state that, if, after receiving the subsidy, the business is convicted of a violation under 8 U.S.C. § 1324a(f), the business shall repay the subsidy with interest not later than the 120th day after notice of the violation. The agreement providing the subsidy also must specify the rate and terms of interest payment. In an action to recover the subsidy, the public agency or local taxing jurisdiction may recover its incurred court costs and reasonable attorney’s fees from the offending business. See TEX. GOV. CODE §§ 2264.001, 2264.051-.053, 2264.101.

- (i) statutory restrictions regarding contracts with companies that boycott Israel;²⁴
- (j) restrictions regarding governmental entity contracts made with companies that do business with certain identified countries or foreign terrorist organizations;²⁵
- (k) compliance with Texas Ethics Commission/Form 1295 Certificate of Interested Parties procedure;²⁶ and
- (l) the need for road maintenance/repair obligations to be contractually imposed on the applicant to protect the county's public road and bridge system.

Know the deal points of the proposed agreement. A clear understanding of the facts and party goals is essential to a successful transaction. The following issues will be important to identify and consider regarding the deal points:

- (a) the public purpose (or goal) to be accomplished by the agreement;
- (b) consideration of the (1) specific accounting controls to be imposed on the applicant, and (2) reasonable inspection rights (pertaining to applicant's relevant property and business records) granted to the county to ensure that all public purposes declared to justify the economic development program and accompanying agreement are actually obtained or substantially achieved;²⁷

²⁴ Pursuant to Chapter 2270 of the Texas Government Code (and related statutes), a governmental entity (including a county, municipality, and public school district) may not enter into a contract for goods or services with a company (including all types of for-profit and non-profit business entities, sole proprietorships, and organizations) unless the contract contains a written verification from the company stating it: (1) does not boycott Israel; and (2) will not boycott Israel during the term of the contract. Under the statutory scheme, "boycott Israel" means taking any action intended to penalize, inflict economic harm on, or limit commercial relations with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but excluding an action made for ordinary business purposes. *See* TEX. GOV. CODE §§ 808.001(1)(2), 2251.001(3)(6), 2270.001-.002.

²⁵ Pursuant to Chapter 2252 of the Texas Government Code, a governmental entity (including a county, municipality, or public school district) may not enter into a governmental contract with a company identified on a list maintained by the Texas Comptroller of Public Accounts under Sections 2252.153 and 2270.0201 of the Texas Government Code as engaged in business with Iran, Sudan, or a foreign terrorist organization (unless the company is excluded from federal sanctions by an affirmative declaration of the United States government). *See* TEX. GOV. CODE §§ 2252.151-.154.

²⁶ *See* TEX. GOV. CODE § 2252.908 (regarding required submission by vendor of certificate of interested parties prior to contract formation with governmental entity [and corresponding submission by government entity if contract is approved] through use of Texas Ethics Commission electronic submission procedure -- unless exempted by the statute).

²⁷ *See* Notes 5, 12.

- (c) the correct description of any property to be the subject of the agreement;
- (d) the engineering, surveying, construction, or other technical requirements planned by the parties for the agreement;
- (e) the parties' plan for the transfer of funds or other property related to the agreement, including transfer procedures, rate and accrual of interest on funds, and creation of liens or other security interests;
- (f) the parties' plan for recovery or reimbursement of incurred transactional and implementation costs for the agreement (including attorney's fees);
- (g) the parties' plan regarding whether the agreement will be assignable without written party consent; and
- (h) a list of proposed special definitions, corollary documents or attached exhibits for the agreement.

3. Approving/Executing the Agreement

The Chapter 381 economic development agreement must be approved by the commissioners court by a public vote recorded in the official minutes at a meeting scheduled and conducted in compliance with the Texas Open Meetings Act. Best practice typically involves a vote-order approved and executed by the court that formally approves the agreement. It is suggested that a copy of the approved agreement be attached to and incorporated by reference in the court's vote-order.

D. Chapter 312 Tax Abatement Agreements

Pursuant to the economic development authority granted by Chapter 381, a county may execute and implement tax abatement agreements with "an owner or lessee of a property interest subject to ad valorem taxation" – however, the execution, duration, and other terms of the tax abatement agreement are governed by certain provisions of Chapter 312 of the Texas Tax Code ("Chapter 312") as if the commissioners court were a governing body of a municipality.²⁸ Parts of Chapter 312 also govern the substantive and procedural issues associated with the execution and implementation of a county tax abatement agreement.

1. County Eligibility – "Guidelines and Criteria"

The tax abatement agreement may be entitled a "Tax Abatement and Economic Development Agreement" giving due consideration to the Chapter 312 and 381 origins of the agreement, and particularly when monetary amounts or authorized economic development

²⁸ TEX. LOC. GOV'T CODE § 381.004(g); TEX. TAX CODE §§ 312.204-.205, 312.211, 312.402.

donations are contemplated to be granted by the applicant to the county during the project. Chapter 312 is divided into three parts:

- Subchapter A -- general provisions for tax abatement procedure;
- Subchapter B -- provisions governing tax abatement for cities; and
- Subchapter C -- provisions governing tax abatement for counties.²⁹

Some of the county tax abatement statutes (found in Subchapter C) adopt by reference the substantive and procedural issues described in certain city tax abatement statutes (found in Subchapter B). This makes a review of the county tax abatement statutes a page-turning exercise. Chapter 312 will expire on September 1, 2019 unless continued by the Legislature.³⁰

A county must be eligible under Chapter 312 to enter into a tax abatement agreement. To establish eligibility, the commissioners court must formally enact:

- (a) an order³¹ stating that the county elects to become eligible to participate in tax abatement as allowed by law; and
- (b) specific guidelines and criteria (“Guidelines,” constituting the county’s formal public policy statement) governing tax abatement agreements made by the county.³²

The county’s Guidelines are effective for two years from enactment. During that period, the Guidelines may not be amended or repealed unless accomplished by a three-fourths vote of the commissioners court. The existence of the Guidelines does not limit the discretion of the court to: (a) decide whether or not to enter into a specific tax abatement agreement; or (b) delegate to the county’s employees the authority to determine whether or not the court should consider a particular application or request for tax abatement. The existence of the Guidelines does not create any property, contract, or other legal right in any person to have the court consider or grant a specific tax abatement.

The commissioners court may not enter into a tax abatement agreement unless it finds that the terms of the agreement and the property subject to the agreement meet the applicable Guidelines adopted by the county. The Guidelines may include a requirement that an application

²⁹ TEX. TAX CODE §§ 312.001-.007 (Subchapter A), 312.201-.211 (Subchapter B), 312.401-.403 (Subchapter C).

³⁰ TEX. TAX CODE § 312.006.

³¹ Some have been trained that a city council enacts *resolutions*, while a commissioners court enacts *orders*. Those terms are synonymous for this discussion.

³² TEX. TAX CODE § 312.002(a).

for tax abatement must be accompanied by a reasonable application fee not to exceed \$1,000.00.³³

The discretion of the commissioners court is broad for determining the scope and content of the Guidelines. Certain issues typically are important to consider for the Guidelines:

- (a) What types of taxable property located in a county Reinvestment Zone should be required to justify a tax abatement agreement -- real property, personal property, or both types of property?
- (b) What types of taxable ownership interest in eligible property should be required to justify a tax abatement agreement -- an ownership interest, a lease interest, or either interest type?
- (c) What minimum fair market value, if any, for improvements placed on the property, or for leased property, should be required to justify a tax abatement agreement?
- (d) What minimum number or type of temporary and permanent jobs should be required to be created in the county regarding the proposed development project to justify a tax abatement agreement?
- (e) What discretion, if any, should the commissioners court have to grant a variance from the technical application of the Guidelines in order to attract increased business and commercial activity to the county?
- (f) What should be specified for the content of the application required by the county to request a tax abatement agreement, and what filing fee, if any, should be required from the applicant?

Chapter 312 grants the county specific power to make written tax abatement agreements, but only under certain circumstances.³⁴ The Guidelines should specifically describe whether all or some of these authorized abatement powers have been adopted for use by the county. Any authorized Chapter 312 power not adopted by the county in the Guidelines cannot support a tax abatement agreement based on that non-adopted power.

The Guidelines must be approved by the commissioners court by a public vote recorded in the official minutes at a meeting scheduled and conducted in compliance with the Texas Open Meetings Act. Best practice typically involves a written order approved and executed by the commissioners court which formally approves the Guidelines. It is suggested that a copy of the approved Guidelines be attachment to and incorporated by reference in the court's vote-order.

³³ TEX. TAX CODE § 312.002(b)-(e).

³⁴ TEX. TAX CODE §§ 312.401-.402.

Chapter 312 contains a special confidentiality rule relating to proprietary information of the applicant. Information that is provided to the county in connection with an application for a tax abatement agreement, and that describes the specific processes or business activities to be conducted, or describes the equipment or other property to be located on the property for which the abatement is sought, is deemed expressly confidential and is not subject to public disclosure until the tax abatement agreement is executed.³⁵ Such information in possession of the county after the agreement is executed is not confidential under the statute.

If the commissioners court executes a tax abatement agreement, Chapter 312 allows the commissioners court to make a tax agreement regarding the same property on behalf of another taxing unit if: (a) a statute requires the ad valorem tax rate of the other taxing unit to be approved by the commissioners court; or (b) the commissioners court is expressly required by statute to levy the ad valorem taxes for the other taxing unit. The additional tax abatement agreement related to the other taxing unit is not required to contain the same terms or provisions as those in the agreement made by the county.³⁶

Pursuant to Chapter 312, the “abatement period” means the period in which all or a portion of the value of real property or tangible personal property that is the subject of a tax abatement agreement is exempt from taxation.³⁷ The parties to a tax abatement agreement may agree to defer the commencement of the abatement period. The years of the deferral period are sometimes informally called “Dead Years,” meaning the years occurring after the execution of the tax abatement agreement, but before commencement of the abatement period. The duration of the entire abatement period may not exceed ten years.³⁸

2. Application for Reinvestment Zone Designation and Tax Abatement

The applicant for a tax abatement agreement should be required to prepare a written application and file it with the appropriate county official (typically the county judge or other designated county officer). The application is an important document for both sides of the proposed agreement, and should be prepared with reference to and awareness of the county’s Guidelines. The application should contain a detailed description (with supporting technical documents) of:

- (a) the proposed development project -- including all anticipated infrastructure and improvements (including their estimated fair market value on completion) and all jobs (temporary and permanent) to be created because of the project;

³⁵ TEX. TAX CODE § 312.003.

³⁶ TEX. TAX CODE § 312.004.

³⁷ TEX. TAX CODE § 312.007(a).

³⁸ TEX. TAX CODE § 312.007(b).

- (b) the contiguous land area in the proposed Reinvestment Zone on which the project will be located;
- (c) a formal request for the county's creation and designation of the Reinvestment Zone; and
- (d) a formal request for the execution of a tax abatement agreement regarding applicant's eligible taxable property located in the Reinvestment Zone, and including a description of the requested abatement period and the percentage and/or level of abatement for the period.

The positions alleged in the application should not be marketing statements. When the terms of the tax abatement agreement are negotiated, the county likely will try to hold the applicant to the specific positions alleged in the application -- particularly in terms of the: (a) fair market value of the anticipated improvements to be placed, constructed, and operated in the Reinvestment Zone; and (b) type and numbers of jobs to be created in the county for the project. If the applicant desires the commissioners court to grant a variance from the technical application of the Guidelines through an authorized act of court discretion, the application should specifically explain the need for and facts to support the variance request.

3. Designation of Tax Abatement Reinvestment Zone

After the county's Guidelines and election to participate in tax abatement have been ordered by the commissioners court, and an application has been received by the county, the next step is the county's designation of a tax abatement Reinvestment Zone. The Reinvestment Zone is a specifically described, designated, and contiguous land area located wholly within the boundaries of the county. The Zone cannot include any area in the taxing jurisdiction of a municipality.³⁹

A Reinvestment Zone may not properly be created until after a public hearing is conducted by the commissioners court. Special notice rules exist to predicate the hearing:⁴⁰

- (a) Not later than the seventh day before the date of the hearing, notice of the hearing must be: (1) published in a newspaper of general circulation in the county; and (2) delivered in writing to the presiding officer of the governing body of each taxing unit with boundaries that include real property to be included in the Reinvestment Zone.
- (b) Written notice for the hearing delivered to the other taxing entity representatives is presumed delivered when placed in the mail, postage prepaid and properly addressed to the appropriate presiding officer. A notice properly addressed and sent by certified mail, for which a return

³⁹ TEX. TAX CODE §§ 312.201-.202, 312.401-.402.

⁴⁰ *Id.*

receipt is received by the sender, is considered to have been delivered to the addressee.

(c) Proper notice of the hearing pursuant to the Texas Open Meetings Act also must be accomplished through inclusion of the public hearing matter on the public meeting agenda posted by the commissioners court.

(d) Best practice typically involves posting a copy of the public hearing notice (1) at the usual and correct courthouse location where public meeting agendas of the commissioners court are posted, and (2) on the county's internet website, if a county website exists, as required by the Texas Open Meetings Act.

(e) The newspaper notice, public meeting agenda, and posted hearing notices all must contain a precise description of the contiguous land area of the proposed Reinvestment Zone, as well as other required information to predicate the public hearing.

At the public hearing, interested persons may speak and present evidence for or against the creation of the Reinvestment Zone. After the hearing, the Zone may be created and designated by the commissioners court by a majority vote recorded in the official public minutes, at a meeting scheduled and conducted in compliance with the Texas Open Meetings Act, provided that the following findings are made from the evidence:

(a) the improvements sought within the proposed Reinvestment Zone are feasible and practical and would be a benefit to the land to be included in the Zone and to the county after the expiration of any tax abatement agreement; and

(b) the proposed Zone would, as a result of the designation, contribute to the retention or expansion of primary employment or would attract major investment in the Zone that would be a benefit to the property in the Zone and that would contribute to the economic development of the county.⁴¹

Best practice typically involves a written vote-order executed by the commissioners court that approves, designates, and creates the Reinvestment Zone, supplies all required statutory findings, and specifically names and describes the contiguous land area of the Zone. It is suggested that a copy of a map of the Zone area be attached to and incorporated by reference in the court's Zone designation vote-order.

⁴¹ TEX. TAX CODE §§ 312.201(a)(b)(d), 312.202(a)(6), 312.401(b). Typically, the applicant will appear at the public hearing to present the development plan, discuss the application, and answer questions from the court members and public. From this public discussion, the evidence for the Zone designation findings usually will be established. If not, evidence can be submitted by the county or third-parties at the hearing to support the Zone designation.

The Zone designation expires five years after its creation. It may be renewed for periods not to exceed five years. The expiration of the Zone designation does not affect existing tax abatement agreements for property located in the Zone. Property located in a county-created Zone also may be located in a city-created Zone.⁴²

Proper designation of an area as an “enterprise zone” pursuant to Chapter 2303 of the Texas Government Code constitutes designation of that area as a county tax abatement reinvestment zone without further hearing or other procedural requirements.⁴³

4. Negotiation/Drafting the Agreement

The next procedural step toward tax abatement agreement approval is the negotiation and drafting of the agreement. Again, a comprehensive list of all issues to consider is difficult to make. The issues previously discussed for drafting a Chapter 381 economic development agreement should be considered. Pursuant to Chapter 312, additional issues also are important as hereafter discussed.

Chapter 312 grants the commissioners court specific power to make written tax abatement agreements, but only under certain circumstances.⁴⁴ The county’s Guidelines should describe the authorized Chapter 312 abatement powers adopted by the county. Any authorized power not adopted by the county in the Guidelines cannot support a proposed agreement seeking abatement under the non-adopted power.

The commissioners court may make a tax abatement agreement with the owner of (a) taxable real property, or (b) tangible personal property located on real property, in a properly designated Reinvestment Zone, so long as the property is not part of an improvement project financed with tax-increment bonds. The abatement may exempt from taxation all or a portion of the value of: (a) the real property; (b) the tangible personal property located on the real property; or (c) both.⁴⁵

The commissioners court may make a tax abatement agreement with the owner of (a) a leasehold interest in tax-exempt real property, or (b) tangible personal property or an improvement located on tax-exempt real property, in a properly designated Reinvestment Zone. The abatement may exempt from taxation all or a portion of the value of: (a) the leasehold interest in the real property; (b) the tangible personal property or improvement located on the real property; or (c) both.⁴⁶

⁴² TEX. TAX CODE §§ 312.401(c), 312.401(d) (stating “[p]roperty may be located both in a reinvestment zone designated by a county under this subchapter and in a reinvestment zone designated by a municipality under Subchapter B.”).

⁴³ TEX. TAX CODE § 312.4011.

⁴⁴ TEX. TAX CODE §§ 312.401-.402.

⁴⁵ TEX. TAX CODE §§ 312.204-.205, 312.211, 312.401-.402(a).

⁴⁶ TEX. TAX CODE §§ 312.204-.205, 312.211, 312.401-.402(a-1).

The commissioners court may make a tax abatement agreement with the lessee of taxable real property located in a properly designated Reinvestment Zone, so long as the property is not part of an improvement project financed with tax-increment bonds. The abatement may exempt from taxation all or a portion of the value of: (a) the fixtures, improvements, or other real property owned by the lessee and located on the real property of the lease; (b) the tangible personal property owned by the lessee and located thereon; or (c) both.⁴⁷

Two important restrictions exist, and these issues should be noted in the agreement: (a) the agreement is subject to the rights of the outstanding bond holders of the county; and (b) the level of tax exemption agreed by the parties does not mean the applicant pays no ad valorem taxes during the abatement period. The tax abatement agreement may provide for the authorized exemption of the described taxable interest in eligible property for each year of the abatement period -- but only to the extent its value for that year *exceeds* its value for the year in which the agreement is executed (sometimes informally called the “Base Year”).⁴⁸

Under Chapter 312, property located in a Reinvestment Zone owned or leased by a person who is a member of the commissioners court may not be subject to a tax abatement agreement. An exception to this rule exists when it is shown that the property is subject to a tax abatement agreement that was in effect when that person became a member of the court.⁴⁹

The Texas Department of Economic Development (or its successor) may recommend to the commissioners court that a tax abatement agreement be executed with a person under Chapter 312. If this recommendation is made, the court must consider, but is not required to accept, the recommendation.⁵⁰

Under Chapter 312, the tax abatement agreement must include the following:

- (a) provide the kind, number, and location of all proposed improvements on the property;
- (b) provide access to and inspection of the property by the county to ensure compliance with the agreement;
- (c) limit the uses of the property, during the duration of the agreement, to those uses specified in the county’s adopted Chapter 381 economic development program;

⁴⁷ TEX. TAX CODE §§ 312.204-.205, 312.211, 312.401-.402(a-3).

⁴⁸ TEX. TAX CODE § 312.204(a).

⁴⁹ TEX. TAX CODE § 402(d).

⁵⁰ TEX. TAX CODE § 312.402(f).

- (d) provide for recapturing lost property tax revenue if the owner commits a default of the agreement by failing to make the improvements or repairs required in the agreement;
- (e) contain the terms agreed to by the parties;
- (f) require the owner to annually certify to the commissioners court and the other affected taxing units that the owner is in compliance with the agreement; and
- (g) provide a termination or modification right to the county should the owner commit a default of the agreement.⁵¹

The tax abatement agreement may provide for the recapture of all or a portion of property tax revenue lost as a result of the agreement if the owner commits a default of the agreement, including failing to: (a) create any new jobs required by the agreement; (b) place improvements on the property of the value specified in the agreement; or (c) meet any performance criteria required by the agreement. The agreement also may provide for the payment of penalty and interest regarding all property tax revenue recaptured by the county due to a default committed by the owner.⁵²

A county typically will seek to negotiate specific conditions to be placed in the agreement governing a variety of issues relating to the applicant's timely and specific performance of the proposed project, including:

- (a) the completion and operation of specified improvements on the property with a minimum fair market value at the initiation of project operations;
- (b) the creation of a specified number and type of temporary and permanent jobs for the life of the project;
- (c) requirements to ensure that the applicant uses reasonable efforts to procure local labor and supplies for the life of the project;
- (d) the payment of all compensation elements (*i.e.*, economic development grants to be paid to the county, including deferral year payments) and minimum taxes to be paid to the county;
- (e) county inspection (regarding site inspection and review/copying of applicant's relevant business records) and audit requirements;

⁵¹ TEX. TAX CODE §§ 312.205(a)(1)-(7), 312.402(a-2).

⁵² TEX. TAX CODE §§ 312.205(b)(1-6), 312.402(a-2).

(f) restrictions on the assignment of the agreement unless the county first consents in writing to the assignment; and

(g) road and bridge system maintenance/repair obligations of the applicant, if appropriate.

A county should negotiate default and remedy provisions in the agreement to establish a clear and unambiguous agreement regarding the correct procedures to apply should the applicant default (and fail to cure) any provision in the agreement. These “Claw-Back” provisions should include broad remedies for the county in the event of the applicant’s default, due to the public funds nature of the agreement, including:

(a) all remedies available at law or in equity to the county, including those available for the collection of delinquent taxes;

(b) recovery of all abated taxes or unpaid compensation due the county under the agreement; and

(c) recovery of all amounts due under the agreement, plus interest, penalties, attorney’s fees, and expenses of investigation and litigation.

Two concepts occasionally appear in the negotiation and drafting of tax abatement agreements: payment in lieu of taxes (“PILOT”); and deferral year (or sometimes called “Dead Year”) payments. PILOT is an annual, agreed payment made by the applicant to the county for each year of the abatement period in lieu of the ad valorem taxes due on applicant’s eligible property in the Reinvestment Zone. The PILOT concept, however, is not described in Chapter 312 -- the phrases “payment in lieu of taxes” or the acronym PILOT are not found in Chapter 312. PILOT nevertheless can be considered an authorized value abatement, as well as an authorized grant of funds or donation to the county for economic development or other authorized purposes.⁵³ If the PILOT concept is included in the agreement, clear and unambiguous language should be used to describe the PILOT payment dates, amounts, and fund transfer procedure.

Chapter 312 states the parties “may agree to defer the commencement of the abatement period until a date that is subsequent to the date the agreement is entered into, except that the duration of an abatement period may not exceed 10 years.”⁵⁴ Important issues exist regarding a requested deferral period, including the following:

(a) What tax treatment will be applied to the applicant’s eligible property in the Zone during a deferral year, particularly when the applicant’s project likely will be under construction (and not operating) during that year?

⁵³ TEX. LOC. CODE §§ 81.032, 381.004(c)(4).

⁵⁴ TEX. TAX CODE § 312.007(b).

- (b) What compensation, if any, should the county receive from the applicant in exchange for the deferral of the commencement of the abatement period?

To answer the first question (tax treatment for a deferral year), the Base Year value (value of the property for the tax year in which the agreement is executed) typically would supply the method of tax treatment for the deferral year, unless the value for the property increased. If the value increased, the then current value of the property would apply for the deferral year. The deferral year tax treatment should be clearly described in the agreement.

To answer the second question (deferral year compensation paid to the county), that type of compensation can be considered as a grant of funds or donation to the county for economic development or other authorized purposes. The parties, therefore, may agree to deferral year payments to be paid to the county.⁵⁵ Should deferral year payments to the county be included in the agreement, clear language should be used to describe the deferral year schedule, payment dates, amounts, and fund transfer procedure.

5. Approving/Executing the Agreement

The final procedural step for approval is the proper scheduling of the public meeting to formally consider approval and execution of the agreement. Again, special notice rules apply.⁵⁶

- (a) Not later than the seventh day before the date the county enters into the tax abatement agreement, the commissioners court must deliver to the presiding officer of the governing body of each affected taxing entity (*i.e.*, each taxing unit which has Reinvestment Zone property located within its geographic jurisdictional area) a written notice that the county intends to enter into the agreement.
- (b) The notice must contain a copy of the proposed agreement.
- (c) The notice will advise the other taxing entity of the date and time of the public meeting of the commissioners court at which the tax abatement agreement will be considered for final approval and signing.
- (d) Failure to deliver the notice will not affect the validity of the executed tax abatement agreement.

The approval of the tax abatement agreement only can occur by the affirmative vote of a majority of the commissioners court at a *regular meeting* of the court. Upon approval, the

⁵⁵ TEX. LOC. CODE §§ 81.032, 381.004(c)(4).

⁵⁶ TEX. TAX CODE § 312.2041.

agreement may be executed in the same manner as other contracts made by the county.⁵⁷ Best practice typically involves the execution of a written vote-order by the commissioners court that approves the adoption and signing of the tax abatement agreement, and supplies all required statutory findings. It is suggested that a copy of the approved agreement be attached to and incorporated by reference in the vote-order.

6. Modifying/Terminating the Agreement

A tax abatement agreement may be modified by the parties at any time before its expiration; however, the modifications: (a) only may add other provisions that could have been included in the original; (b) may delete provisions that were not necessary to the original; (c) must occur through the same procedure by which the original was approved and executed; and (d) may not be extended beyond 10 years from the date of the original.⁵⁸ A tax abatement agreement may be terminated by parties' mutual consent, but only through the same procedure by which the original agreement was approved and executed.⁵⁹

E. Conclusion

You work as a public servant -- you serve in challenging times. When the subject of economic development is raised, what is the proper answer in terms of the exercise of the lawful authority, discretion, and best business judgment of the Commissioners Court?

A famous literary expression states: "You can't squeeze blood from a turnip."⁶⁰

Your role as an elected public servant on a commissioners court places you squarely in the middle between competing and often complex demands, including: state mandated revenue caps; unfunded state mandates; increased public demand for better infrastructure and services; rising costs; and limited authority to develop revenue to meet the people's needs.

In these challenging economic times for Texas counties, is it possible "to squeeze blood from a turnip" by considering the available tools for economic development? Probably, the best answer is maybe -- sometimes yes, sometimes no. That is because an acceptable solution typically will depend on a thoughtful analysis of available statutory options and procedures, as well as the risk and expense associated with each alternative. In other words, through

⁵⁷ TEX. TAX CODE § 312.207.

⁵⁸ TEX. TAX CODE §§ 312.208(a), 312.402(e); *see also* Tex. Att'y Gen. Op. No. GA-0134 (2004) at *3-*4 (county may not retroactively amend tax abatement agreement to prohibit collection of taxes already due as result of taxpayer's default of agreement); Tex. Att'y Gen. Op. No. DM-456 (1997) at *2-*5 (county may not modify Zone, and tax abatement agreement may not be amended to modify Zone).

⁵⁹ TEX. TAX CODE §§ 312.208(b), 312.402(e).

⁶⁰ This expression usually is attributed to the writings of Charles Dickens in the mid-19th century. *See* Charles Dickens, *David Copperfield* (1850) ("Blood cannot be obtained from a stone."); Charles Dickens, *Our Mutual Friend* (1865) ("You can't get blood from a turnip."). It can be traced, however, to earlier literary roots. *See* John Lydgate, *Minor Poems* (circa 1435) ("... hard to get honey from a marble stone.").

application of the lawful authority, discretion, and best business judgment of the commissioners court, are the resulting benefits of an available economic development alternative worth the effort, risk, and cost necessary to establish and implement the program?

Your effort as a public servant to participate in continuing education is the important first step toward an acceptable solution. A working knowledge of the available economic development tools for Texas counties will provide important perspective and helpful insight for you as a public servant, and may provide the basis for the later establishment and implementation of a worthwhile county plan for economic development.

We wish you the best of success in your work as a public servant.