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LAND USE AND ECONOMIC DEVELOPMENT AGREEMENT DUE DILIGENCE

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LAND USE DUE DILIGENCE

COMPREHENSIVE PLAN

ZONING

PLATTING/SUBDIVISION

SPECIAL CONSIDERATIONS

Request Early

- As Built Survey or Site Plan
 - Height - as measured by zoning ord.
 - Distances to boundary line
 - Parking Calculation
 - Tenants with floor area occupied
 - Sign details

Open Records Request

- Zoning Verification Letter
- Unresolved Code violations
- Certificates of Occupancy
- Ordinances and approvals
- Notices
- Thoroughfare plan
- Moratorium?
- Charter

LAND USE DUE DILIGENCE

■ THE COMPREHENSIVE PLAN

The Comprehensive Plan

- **Chapter 213, Texas Local Government Code**

A comprehensive plan may

- 1) Include provisions on land use, transportation, and public facilities**
- 2) Consist of a single plan or a set of plans**
- 3) Be used to coordinate and guide the establishment of development regulations**

The Comprehensive Plan

- Section 211.004, Texas Local Government Code

“Zoning regulations must be adopted in accordance with a comprehensive plan”

The Comprehensive Plan

- **LGC § 214.002(c)**

A municipality may define, in its charter or by ordinance, the relationship between a comprehensive plan and development regulations and may define standards for determining the consistency required between a plan and development regulations

The Comprehensive Plan

- Mayhew v. Town of Sunnyvale, 905 S.W.2d 284, 295 (Tex. App.-Dallas 1989, writ denied), cert. denied, 498 U.S. 1087 (1991)

The law demands that the approved zoning plan should be respected.... The duty to obey the existing law forbids municipal actions that disregard not only the pre-established zoning ordinance but also the long range master plans and maps that have been adopted by ordinance.

The Comprehensive Plan

- Is desired rezoning consistent the adopted comprehensive plan
- Are any rezonings contemplated due to adoption of the comprehensive plan
- Is a recent rezoning of the property consistent with the comprehensive plan
- Does the plan contemplate any limitations on permitting Tex. Atty. Op. No. JC-0142

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ZONING OVERVIEW

Zoning Overview

■ Procedure:

- **Zoning Commission Hearing**
 - Notice mailed \geq 11 days before
 - Report
- **Governing Body Hearing**
 - Notice published \geq 16 days before
- **Supermajority**

Zoning Overview

■ Procedure

- Rezoning process generally consists of several steps:

- meeting with the city staff
- preparing the application
- meeting with surrounding property owners and neighborhood associations
- filing the application
- conducting the zoning commission hearing

Zoning Overview

- Rezoning process generally consists of several steps (cont.):
 - addressing any conditions, concerns or questions of the zoning commission including meeting with the neighborhood association, if necessary
 - presenting the application to city council
 - confirming adoption of the ordinance

Zoning Overview

■ Board of Adjustment

Board's role:

- hear and decide an appeal that alleges error in an order, requirement decision, or determination made by an administrative official in the enforcement of the city's zoning ordinance
- hear and decide special exceptions
- authorize a variance from the terms of a zoning ordinance
- hear and decide other matters authorized by the city's zoning ordinance

Did rezoning of the property meet statutory requirements ?

- Zoning Notice – mailing and publication
- Agenda Notice (get copies)
- Public Hearings
- Quorum
- Majority or Supermajority vote (get minutes)
- Ordinance
- Appeal

Board of Adjustment

Variations – but no use variations

Special Exceptions

Appeals of administrative zoning interpretation

Amortization of Nonconforming Uses

Nonconforming Uses

Legal when installed.

Registration?

Lapse

Amortization

Zoning Overview

BOARD OF ADJUSTMENT

- The concurring vote of 75 percent of the members of the board is necessary to:
 - (1) reverse an order, requirement, decision, or determination of an administrative official;
 - (2) decide in favor of an applicant on a matter on which the board is required to pass under a zoning ordinance; or
 - (3) authorize a variation from the terms of a zoning ordinance.

Zoning Overview

- **BOARD OF ADJUSTMENT**

- **APPEAL**

- The petition must be presented within 10 days after the date the decision is filed in the board's office.

Zoning Overview

- **Uses**
 - **Land use chart / schedule**
 - **Classification of new uses**
 - **Accessory uses**
 - **Does the actual use match the definition for the use listed on the C.O.**

Zoning Overview

- **Zoning Districts**
 - **Residential uses**
 - **Nonresidential uses**
 - **Special districts**
 - **Development / site plan requirements**
 - **Landscape / tree preservation requirements**
 - **Off-street parking requirements**
 - **Environmental performance standards**
 - **Signs**
 - **Alcohol sales**

Zoning Overview

■ Site Plan Review

- if a site plan is required
- if a site plan has been approved
- if a site plan has been approved, does the site comply
- if the site does not comply, what is the site plan amendment process
- if the city has a minor amendment process
- whether the site plan needs to be approved by the planning and zoning commission or city council
- whether the review is discretionary or ministerial

Zoning Overview

Performance Standards

Environmental constraints

Architectural standards

Amenities Required

Density bonuses

Phasing

Special/Overlay Districts

Unique uses

Park Dedication Requirements

Parking

Under-Parked - Explanations/Remedies

Code procedures for reducing parking

Shared Parking

Remote Parking

Code defined reductions

Nonconforming rights

Variances/Special Exceptions

Removing obstructions

Restriping

Validation Statute

L.G.C. Sec. 51.003. MUNICIPAL ACT OR PROCEEDING PRESUMED VALID.

(a) A governmental act or proceeding of a municipality is conclusively presumed, as of the date it occurred, to be valid and to have occurred in accordance with all applicable statutes and ordinances if:

(1) the third anniversary of the effective date of the act or proceeding has expired; and

(2) a lawsuit to annul or invalidate the act or proceeding has not been filed on or before that third anniversary.

Validation Statute

.(b) This section does not apply to:

(1) an act or proceeding that was void at the time it occurred;

(2) an act or proceeding that, under a statute of this state or the United States, was a misdemeanor or felony at the time the act or proceeding occurred;

Validation Statute

(3) an incorporation or attempted incorporation of a municipality, or an annexation or attempted annexation of territory by a municipality, within the incorporated boundaries or extraterritorial jurisdiction of another municipality that occurred without the consent of the other municipality in violation of Chapter 42 or 43;

(4) an ordinance that, at the time it was passed, was preempted by a statute of this state or the United States, including Section 1.06 or 109.57, Alcoholic Beverage Code; or

Validation Statute

(5) a matter that on the effective date of this section:

(A) is involved in litigation if the litigation ultimately results in the matter being held invalid by a final judgment of a court; or

(B) has been held invalid by a final judgment of a court.



Subdivision Platting

Why Is Platting Required

- To regulate subdivision development and implement planning policies;
- To implement plans for orderly growth and development within the city's boundaries and extraterritorial jurisdiction;
- To ensure adequate provision for streets, alleys, parks and other facilities indispensable to the community;
- To protect future purchasers from inadequate police and fire protection;

When Is A Plat Required

“The owner of a tract of land located within the limits or in the extraterritorial jurisdiction of a municipality who divides the tract into two or more parts to lay out a subdivision of the tract, including an addition to the municipality,

to lay out suburban, building, or other lots, or to lay out streets, alleys, squares, parks, or other parts of the tract intended to be dedicated to public use

or for the use of purchasers or owners of lots fronting on or adjacent to the streets, alleys, squares, parks, or other parts must have a plat of the subdivision prepared.

When Is A Plat Required

A division of a tract under this subsection includes a division regardless of whether it is made by using a metes and bounds description in a deed of conveyance or in a contract for deed, by using a contract of sale or other executory contract to convey, or by using any other method.

A division of land under this subsection does not include a division of land into parts greater than five acres, where each part has access and no public improvement is being dedicated.” (LGC Section 212.004)

Standard of Review

A municipal authority is obligated to approve a plat if:

- It conforms to the general plan of the municipality in its current and future streets, alleys, parks, playgrounds, and public utility facilities;
- It conforms to the general plan for the extension of the municipality and its roads, streets, and public highways within the municipality and in its extraterritorial jurisdiction, taking into account access to an extension of sewer and water mains in the instrumentalities of public utilities;
- A bond, if required, is filed with the municipality; and,
- It conforms to any rules adopted by the municipality on subdivision. (LGC Section 212.010)

Types of Plats

- **Conveyance Plat**
- **Minor Plat**
- **Municipal Determination**
- **Vacating Plat**
- **Replat**
- **Residential Replats**
- **Amending Plat**
- **Development Plat**

Is platting required prior to the transfer of the property?

1. Does an exception apply?
 - a. Statutory Exception
 - b. Local Exception

Sec. 212.0045. EXCEPTION TO PLAT REQUIREMENT: MUNICIPAL DETERMINATION. (a) To determine whether specific divisions of land are required to be platted, **a municipality may define and classify the divisions. A municipality need not require platting for every division of land otherwise within the scope of this subchapter.**

(b) In lieu of a plat contemplated by this subchapter, a municipality may require the filing of a development plat under Subchapter B if that subchapter applies to the municipality.

Potential Subdivision Platting Exactions

- Rights-of-way and easement dedication;
- Utility construction;
- Park dedication;
- Impact fees assessment;
- Other dedications; and,
- Development agreements.

Subdivision Controls

■ EXACTIONS

- The “two-pronged” test for determining that an exaction is not a taking is that (1) an essential nexus exist between the exaction and a legitimate state interest, and (2) that the exaction be roughly proportional to the public consequences of the requested land use. The burden of proof, the court added, was on the Town to prove that the condition imposed on Stafford met the test.

Subdivision Controls

- **EXACTIONS**
- **The burden of proof is on the municipality to prove that the condition imposed meets the legal tests.**

Subdivision Controls

Nollan v. California Coastal Commission,
483 U.S. 825, 107 S.Ct. 3141 (1987)

“RATIONAL NEXUS”

Subdivision Controls

Nollan v. California Coastal Commission, 483 U.S. 825, 107 S.Ct. 3141 (1987)

- “... ‘substantial advancement’ requires an ‘essential nexus’ between the restriction and the interests to be served.

Subdivision Controls

Dolan v. Tigard, 512 U.S. 374, 114 S.Ct. 2309
(1994)

“ROUGH PROPORTIONALITY”

Subdivision Controls

Dolan v. Tigard, 512 U.S. 374, 114 S.Ct. 2309
(1994)

- We think a term such as “rough proportionality” best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.

Subdivision Controls

Town of Flower Mound v Stafford Estates,
135 S.W.3d 620, 47 Tex. Sup. Ct. J. 497, 2004
WL 1048331 (Tex. 2004)

“NON-DEDICATORY EXACTIONS”

Subdivision Controls

Town of Flower Mound v Stafford Estates, 135 S.W.3d 620, 47 Tex. Sup. Ct. J. 497, 2004 WL 1048331 (Tex. 2004)

- “For purposes of determining whether an exaction as a condition of government approval of development is a compensable taking, we see no important distinction between a dedication of property to the public and a requirement that property already owned by the public be improved. The Dolan standard should apply to both.”

Subdivision Controls

Town of Flower Mound v Stafford Estates, 135 S.W.3d 620, 47 Tex. Sup. Ct. J. 497, 2004 WL 1048331 (Tex. 2004)

- “...we agree with the Supreme Court that the burden should be on the government to ‘make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.’”

Subdivision Controls

Town of Flower Mound v Stafford Estates,
135 S.W.3d. 620, 47 Tex. Sup. Ct. J. 497, 2004
WL 1048331 (Tex. 2004)

- In sum, the Town has failed to show that the required improvements to Simmons Road bear any relationship to the impact of the Stafford Estates development on the road itself or on the Town's roadway system as a whole. On this record, conditioning development on rebuilding Simmons Road with concrete and making other changes was simply a way for the Town to extract from Stafford a benefit to which the Town was not entitled. The exaction the Town imposed was a taking for which Stafford is entitled to be compensated.”

Exaction

Rough proportionality test now set forth in Local Government Code statute.

Sec. 212.904. APPORTIONMENT OF MUNICIPAL INFRASTRUCTURE COSTS. (a) If a municipality requires as a condition of approval for a property development project that the developer bear a portion of the costs of municipal infrastructure improvements by the making of dedications, the payment of fees, or the payment of construction costs, the developer's portion of the costs may not exceed the amount required for infrastructure improvements that are roughly proportionate to the proposed development as approved by a professional engineer who holds a license issued under Chapter 1001, Occupations Code, and is retained by the municipality.

Exactions

(b) A developer who disputes the determination made under Subsection (a) may appeal to the governing body of the municipality. At the appeal, the developer may present evidence and testimony under procedures adopted by the governing body. After hearing any testimony and reviewing the evidence, the governing body shall make the applicable determination within 30 days following the final submission of any testimony or evidence by the developer.

(c) A developer may appeal the determination of the governing body to a county or district court of the county in which the development project is located within 30 days of the final determination by the governing body.

Exactions

(d) A municipality may not require a developer to waive the right of appeal authorized by this section as a condition of approval for a development project.

(e) A developer who prevails in an appeal under this section is entitled to applicable costs and to reasonable attorney's fees, including expert witness fees.

(f) This section does not diminish the authority or modify the procedures specified by Chapter 395.

Impact Fees

Has the city adopted Impact Fees under Chapter 395?

Will Impact Fees be due for the project?

Impact Fee Waiver

Impact Fee Credits

“Impact Fees” that aren’t Chapter 395 Impact Fees

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ECONOMIC DEVELOPMENT AGREEMENTS

Certificate of Interested Parties

Was the agreement executed on or after January 1, 2016?

A Certificate of Interested Parties (Form 1295) most likely would have been required.

Check Texas Ethics Commission's (TEC) database to confirm whether a Form 1295 has been completed and acknowledged.

Certificate of Interested Parties

Governing statute is located at Government Code §2252.908.

Rules are located at 1 TAC Ch. 46

Requires disclosure to city and TEC of owners of more than a 10% interest, board members and intermediaries.

Probably not required for Type A and Type B Corp. contracts.

Certification Regarding Undocumented Aliens

**Was the contract executed on or after
September 1, 2007?**

Does the contract provide a “public subsidy”?

Certification Regarding Undocumented Aliens

"Public subsidy" means a public program or public benefit or assistance of any type that is designed to stimulate the economic development of a corporation, industry, or sector of the state's economy or to create or retain jobs in this state. **The term includes grants, loans, loan guarantees, benefits relating to an enterprise or empowerment 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.**

Certification Regarding Undocumented Aliens

Agreement must provide a certification that the business does not and will not hire undocumented workers.

Business must agree that if convicted under 8 U.S.C. Section 1324a(f), the business shall repay the amount of the public subsidy with interest, at the rate and according to the other terms provided by the agreement, not later than the 120th day after the date the public agency, state or local taxing jurisdiction, or economic development corporation notifies the business of the violation.

All Agreements

- Agenda notice provided timely/adequately?
- Does the agreement conform to the authorizing resolution?
- Is there statutory authorization?
- Are there any limitation in the charter?
- Is the agreement assignable?

Infrastructure Cost Participation

Chapter 212 Subchapter C and § 252.022(a)(11)

A municipality may participate in the costs of public infrastructure under a contract with the developer of a subdivision for up to 30% of the contract price.

Exempt from public bidding requirements.

If over 30% was there public bidding?

Does the city have funds in hand?

Chapter 380/381 Grants or Loans

Was a program created?

Does the agreement conform to the program?

Is there an economic development purpose?

Are there provisions for the return of the money if the requirements are not met?

Will bond or certificate of obligation proceeds be used?

Is the agreement written as a true grant or loan agreement?

Annual appropriation?

Tax Abatement - Tax Code Chapter 312

- **Has a reinvestment zone been created?**
- **Was notice provided prior to the public hearing?**
- **Approval on a regularly scheduled meeting date?**
- **Were the statutory findings made?**
- **Are adopted guidelines current?**
- **Does the agreement conform to the adopted guidelines?**

Tax Abatement - Tax Code Chapter 312

- **Eligible entity?**
- **Are only taxes on increased value abated?**
- **Is the abatement period 10 years or less?**
- **Has the property previously been subject to an abatement?**
- **Is the assignee an eligible entity?**
- **Annual certification of compliance?**
- **Annual exemption applications mentioned?**

TIF/TIRZ Agreement – Tax Code Ch. 311

- Was the zone properly created?
 - Notice?
 - Public Hearing?
 - Meets statutory criteria?
 - Blight?
 - Ordinance includes statutory requirements?
- Is Board composition proper? Authority?
- Are participation agreements in place?
- What is the remaining term?
- Has the project and financing plan been properly approved?

TIF/TIRZ Agreement

- Have any amendments been done properly?
- Is the project consistent with the project and financing plan?
- If a grant, has only city increment been pledged?
- What at the prior obligations?
- Are there accrued funds?
- What is the projection of annual revenues?
 - Check annual report.

TIF/TIRZ Agreement

- What is the remaining term of the zone?
- How are funds distributed?

Type A /Type B Economic Development Corporations

- Request ballot language. Does the project conform?
- Review Board approval?
- Does the project meet the definition of “project” for the corporation type?

TYPE A /TYPE B ECONOMIC DEVELOPMENT CORPORATIONS

Sec. 501.101. PROJECTS RELATED TO CREATION OR RETENTION OF PRIMARY JOBS. In this subtitle, "project" includes the land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are:

- (1) for the creation or retention of primary jobs; and**
- (2) found by the board of directors to be required or suitable for the development, retention, or expansion of:**
 - (A) manufacturing and industrial facilities;**
 - (B) research and development facilities;**

TYPE A /TYPE B ECONOMIC DEVELOPMENT CORPORATIONS

(C) military facilities, including closed or realigned military bases;

(D) transportation facilities, including airports, hangars, railports, rail switching facilities, maintenance and repair facilities, cargo facilities, related infrastructure located on or adjacent to an airport or railport facility, marine ports, inland ports, mass commuting facilities, and parking facilities;

(E) sewage or solid waste disposal facilities;

(F) recycling facilities;

(G) air or water pollution control facilities;

TYPE A /TYPE B ECONOMIC DEVELOPMENT CORPORATIONS

(H) facilities for furnishing water to the public;

(I) distribution centers;

(J) small warehouse facilities capable of serving as decentralized storage and distribution centers;

(K) primary job training facilities for use by institutions of higher education; or

(L) regional or national corporate headquarters facilities.

TYPE A /TYPE B ECONOMIC DEVELOPMENT CORPORATIONS

Sec. 501.103. CERTAIN INFRASTRUCTURE IMPROVEMENT PROJECTS. In this subtitle, "project" includes expenditures that are found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises, limited to:

- (1) streets and roads, rail spurs, water and sewer utilities, electric utilities, or gas utilities, drainage, site improvements, and related improvements;
- (2) telecommunications and Internet improvements; or
- (3) beach remediation along the Gulf of Mexico.

TYPE A /TYPE B ECONOMIC DEVELOPMENT CORPORATIONS

- **Certain military base projects**
- **Career center projects**
- **Border airport facilities**
- **Certain projects by cities in border counties**

Type A Corporations

A Type A corporation may undertake a project the primary purpose of which is to provide:

- (1) a general aviation business service airport that is an integral part of an industrial park;
- (2) a port-related facility to support waterborne commerce; or

Type A Corporation

(3) an airport-related facility, if the authorizing municipality:

(A) is wholly or partly located within 25 miles of an international border; and

(B) has, at the time the project is approved by the corporation as provided by this subtitle:

(i) a population of less than 50,000; or

(ii) an average rate of unemployment that is greater than the state average rate of unemployment during the most recent 12-month period for which data is available that precedes the date the project is approved.

Type B Corporation – LGC Chapter 505

§505.152 Recreational and Community Facilities

§505.153 Affordable Housing

§505.154 Water supply facilities and water conservation

§505.155 Land/buildings/equipment/facilities to promote/develop new or expanded business enterprises that create or retain primary jobs

§505.156 Project in cities with < \$50,000 in sales tax for 2 years

Type B Corporation – LGC Chapter 505

§505.1561 airport facilities in certain municipalities

§505.157 business enterprises in landlocked communities

§505.158 business development in $\leq 20,000$ municipalities

Ch. 505 Subchapter E Sports Venue Projects

Type B Corporations

- If §505.156 or §505.1561
- Or expenditure the expenditure for more than \$10,000 under §505.158
- has the city council adopted a resolution authorizing the development or expenditure

Type A/ Type B Corporations

Sec. 501.158. PERFORMANCE AGREEMENTS. (a) A corporation may not provide a direct incentive to or make an expenditure on behalf of a business enterprise under a project as defined by Subchapter C of this chapter or by Subchapter D, Chapter 505, unless the corporation enters into a performance agreement with the business enterprise.

(b) A performance agreement between a corporation and business enterprise must:

(1) provide, at a minimum, for a **schedule of additional payroll or jobs to be created or retained and capital investment to be made** as consideration for any direct incentives provided or expenditures made by the corporation under the agreement; and

(2) **specify the terms under which repayment must be made** if the business enterprise does not meet the performance requirements specified in the agreement