CHAPTER 380 ECONOMIC DEVELOPMENT AGREEMENTS, THE RIGHT STUFF?

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INCENTIVES (I CAN’T DO IT WITHOUT YOU)

- Growth is a battlefield
  - Developer represents he cannot get the project done without incentives or portrays your city in competition with neighboring cities for national retailers, restaurants etc.

- We built this city
  - New development typically increase ad valorem, sales tax, jobs and property values but at what costs?
    - What will be the impact of Increase traffic?
    - What will be the impact on water, sewer and drainage utilities?
    - What will be the impact on services such as fire department, police department, emergency medical services, garbage collection, code compliance?
    - What will be the impact on amenities like parks, and public libraries?

- Give a little bit
  - City seeks industry or commercial development
    - Anywhere is fine
    - Targeted areas
Some of the impact will be addressed by requirements in a municipality’s development codes and ordinances.

Where development codes fall short, or a developer has a compelling Texas Local Government Code Chapter 245 or Section 212.904 argument, incentives can be used to contract with the developer to make necessary improvements to a city’s streets and sidewalks, water, sewer or drainage utilities, that may not have been adequately addressed by the city’s existing regulations.
Not only can incentives be used to enhance public infrastructure:

- Incentives can also be a vehicle for obtaining architectural enhancements, landscaping, tree preservation beyond what is required by a city’s code or ordinances.
- Incentives can be used to direct growth to targeted underdeveloped, or economically distressed areas of a city.
GOD BLESS THE CHILD

- Be proactive not reactive
  - Develop incentive programs
- Questions to ask
  - What kind of development does the city wish to encourage?
  - Are incentives really necessary to encourage development. What kind? How much?
  - In what areas of the City may incentives be required.
IT DON’T MEAN A THING

- Don’t be forced to incentivize something a developer is legally obligated to do.
  - Be sure that you periodically review your development codes
    - Do the codes adequately address the impact development puts on public infrastructure,
    - do permits have clear expiration dates,
    - have you implemented a permit dormancy policy that complies with Texas Local Government Code Section 245.005

- Cost Benefit Analysis: Recognize that although incentives may help address a project’s impact on public infrastructure, they do so often at the expense of services such as police, fire, ems. In other words, development projects most certainly will impact these services; however, if a portion of the tax revenues generated by these projects is going back to the developer, funding to meet this increase demand will have to come from other sources.
CHAPTER 380 TEXAS LOCAL GOVERNMENT CODE

(a) The governing body of a municipality may establish and provide for the administration of 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. For purposes of this subsection, a municipality includes an area that:

(1) has been annexed by the municipality for limited purposes; or

(2) is in the extraterritorial jurisdiction of the municipality.

(b) The governing body may:

(1) administer a program by the use of municipal personnel;

(2) contract with the federal government, the state, a political subdivision of the state, a nonprofit organization, or any other entity for the administration of a program; and

(3) accept contributions, gifts, or other resources to develop and administer a program.
Tex Constitution art. III Sec. 52(a): Except as otherwise provided by this section, the Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever, or to become a stockholder in such corporation, association or company.
In 1987 the voters approved Section 52-a which provides that the promotion of economic development constitutes a public purpose, including programs that address economic development and diversification, elimination of unemployment and underemployment, stimulation and growth of agriculture, and the expansion of state transportation and commerce.

Moreover, a program created or a loan or grant made as provided by this section that is not secured by a pledge of ad valorem taxes or financed by the issuance of any bonds or other obligations payable from ad valorem taxes of the political subdivision does not constitute or create a debt for the purpose of any provision of this constitution.
TELL ME WHY

- Types of incentives
  - The statute allows administration of one or more programs, including:
    - loans and grants of public money;
    - providing personnel
    - and services of the municipality.
    - Water and sewer services
- Scope: The legislature intended Section 380.001 to authorize a municipality to implement a range of programs designed to promote economic development. Op. Tex. Att’y Gen. No. DM-185
  - What about single family development?
    - Op. Tex. Att’y Gen. No. GA 0529 The opinion states:
      - there is nothing in the Constitution, nor in Local Government Code, that prohibits municipalities from determining that housing may be considered economic development; and
      - there has been no determination that, as a matter of law, housing projects do not promote economic development.
      - Therefore, it would be up to the municipality to determine how they wish to run their economic development program, and whether housing falls within the projects that may benefit from economic grants.
  - Making the case:
    - Is there a shortage of housing which is preventing industrial or commercial developers to consider a targeted area?
    - Will the public infrastructure the housing development bring help facilitate future industrial or commercial development?
Guidelines.

Must create a program

- Can adopt a policy (similar to tax abatement guidelines); or
- rely on the specific contract to establish the required program

Program considerations:

- duration/number of years;
- maximum amount or limit of incentive;
- limited to geographical area or certain zoning districts;
- generation of certain level of sales tax; creation of a certain number, type and kinds of jobs;
- Employment (number of jobs created/ wages);
- Local suppliers, minority or women owned businesses;
- limited to certain types of industry or commercial activity;
- environmental restrictions; required capital or infrastructure improvements;
- required level of capital investment; and
- required development standards.
A city contracts with the recipient of the grant incentive;

Receipt of grant conditioned on:

- creation of employment opportunity (number of workers, wages);
- construction of improvements, public infrastructure, big box store, seamless pipe mill; (how to value, construction costs, appraisal district valuation?);
- targeted development (type: retail, industrial, warehousing), (location: economically depressed area or area lacking public infrastructure);
- development standards, architectural design, landscaping or other land use controls that exceeds code requirements;
- Waive right to protest appraisal district valuations.
YOU GIVE TO GET

- Claw-backs
  - the right to seek reimbursement of the incentives if the business does not fulfill its obligations.
    - The recapture of incentives for a breach must be significant enough to deter the recipient from breaching its contractual obligations and/or relocating to another jurisdiction that has offered greater incentives.
    - In the absence of significant liquidated damages, there is no incentive for business to continue to comply with the terms of the agreement and fulfill its obligations to promote economic development.
The ask:

- Project site not to be subject to future annexation for as long as possible.
- Portion of the project site within corporate limits to be dis-annexed.
- In city price for water and sewer discharge.
THE AGREEMENT

- Texas Local Government Code Chapter 380 and Section 212.172

- Section 212.172 Development Agreement allow municipalities and owners of land in its ETJ to agree about the following:
  - Guarantee of the lands immunity from annexation
  - Extension of the City’s planning authority by preparation of a development plan specific to the land
  - Enforcement of zoning and other land use regulations which would otherwise only be enforceable in the corporate limits
  - Provide for public infrastructure (streets, drainage, wastewater, water)
  - Agree as to when property will be annexed
  - Specify pre and post annexation use of land
  - Other lawful terms
TENARIS’S OBLIGATION UNDER THE AGREEMENT

- Will use best efforts to give preference to local service and goods provider.
- Compliance with reimbursement agreement for design of water and sewer services.
- Reimburse unforeseen costs incurred by City to provide water and sewer service.
- Complete construction of 1.3 billion dollar plant by December 31, 2017.
- Sewer discharge compliance with federal, state and municipal requirements.
- Create 300 full time jobs with average pay 60k and costs of living adjustment.
TENARIS’S OBLIGATION UNDER THE AGREEMENT

- Payment of indebtedness and obligations.
- Tax obligations
- Drainage compliance with requirements of Matagorda County Drainage District No. 1
- Development approvals through city and Matagorda County
- Use of property limited to seamless pipe mill or existing uses – express waiver of common law and TLGC 43.002 vested rights
REQUIRED REPORTS

- Annual report on use of local suppliers
- Annual statement of value created through development and construction
- Annual Job creations report
- Annual Certification of full compliance with agreement
- Other information as may be reasonably necessary for city to manage contract
CITY’S OBLIGATION UNDER THE AGREEMENT

- Compliance with the terms of the reimbursement agreement
- Provide water and sewer service to the facility as any other customer
- Grant Payment from 01/01/16 to 12/31/25 charge “In City Water and Sewer Rates”
- Immunity from Annexation during term of agreement (forty-five years)
- Extension of Land Use Regulations (oil and gas drilling)
Cibolo residents plan to appeal judge's decision in lawsuit over Walmart site
By David DeKunder, San Antonio Express-News Published 12:01 am, Tuesday, March 25, 2014

Cibolo residents who filed a lawsuit against the city over the zoning of a Walmart store plan to appeal a judge's ruling dismissing the case. Guadalupe County District Judge William Old III ruled March 17 the plaintiffs in the lawsuit, including five residents of the Bentwood Ranch subdivision and the Bentwood Ranch Homeowners Association, had no legal standing. City Manager Robert Herrera said the city was pleased by the court's decision while Catherine Benecke, president of the Bentwood Ranch HOA, said her group plans to appeal the ruling. “The response that we have received from citizens is a mixture of surprise and disappointment, as well as from the HOA,” said Benecke about the response to Old's decision. Herrera said the ruling confirms that city officials followed proper procedures when the Walmart property was rezoned in 2010.
CIBOLO WALMART

The Players

- Walmart
  - 11,527 stores in 27 countries
  - World's largest company according to revenue
  - Nations largest employer

City of Cibolo

- 2000 census 3,035; 2010 census 15,349; 2013 est. 23,890
- Median income for a family was $65,545
CIBOLO WALMART

- Proposed store
  - 24.75 acres of real property
    - intersection of Borgfeld Road and North Main Street
  - 186,000 square feet of retail space
  - Projected sales 65 million dollars annually
    - 65% subject to sales tax
  - 300 employees
CIBOLO WALMART

- Public infrastructure
  - Total need: $3,371,565.00
    - Road, water, wastewater, and drainage improvements
    - Relocation of electric along Borgfeld Road
    - Water line replacement
    - Sidewalks
  - Impact fee assessment:
    - Approximately $841,565.00
  - Grant: $2,530,000.00
    - 50% of sales tax refund
    - Maximum term: twenty years.
• Ancillary issues
  • City acquisition of right-of-way (City acquires or developer relived of related improvement obligations)
  • Walmart
    • Architectural features
    • Residential landscape buffer
    • Truck Route
    • Offsite School Improvements (wrought iron fence/gates)
    • Property maintenance and operation. Prohibit overnight parking/ truck idling; noise (11:00 p.m. and 8:00 a.m.); light pollution
    • Pay city’s attorneys fees ($7500.00)
FIRST WALMART IN TEXAS TO PROVIDE PICKUP SERVICE
A “first of its kind” Walmart Supercenter is opening in Cibolo on Wednesday. The store has several features that are new to Texas, including an upgraded electronics lounge; a “Smart Life Hub” showcasing wearable electronics and other devices; and an expanded area for its bakery, dairy products, deli and produce, according to a news release from the company.
From the Negotiation Book by Steven Gates:

**Auction:** The bidding process is designed to create competition. When multiple parties want the same thing, pit them against one another. When people know that they may lose out on something, they will want it even more. Not only do they want the thing that is being bid on, they also want to win, just to win. Taking advantage of someone’s competitive nature can drive up the price.

**Brinksmanship:** One party aggressively pursues a set of terms to the point at which the other negotiating party must either agree or walk away. Brinksmanship is a type of "hard nut" approach to bargaining in which one party pushes the other party to the "brink" or edge of what that party is willing to accommodate. Successful brinksmanship convinces the other party they have no choice but to accept the offer and there is no acceptable alternative to the proposed agreement.

**Bogey:** Negotiators use the bogey tactic to pretend that an issue of little or no importance to him or her is very important. Then, later in the negotiation, the issue can be traded for a major concession of actual importance.

**Chicken:** Negotiators propose extreme measures, often bluffs, to force the other party to chicken out and give them what they want. This tactic can be dangerous when parties are unwilling to back down and go through with the extreme measure.

**Defense in Depth:** Several layers of decision-making authority is used to allow further concessions each time the agreement goes through a different level of authority. In other words, each time the offer goes to a decision maker, that decision maker asks to add another concession in order to close the deal.
BABY DON’T COME BACK

- **Deadlines:** Give the other party a deadline forcing them to make a decision. This method uses time to apply pressure to the other party. Deadlines given can be actual or artificial.

- **Flinch:** Flinching is showing a strong negative physical reaction to a proposal. Common examples of flinching are gasping for air, or a visible expression of surprise or shock. The flinch can be done consciously or unconsciously. The flinch signals to the opposite party that you think the offer or proposal is absurd in hopes the other party will lower their aspirations. Seeing a physical reaction is more believable than hearing someone saying, "I'm shocked."

- **Good Guy/Bad Guy:** The good guy/bad guy approach is typically used in team negotiations where one member of the team makes extreme or unreasonable demands, and the other offers a more rational approach. This tactic is named after a police interrogation technique often portrayed in the media. The "good guy" will appear more reasonable and understanding, and therefore, easier to work with. In essence, it is using the law of relativity to attract cooperation. The good guy will appear more agreeable relative to the "bad guy." This tactic is easy to spot because of its frequent use.

- **Highball/Lowball:** Depending on whether selling or buying, sellers or buyers use a ridiculously high, or ridiculously low opening offer that will never be achieved. The theory is that the extreme offer will cause the other party to reevaluate his or her own opening offer and move close to the resistance point (as far as you are willing to go to reach an agreement). Another advantage is that the person giving the extreme demand appears more flexible he or she makes concessions toward a more reasonable outcome. A danger of this tactic is that the opposite party may think negotiating is a waste of time.

- **The Nibble:** Nibbling is asking for proportionally small concessions that haven't been discussed previously just before closing the deal. This method takes advantage of the other party's desire to close by adding "just one more thing."

- **Snow Job:** Negotiators overwhelm the other party with so much information that he or she has difficulty determining which facts are important, and which facts are diversions. Negotiators may also use technical language or jargon to mask a simple answer to a question asked by a non-expert.
• Become familiar with all of the incentive tools available to your governmental entity.
• Implement incentive policies that encourage the type of development the city finds beneficial and directs development in distressed or underdeveloped areas.
• Keep your development codes current.
QUESTIONS?

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