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CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENTS:
The Right Stuff?

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INTRODUCTION:

Chapter 380 of the Texas Local Government Code is one of the most powerful yet shortest statutes there is in the municipal economic development arsenal. It truly is a “gateway” statute in that all grants or loans of municipal funds for an economic development purpose must pass through the Chapter 380 mechanism. So many times, elected officials and city staff ask “Have you ever done a 380 Agreement?” Fortunately, Chapter 380 Agreements aren’t like bigfoot in that seeing one is a rare citing. Instead, “380 Agreements” are quite common and are nothing to fear. The tricky part about Chapter 380 Agreements is adequately memorializing each party’s obligations, ensuring that the grant or loan of public funds is a proper use of the funds pledged, and making sure the City gets its money back in the event things go south.

This paper, and the accompanying presentation, is geared toward the novice Chapter 380 Agreement craftsman to give them an overview of the legislative intent, establishing talk about the process for creating economic development programs, drafting tips, and liability pitfalls to avoid.

THE LEGISLATIVE INTENT BEHIND ADOPTION OF THE 380 STATUTE:

Until 1987, Texas lacked the constitutional authority to incentivize

businesses to undertake projects in certain areas with the intent to spark economic development in those areas. However, in 1987 Texas Assistance for Economic Development, otherwise known as proposition 4, was approved thus adding Article III, Section 52-a of the Texas Constitution. Section 52-a authorizes the Legislature to create economic development programs and make loans and grants of public monies in association with such programs.

The Legislature then extended to municipalities the authority to create economic development programs with the addition of Chapter 380 to the Texas Local Government Code in 1989. By enacting Section 380.001, the legislature intended to authorize municipalities to perform any of the functions that Article III, Section 52-a permitted the legislature to delegate.¹ Chapter 380 agreements, as they are now commonly called, serve to memorialize the economic development programs that municipalities create and undertake and are a broad economic development tool that serves as a conduit for many types of economic development programs.

ESTABLISHING PROGRAMS TO INCENTIVIZE ECONOMIC DEVELOPMENT:

The unique brevity of Chapter 380 affords municipalities the opportunity to provide an array of incentives to draw

¹ Tex. Atty. Gen. Op. DM-185 (1992).

businesses, industries, and developers to their community. The main provision of Chapter 380 authorizes municipalities to establish and administer “one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality.”² The municipality may either use city staff or contract with another entity to administer the program.³ Furthermore, there are no restrictions on the source of funds used to establish and administer the programs.⁴

In 1992, the Attorney General of Texas declined to determine specifically which incentives, when offered singularly or in combination, constitute a “program... to promote state or local economic development.”⁵ Furthermore, neither Article III, Section 52-a of the Texas Constitution, nor Chapter 380 of the Texas Local Government Code specifically reference any programs or measures but merely requires that they promote economic development.⁶ Since Chapter 380 prescribes only the purpose of the required program, and not the procedure for establishing or the process for administering it, the usefulness of Chapter 380 as a tool for economic development is limited only by the creativity of the

municipality utilizing it - and other applicable law.

Pursuant to Chapter 380 and the Texas Constitution, all expenditures of municipal funds must serve a public purpose. Therefore, despite there being no procedure for establishing nor process for administering the Chapter 380 program, a municipality must be cognizant of certain elements that should be included in the agreement.

DRAFTING 380 AGREEMENTS:

Commonly referred to as “380 Agreements,” these agreements memorialize the municipality’s (or economic development corporation’s) establishment of the economic development programs authorized under the statute. 380 Agreements should guarantee that the public funds or resources behind the economic development program / incentive will serve to benefit a public purpose. In other words, no public monies should be earmarked, pledged, dedicated, or otherwise paid to a program partner for a private purpose. Likewise, the agreement should provide remedies for the City if the program fails to serve a public purpose.

Therefore, common to many 380 Agreements, the “Program” is generally described as an economic development program established by the City to

² Tex. Loc. Gov’t Code §380.001(a).

³ *Id.* §380.001(b).

⁴ *Id.* §380.001(b)(3).

⁵ Tex. Atty. Gen. Op. DM-185 (1992).

⁶ Tex. Atty. Gen. Op. GA-0529 (2007)

promote local economic development and stimulate business and commercial activity within the City. The agreement should then outline obligations that will bind the incentive recipient to fulfilling certain economic growth benchmarks established by the City. Achieving the benchmarks will satisfy the public purpose requirement and thus justify the City's contribution of public funds and resources to a private business partner or developer. The obligations that may be included in the agreement may include expanding the tax base (ad valorem, sales tax, or both), creating permanent jobs, or other enhancements that will induce local economic development or stimulate business and commercial activity.

Consequently, the City should also include a "recapture" or "claw-back" provision to every 380 Agreement if the incentive recipient fails to meet the obligations mentioned above or otherwise associated with their 380 Agreement. The recapture provision serves as additional motivation for the incentive recipient to ensure that its project complies with a public purpose as well as serving as a safeguard for the municipality to ensure that it is not in conflict with the Texas Constitution by providing public funds or resources for private purposes. Therefore, as an event of default for failure to materially perform the terms of the agreement, the City should include in its remedies the ability to recapture all public funds or resources that the developer has received under this agreement. This,

however, requires that the City explicitly outline the obligations mentioned above along with a tangible means for measuring whether the developer complies with such obligations.

CREATING CHAPTER 380 PROGRAMS & ADOPTING CHAPTER 380 AGREEMENTS:

Putting together an attractive economic development incentive package and then memorializing it with a 380 Agreement is only part of the process. Chapter 380 requires municipalities to create "programs" in conjunction with their 380 Agreements. These programs can be global in scope to the extent they may be designed to implement multiple 380 Agreements, or you may have multiple programs that are specifically targeted to community needs and desires. Either way, creating your "program" (which is a term that is not defined by the statute) is a critical part of adopting a 380 Agreement to properly comply with the Chapter 380 statute.

When it comes to seeking approval from your municipality's governing body for your 380 Agreement, it is recommended that you memorialize the approve of the 380 Agreement with an ordinance or resolution that specifically authorizes the execution of the Agreement. Formal presentation and approval of the by the municipality's governing body also allows the City Council or Commissioner's to place any other final terms or conditions on the 380 Agreement (e.g., making the agreement

subject to incentive or program components, etc.)

POTENTIAL MUNICIPAL LIABILITY:

Because a municipality's actions are dictated by state and local regulations, it must ensure that it checks all boxes required by such regulations to take any action. Fortunately, the brevity of Chapter 380 means fewer required boxes to check, but nonetheless important. Therefore, as described above, a validly executed 380 Agreement must implement a properly established economic development program that promotes a public purpose by promoting economic development and stimulating business or commercial activity in the area.

Furthermore, because Chapter 380 essentially only regulates the purpose of economic development programs, a municipality establishing an economic development program need only concern itself with the regulations applicable to the specific functions of the program independent of the program itself.

For example, if a municipality enters into a Chapter 380 agreement providing for a grant or loan by the municipality, the grant or loan expenditure must be in strict compliance with the municipality's budget.⁷ If an agreement requires expenditure to occur after final approval of a budget not providing for the expenditure, then the expenditure must

meet the public necessity requirement for an emergency budget amendment or it cannot be made until the adoption of the next annual budget.⁸

Not only are there these and potentially other regulations applicable to the expenditure of program funds, there are also certain regulations applicable to the source of program funds.⁹ For example, general law municipalities are not able to issue debt to fund an economic development program, and home-rule municipalities may do so only if their charter so provides. However, there are few regulations applicable to funding economic development programs which leaves plenty of room for ingenuity.

CONCLUSION

Chapter 380 of the Local Government Code offers municipalities nearly limitless potential for economic development. Even when a municipality cannot fund an economic development program with cash on hand, the broad funding possibilities sometimes allow for funding of a project with the revenues the project itself generates. Although there may be reasons why another economic development tool is more appropriate in certain situations, they can often be combined with a Chapter 380 economic development program to create economic development that is greater than the sum of its parts.

⁷ See *Id.* §102.009(b).

⁸ See *Id.* §1002.009(c).

⁹ See *Id.* §380.002(c).