

**TAX ABATEMENT AND ECONOMIC
DEVELOPMENT AGREEMENTS FOR
TEXAS COUNTIES**

SPONSORED BY:

**THE V.G. YOUNG INSTITUTE OF COUNTY GOVERNMENT,
A PART OF THE TEXAS A&M AGRILIFE EXTENSION
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Effective Date: August 24, 2021

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A. Introduction

Texas continues to grow in population. The 2020 federal census data shows the population of Texas is 29,145,505, an approximate 15.907% (or approximate 3,999,900 person) increase from 2010.¹ The growth has not been limited to cities -- the unincorporated areas of some counties grew dramatically in the past decade. At the same time, however, some rural counties continued to lose population to the more urban areas. During the past decade, some Texas counties have experienced the problematic governance issues associated with substantial, even explosive population growth -- while other counties have experienced the problematic governance issues associated with the loss of significant population.

The goal of sustained economic growth carries with it certain unique and complex problems related to current county governance in Texas -- including the following issues well known to many county officials: state mandated revenue caps coupled with unfunded state mandates; public demand for increased county services and infrastructure coupled with rising costs; and limited county authority to develop revenue to meet the needs of the public.

Given these present circumstances in Texas, a fundamental question typically arises before a commissioners court for discussion: how can a county attract and regulate *preferred growth* which improves the local economy and enhances the quality of life for the people? To address that question, Texas county officials should consider all tools available for economic development -- including procedures traditionally applicable or viewed as relevant only to the more urban counties of the state.

This paper discusses two economic development tools available to all Texas counties: tax abatement and other economic development agreements as authorized by Chapter 381 of the Texas Local Government Code and Chapter 312 of the Texas Tax Code.²

B. County Governance Issues

County governance in Texas is different than that used by Texas cities, particularly home-rule cities. Some of the basic rules for county governance in Texas are discussed below.

The commissioners court, as the governing body of a county, is a limited regulatory body. It may regulate only those issues regarding county business that are expressly authorized or implied by the Texas Constitution or statutes.³ The powers and duties of a commissioner

¹ The 2020 population statistics show the population of Texas (on April 1, 2020) to be 29,145,505 people, representing an approximate 3,999,900 person (or 15.907%) increase from the reported 2010 population (on April 1, 2010) of 25,145,561. U.S. CENSUS BUREAU, QuickFacts Texas (August 19, 2021).

² Unless otherwise designated: (a) "Chapter 381" shall mean Chapter 381 of the Texas Local Government Code; (b) "Chapter 312" shall mean Chapter 312 of the Texas Tax Code; and (c) the past, present, or future tense shall each include the other, the masculine, feminine, or neuter gender shall each include the other, and the singular and plural number shall each include the other where necessary for a correct meaning.

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.

court regarding county business include legislative, executive, administrative, and judicial functions coupled with an implied authority to exercise discretion to accomplish the purposes expressly authorized by law.⁴

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

Individual members of a commissioner court have no authority to bind a county by their separate action. The court may act validly only as a duly constituted governing body, through a recorded vote at an authorized public meeting, as shown by the official court minutes.⁶

C. Chapter 381 Economic Development Agreements

1. General Considerations

Constitutional and Statutory Basis

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

Section 381.004 Components and Procedure

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

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; see also Note 12.

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”).

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, judgment 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).

- (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 of a lawfully enacted county economic development program:

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

⁹ TEX. LOC. GOV'T CODE § 381.004.

¹⁰ "Another entity" includes 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).

- (g) make loans and grants of public money, receive donations, and provide the personnel and services of the county for authorized economic development programs.¹¹

Certain procedural steps must occur to formally enact and administer a Chapter 381 county economic development program. Commissioners court approval of the program should occur to approve the enactment and implementation of the program. This can occur at the time of the approval of the Chapter 381 economic development agreement, or at an earlier time by a separate agenda item and recorded vote.

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 economic development program. Some counties may choose to hold a preliminary public hearing on the proposed program as a matter of transparency, to allow public input, or for informational purposes.

Best practice procedure typically involves the Chapter 381 economic development program being memorialized in a written order executed by the commissioners court upon its approval through a recorded public vote at an authorized public meeting. That order should include the following:

- (a) the specific details of the program, in order 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) a fact recitation sufficient to show that the public purpose associated with the program will be accomplished by its successful enactment and implementation;
- (d) the contract, audit, or other accounting and management controls to be required and performed under the program, in order to ensure that the recited public purpose will be accomplished or substantially achieved;¹²

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 to this prohibition exists when: (a) the grant of public resources serves an authorized public purpose as determined by the legislative function of the commissioners court; (b) sufficient controls are placed by the county on the transaction or project to ensure the public purpose is accomplished; and (c) the county obtains a return benefit. *See* Op. Tex. Att'y 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.

- (e) the order should recite that the Chapter 381 economic development program was approved by the commissioners court by a public vote recorded in the official minutes at a public meeting scheduled and conducted in compliance with the Texas Open Meetings Act,¹³ and
- (f) the order should state: (i) the worthwhile public purposes declared as the reason for the program’s enactment and implementation; and (ii) that those purposes will be obtained or substantially achieved by the program’s successful enactment and implementation.¹⁴

Texas Unclaimed Money Fund

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.¹⁵ To acquire this money, 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.

County Board of Development

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.¹⁶

¹³ TEX. GOV. CODE Ch. 551.

¹⁴ The potential public purposes to support an enacted economic development program are as varied as the types of projects proposed. However, the following public purposes, if successfully developed and achieved during the life of a project, are certainly important goals for increased economic development and opportunity for many county projects: (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.

¹⁵ TEX. LOC. GOV’T CODE § 381.004(e).

¹⁶ TEX. LOC. GOV’T CODE § 381.002. The board has 5 members (serving without compensation), 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.

Federal Projects

Under Chapter 381, the county also may engage in economic development projects authorized by federal law, including housing and community development programs.¹⁷

2. Negotiating/Drafting the Chapter 381 Agreement

Practical Issues

A comprehensive list of all issues to consider when negotiating and drafting a Chapter 381 economic development agreement is difficult to make. All projects are different. Certain issues may exist that are helpful in one factual context -- while the same issues 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* pursuant to Chapter 791 of the Texas Government Code must be followed.¹⁸

The county should identify its specific goals for the proposed agreement, typically analyzed in terms of the: (a) county's economic interests (short and long term); and (b) realistic evaluation of adverse project risk (economic and litigation risk). The county representatives should try to know and understand 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.

Legal Issues

The county representatives should know the law regarding the proposed agreement, including the legal issues important to consider at the drafting stage. 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;¹⁹

¹⁷ TEX. LOC. GOV'T CODE § 381.003.

¹⁸ 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 agreements between governmental entities).

¹⁹ 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.

- (d) selection of mandatory venue for litigation;²⁰
- (e) selection of preferred alternative dispute resolution (“ADR”) remedies;²¹
- (f) application of governmental immunity protection;²²
- (g) application of indemnity, hold harmless, and defense protection;²³
- (h) statutory restrictions regarding public subsidies granted to businesses employing undocumented workers;²⁴

²⁰ 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).

²¹ See TEX. CIV. PRAC. & REM. CODE §§ 154.001-.073 (general ADR procedures); TEX. GOV’T CODE §§2009.001-.055 (ADR procedures for governmental bodies).

²² See *City of Dallas v. Albert*, 354 S.W.3d 368, 373-74 (Tex. 2011) (discussion of governmental immunity doctrine), cited as controlling in *Kaufman County v. Combs*, 393 S.W.3d 336, 342 (Tex. App. -- Dallas 2012, pet. denied); see also *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), compare 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 this statute expressly states it is not applicable to county or unit of state government*).

²³ 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).

²⁴ 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 among other things 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

- (i) statutory restrictions regarding contracts with companies that boycott Israel,²⁵ and restrictions regarding governmental entity contracts made with companies that do business with certain identified countries or foreign terrorist organizations;²⁶
- (j) compliance with Texas Ethics Commission/Form 1295 Certificate of Interested Parties procedure;²⁷ and
- (k) the need for road maintenance/repair obligations to be contractually imposed on the applicant to protect the county's public road and bridge system.

Deal Points

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 to be accomplished by the agreement;
- (b) consideration of the (i) specific accounting controls to be imposed on the applicant, and (ii) reasonable inspection rights (pertaining to applicant's project property and business records) granted to the county, to ensure that all public purposes declared to justify the

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.

²⁵ Pursuant to Chapter 2271 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: (a) does not boycott Israel; and (b) 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), 2271.001-.002.

²⁶ 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.

²⁷ *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).

economic development program and accompanying agreement are actually obtained or substantially achieved;²⁸

- (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 Chapter 381 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 public meeting scheduled and conducted in compliance with the Texas Open Meetings Act. Best practice typically involves a vote-order approved and executed by the commissioners court that formally approves the agreement. A copy of the approved agreement should 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, and the related procedure through which tax abatements are approved and implemented, are governed exclusively by Chapter 312 of the Texas Tax Code.²⁹

²⁸ See Notes 5, 12.

²⁹ TEX. LOC. GOV'T CODE § 381.004(g); *see also* TEX. TAX CODE §§ 312.002-.0021, 312.003, 312.005, 312.007, 312.201-.205, 312.207-.208, 312.211, 312.401-.402, 312.404.

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 donations are to be granted by the applicant to the county during the project.

Predicate Issues

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 order³⁰ stating the county elects to become eligible to participate in tax abatement as allowed by law; and specific guidelines and criteria (“Guidelines”) constituting the county’s formal public policy statement governing tax abatement agreements made by the county.³¹

A *public hearing* also is required to predicate the approval of Guidelines: “Before the governing body of a taxing unit may adopt, amend, repeal, or reauthorize guidelines and criteria, the body must hold a public hearing regarding the proposed adoption, amendment, repeal, or reauthorization at which members of the public are given the opportunity to be heard.”³²

Implementation of Guidelines

The county’s Guidelines are effective for two years from enactment. During that period, the Guidelines may not be amended, revised, or repealed unless accomplished by a three-fourths vote of the commissioners court. Furthermore, the county 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. A county that maintains an internet website also must post the current version of its Guidelines on the website.³³

Importantly, the existence of the Guidelines does not limit the discretion of the commissioners 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 Guidelines do not create any property, contract, or other legal right in any person to have the court consider or grant a specific tax abatement.³⁴

³⁰ Generally, it is considered that a city council enacts *resolutions*, while a commissioners court enacts *orders*. Those terms are synonymous for this discussion.

³¹ TEX. TAX CODE § 312.002(a).

³² TEX. TAX CODE § 312.002(c-1) (emphasis added).

³³ TEX. TAX CODE § 312.002(b)-(c-2).

³⁴ TEX. TAX CODE § 312.002(d).

Application Fee

The Guidelines may include a requirement that an application for tax abatement must be accompanied by a reasonable application fee not to exceed \$1,000.00.³⁵

Scope and Content of Guidelines

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

- (a) What types of taxable property located in a county Reinvestment Zone should 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 justify a tax abatement agreement -- an ownership interest, a lease interest, or either type?
- (c) What minimum fair market value, if any, for improvements placed on the property, or for leased property, should justify a tax abatement agreement?
- (d) What minimum number or type of temporary and permanent jobs should be created 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?
- (f) What should be specified for the content of the application required by the county to request a tax abatement agreement?
- (g) What application or 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.³⁶ 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.

³⁵ TEX. TAX CODE § 312.002(b),(e).

³⁶ TEX. TAX CODE §§ 312.401-.402; *see infra* pp. 16-21.

Approval of Guidelines

After the required public hearing, the Guidelines may 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 procedure typically involves a written order approved and executed by the commissioners court which formally adopts the Guidelines. It is suggested that a copy of the adopted Guidelines be attached to and incorporated by reference in the vote-order.

Confidential or Proprietary Information of Applicant

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.³⁷ Such information in possession of the county after the agreement is executed is not confidential under the statute.

Other Taxing Units

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.³⁸

Abatement Period and Deferral Years

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 the agreement is exempt from taxation. However, the parties to a tax abatement agreement may agree to *defer the commencement of the abatement period* to a date when the project is fully constructed or substantially complete.³⁹ When this deferral period is included in an agreement, the years of the deferral period are sometimes informally called “Dead Years,” -- meaning the years of the agreement occurring after its execution but before commencement of the abatement period. The duration of the entire abatement period, however, may not exceed ten years, as required by Chapter 312.⁴⁰

³⁷ TEX. TAX CODE § 312.003.

³⁸ TEX. TAX CODE § 312.004.

³⁹ TEX. TAX CODE § 312.007.

⁴⁰ *Id.*

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 county judge or other designated county officer named in the Guidelines. The application is an important document for both sides of the proposed agreement, and should be prepared with reference to and awareness of the Guidelines. The application should contain a detailed description (with supporting technical documents) of:

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

Zone Defined

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 may not include any area in the taxing jurisdiction of a municipality.⁴¹

⁴¹ TEX. TAX CODE § 312.401.

Public Hearing Predicate and Procedure

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:⁴²

- (a) Not later than the seventh day before the date of the hearing, notice of the hearing must be: (i) published in a newspaper of general circulation in the county; and (ii) 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 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 procedure typically involves posting a copy of the public hearing notice (i) at the usual courthouse location where public meeting agendas of the commissioners court are posted, and (ii) on the county's internet website (if a 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;

⁴² TEX. TAX CODE §§ 312.201-.202, 312.401-.402.

- (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; and
- (c) the proposed Zone does not include any land area in the taxing jurisdiction of a municipality, and the Zone land is eligible for commercial-industrial tax abatement.⁴³

Zone Approval and Implementation

Best practice procedure 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 and separate land parcels comprising the Zone. A good map of the Zone area should be attached to and incorporated by reference in the Zone designation vote-order.

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.⁴⁴

Chapter 312 does not allow a Zone, once established, to be amended or modified to enlarge or reduce its land area.⁴⁵

Enterprise Zone

Proper designation of an area as an “enterprise zone” pursuant to Chapter 2303 of the Texas Government Code (and through a declaration of the Texas Governor) constitutes designation of that area as a county tax abatement reinvestment zone without further hearing or other procedural requirements.⁴⁶

⁴³ TEX. TAX CODE §§ 312.201-.202, 312.401. Typically, the applicant will appear at the public hearing to present the project 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.

⁴⁴ 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.”).

⁴⁵ See Tex. Atty. Gen. Op. DM-456 (1997) at *2 (concluding no authority exists for county to modify a Zone since (a) county has only those powers conferred expressly or impliedly by Texas Constitution and statutes, and (b) Chapter 312 contains no provision authorizing county modification of Zone once established).

⁴⁶ TEX. TAX CODE § 312.4011.

4. Negotiation/Drafting the Chapter 312 Tax Abatement Agreement

General Scope and Content of Agreement

The next procedural step toward tax abatement agreement approval is the negotiation and drafting of the proposed agreement. Again, a comprehensive list of all potential 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 for consideration, as hereafter discussed.

Chapter 312 grants the commissioners court specific power to make written tax abatement agreements, but only under certain circumstances.⁴⁷ The county's Guidelines should describe the authorized Chapter 312 abatement powers adopted by the county. Any authorized power not adopted 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.⁴⁸

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.⁴⁹

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.⁵⁰

⁴⁷ TEX. TAX CODE §§ 312.401-.402.

⁴⁸ TEX. TAX CODE §§ 312.204-.205, 312.211, 312.401-.402.

⁴⁹ *Id.*

⁵⁰ *Id.*

Bondholders and Base Year Rules

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”).⁵¹

Commissioners Court Member Rule

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. An exception to this rule exists when it is shown that the property is subject to a tax abatement that was in effect when that person became a member of the court.⁵²

Mandatory Components of Agreement

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

- (a) the kind, number, and location of all proposed improvements on the property;
- (b) 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;
- (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) the terms agreed 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

⁵¹ TEX. TAX CODE § 312.204(a).

⁵² TEX. TAX CODE § 402(d).

- (g) a termination or modification right to the county should the owner commit a default of the agreement.⁵³

Discretionary Components of Agreement

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 other 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.⁵⁴

Production Requirements

A county typically will seek to negotiate certain conditions to be placed in the agreement as specific contract promises of the applicant to perform certain obligations, engage in certain conduct, or produce certain results on or before a certain date. These matters sometimes are referred to as “production requirements” or “deliverables” and pertain to a variety of issues related to the applicant’s timely construction, completion, and performance of the proposed development project. The following is a summary of these important issues for consideration:

- (a) the construction completion of project improvements and commencement of commercial project operations (with a minimum certified appraised value and other operational characteristics confirmed to exist) on or before Year 1 of the abatement period;
- (b) the creation of a specified number and type of temporary and permanent jobs for the project on or before certain specified dates in the agreement;
- (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 on or before specified dates in the agreement;

⁵³ TEX. TAX CODE §§ 312.205, 312.402.

⁵⁴ *Id.*

- (e) county inspections (regarding site inspection and review/copying of applicant's relevant business records) allowed, company reports delivered, and audits performed and reported, on or before specified dates in the agreement;
- (f) restrictions on assignment of the agreement unless the county first consents;
- (g) county road and bridge system repair obligations required by the applicant if the system is damaged by project construction, operations, or maintenance; and
- (h) reimbursement paid by the applicant to the county for all costs and expenses incurred by the county (including attorney's fees and newspaper publication fees) in reviewing the application documents, creating the Zone, negotiating the agreement, and executing and implementing the agreement.

Default and Remedy Provisions

A county should negotiate default and remedy provisions to establish a clear and unambiguous agreement regarding the correct procedure to apply should the applicant commit a default of a contract obligation. These "Claw-Back" provisions should include broad remedies for the county in the event of an applicant default, including the following:

- (a) all remedies available at law or in equity to the county, including those available for the collection of delinquent taxes through recapture;⁵⁵
- (b) recovery of all abated taxes or unpaid compensation due the county under the agreement;
- (c) recovery of all amounts due the county under the agreement, plus interest, penalties, attorney's fees, and expenses of investigation and litigation; and
- (d) special language disallowing certain applicant default conduct (such as the failure of the applicant to pay any monetary amount to the county on time pursuant to the agreement) from being (i) excused pursuant to the application of a force majeure clause, or (ii) the subject of a time extension or default-cure period.

⁵⁵ See TEX. TAX CODE §§ 33.01, 312.205, 312.402 (regarding recapture with penalties and interest); TEX. TAX CODE Chs. 31-34 (regarding collections, delinquencies, penalties, tax liens, and other remedies).

PILOT, Deferral Year Payment, and Drop-Dead Provisions

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 Zone for each year during that period. The PILOT concept, however, is not described in Chapter 312. PILOT nevertheless can be considered as an authorized grant of funds (or donation) by the applicant to the county for economic development or other authorized purposes.⁵⁶ 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 that the parties may agree to *defer the commencement* of the abatement period until a date that is subsequent to the effective date the agreement -- except that the duration of an abatement period may not exceed 10 years.⁵⁷ Important issues exist regarding a requested deferral period, as shown below:

- (a) What tax treatment will be applied to the applicant’s eligible property in the Zone during deferral years -- particularly when the applicant’s project likely will be under construction and not operating during those years?
- (b) What compensation, if any, should the county receive from the applicant in exchange for the deferral of the commencement of the abatement period – in view of the opportunity cost incurred by the county for the deferral period?

To answer the first question (regarding 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 (regarding deferral year compensation paid to the county), that deferral year 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.⁵⁸

⁵⁶ TEX. LOC. CODE §§ 81.032, 381.004.

⁵⁷ TEX. TAX CODE § 312.007.

⁵⁸ TEX. LOC. CODE §§ 81.032, 381.004.

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.

A tax abatement agreement with a deferral year component typically will not specify the exact date on which commencement of the abatement period will occur. Instead, a “trigger event” will be described and the abatement period will be stated to commence on January 1 of the next calendar year following the occurrence of the trigger event. A common trigger event used is the applicant’s delivery to the county of a Certificate of Completion (“Certificate”) therein stating that (a) 100% construction of the project improvements has been completed in compliance with the agreement, and (b) commercial operations are ready to commence or have commenced.

It is important for the county to exercise some control over the outside limits of the applicant to defer the beginning of the abatement period through negotiated deferral years. Without that control, the county could be forced to continue as a party to a tax abatement agreement for a project that was not constructed within a commercially reasonable time period, or not constructed at all. To address that problem, an automatic termination provision (sometimes called a “Drop-Dead” provision) provides a solution.

In a Drop-Dead provision, a specific deadline (described by date and time) is stated in the agreement for construction of the project improvements to be 100% complete, and for the Certificate to be timely delivered to the county -- with additional language added to the state as follows: if the applicant defaults and does not timely meet that deadline -- then, at the county’s sole option and discretion, the agreement may be terminated by the county through the notice and public meeting procedures required by sections 312.208 and 312.402 of the Texas Tax Code.

5. Approving/Executing the Chapter 312 Tax Abatement Agreement

Procedural Predicate

The final procedural step for approval is the proper scheduling of the public meeting of the commissioners court to formally consider approval and execution of the agreement. Special notice rules apply as shown below:⁵⁹

- (a) Taxing Entity Notice Letters -- 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. The notice must contain a copy of the proposed agreement. The notice will advise the other taxing entity of the date and time of the public meeting of the

⁵⁹ TEX. TAX CODE §§ 312.2041, 312.207.

commissioners court at which the tax abatement agreement will be considered for final approval and signing.

- (b) **Special 30-Day Meeting Notice** -- In addition to any other requirement of law, the public notice of the meeting at which the commissioners court will consider the approval of a tax abatement agreement with a property owner must contain the following matters: (i) the name of the property owner and the name of the applicant for the proposed tax abatement agreement; (ii) the name and location of the reinvestment zone in which the property subject to the proposed agreement is located; (iii) a general description of the nature of the improvements or repairs included in the proposed agreement; and (iv) the estimated cost of the improvements or repairs for the proposed project. This special meeting notice must be given in the manner required by Chapter 551 of the Texas Government Code (the Texas Open Meetings Act), except that: (i) the notice must be posted at least *30-days* before the scheduled time of the meeting; and (ii) the usual 72-hour meeting notice requirements of the Texas Open Meetings Act (including agenda posting and sufficiency requirements) also must be followed.

Regular Meeting Required

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 (i.e., not a special, called, or emergency meeting).

Upon approval, the agreement may be executed in the same manner as other contracts made by the county.⁶⁰ 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 Chapter 312 Tax Abatement Agreement

Modification

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 abatement period.⁶¹

⁶⁰ TEX. TAX CODE § 312.207.

⁶¹ TEX. TAX CODE §§ 312.208, 312.402; *see also* Tex. Att’y Gen. Op. No. GA-0134 (2004) at *3-*4 (tax abatement agreement may not be retroactively amended to prohibit collection of taxes already due as result of taxpayer’s

Termination

A tax abatement agreement may be terminated by the parties' mutual consent -- but only through the same procedure by which the original agreement was approved and executed.⁶²

E. Concluding Comments

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 lawful authority, discretion, and best business judgment of the commissioners court?

A famous literary expression states: "You can't squeeze blood from a turnip."⁶³

Your role as an elected county official and public servant 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 public needs.

In these challenging 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 all available options -- as well as the risk and expense associated with each alternative. In other words, through 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, cost, and risk associated with implementing the program?

Your effort as a public servant to participate in continuing education is the important first step toward determining 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 county official, and may provide the basis for the later enactment and implementation of a worthwhile county program for economic development.

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

default of agreement); *see also* 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).

⁶² TEX. TAX CODE §§ 312.208, 312.402.

⁶³ 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, however, be attributed to earlier literary roots. *See* John Lydgate, *Minor Poems* (circa 1435) ("... hard to get honey from a marble stone.").