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Legal Q&A

By Scott Houston, TML Director of Legal Services

What is a development agreement?

Subchapter G of Chapter 212 of the Texas Local Government Code, which was enacted in 2003, allows any city (other than the City of Houston) to enter into a written contract with an owner of land in the city's extraterritorial jurisdiction to: (1) guarantee the land's immunity from annexation for a period of up to fifteen years; (2) extend certain aspects of the city's land use and environmental authority over the land; (3) authorize enforcement of land use regulations other than those that apply within the city; (4) provide for infrastructure for the land; and (5) provide for the annexation of the land as a whole or in parts and to provide for the terms of annexation, if annexation is agreed to by the parties. TEX. LOC. GOV'T CODE § 212.172.

Development agreements have most frequently been used by cities as an alternative to annexing land on which new residential development is planned. The agreements allow a city to provide for sustainable residential development by controlling lot size and density, infrastructure quality, and other matters. They are often used when the new development is created as a special district. The district imposes ad valorem taxes to pay for infrastructure, and it is sometimes not in the best financial interests of current city residents or the residents of the new development to include them in the city until some future date.

How have development agreements been used to protect rural land?

After the legislative authorization of development agreements in 2003, some cities used the agreements in a somewhat novel way. While the intent of the development agreement statute was arguably to allow a city to regulate development in the city's extraterritorial jurisdiction in lieu of annexing, the broad authority granted by the statute allows for what some have termed "non-development" or "non-annexation" agreements.

In 2003, as certain cities began annexations of farmland in an attempt to regulate future development, rural landowners who claimed to have no intention of developing their property became increasingly concerned that their chosen lifestyle was in jeopardy. Influential legislators, as well as the Texas and Southwestern Cattle Raisers Association and the Texas Farm Bureau, became involved in the issue. As a compromise, the cities and landowners ultimately used the authority of Section 212.172 to enter into "non-development" agreements, under which a city agrees to not annex the land for a period of time in exchange for the landowner's promise to not develop the land. Legislators and others believed that the compromise agreements were the right tool to protect farms and ranches from what they believed was unnecessary municipal annexation.

What is House Bill 1472 (Texas Local Government Code Section 43.035)?

House Bill 1472, which became effective on May 25, 2007, enacted Section 43.035 of the Texas Local Government Code. The bill provides that a city may not annex an area that is appraised for

ad valorem tax purposes as agricultural, wildlife management, or timber management unless the city offers a development agreement to the landowner that would:

- guarantee the continuation of the extraterritorial status of the area; and
- authorize the enforcement of all regulations and planning authority of the city that do not interfere with the use of the area for agriculture, wildlife management, or timber.

TEX. LOC. GOV'T CODE § 43.035(b). Under the bill, the landowner may either: (1) accept the agreement; or (2) decline to make the agreement and be subject to annexation.

Wasn't there a similar bill that passed in 2005?

Yes. In 2005, H.B. 2305 contained provisions that were very similar to those found in H.B. 1472. Texas Municipal League staff testified on H.B. 2305 in the House Land and Resource Management Committee at that time, pointing out various concerns and unintended consequences that might result from the bill's passage. H.B. 2305 was voted from committee and placed on the House calendar for consideration, but the bill had little chance of passage due to the late date of the session.

H.B. 1772 was another bill in 2005 that slightly modified the authority of certain general law cities to annex, and it was much further along in the process. As often happens near the end of a legislative session, the provisions of H.B. 2305 were added to H.B. 1772 as a Senate committee amendment. H.B. 1772 passed both the House and the Senate unanimously, but it ran into trouble due to the bill's caption. A bill's "caption" describes the subject matter of the bill, and the subject matter of the bill must be germane (or relevant) to the caption. H.B. 1772's caption referenced only general law cities. As such, the annexation provision relating to all cities was not germane.

A conference committee was appointed to work out the issue, and the final version of the bill added Section 43.033(a)(7) to the Local Government Code. That section contained the requirement to offer a development agreement, but it only applies to the very limited authority of certain general law cities to annex without consent.

When should a city make the required offer of a development agreement under House Bill 1472 (Texas Local Government Code Section 43.035)?

Other than providing that a city may not annex an area that is appraised for ad valorem tax purposes as agricultural, wildlife management, or timber management unless the city offers to make a development agreement, Section 43.035 is silent regarding when the offer must be made. Each city should decide when it is appropriate to offer the agreement. In most cases, the offer of the agreement would be made prior to expending time and resources on the required prerequisites to annexation (that is, service plan, notice, hearings, and so on).

A more important question is: How long does the landowner have to accept or decline the agreement? The law is also silent on this question. Section 43.033 (the general law statute that was amended in 2005) provides that a city may annex the property if "the landowner fails to

accept...[the offer]...within 30 days after the date the offer is made.” The fact that the new statute is silent as to time indicates that the decision of how long a city gives a landowner to accept or decline an agreement is up to each individual city. Of course, analogizing to contract law and pursuant to the Code Construction Act, the time period should be reasonable, based on the circumstances. TEX. GOV’T CODE § 311.021. In addition, a city should retain documentation that an agreement was offered, whether the agreement was accepted or refused.

What provisions should be in the agreement?

Local Government Code Section 212.172, read in conjunction with Section 43.035, indicates broad authority for a city to offer an agreement on the city’s terms. Most cities’ proposed agreement would include provisions such as:

- A guarantee by the city of “the continuation of the extraterritorial status of the area.” In other words, a guarantee that the city won’t annex the property for a definite term unless the terms of the agreement are violated. And a term not to exceed fifteen years, with an option to renew if desired, but in no case lasting longer than 45 years. TEX. LOC. GOV’T CODE §§ 43.035(b)(1); 212.172(b)(1) and (d).
- A promise by the owner not to use the property for any purpose other than for agriculture, wildlife management, and/or timber management, and related incidental activities. *Id.* § 212.172(b)(9).
- A promise by the owner that no person will file any type of subdivision plat or related development document for the property with any entity. *Id.* § 43.035(d).
- A provision that a violation of the agreement by the landowner by commencing development or by any other manner will constitute a petition for voluntary annexation in addition to other remedies available to the city, and that the owner waives any and all claims to a vested right of any kind. *Id.* § 212.172(b)(9).
- A provision authorizing the city to enforce all of the city’s regulations and planning authority that do not interfere with the use of the property for agriculture, wildlife management, or timber, in the same manner that the regulations are enforced within the city’s boundaries (or in a different manner, as authorized by Section 212.172). *Id.* § 212.172(b)(4); (b)(6); (b)(8).
- Recordation of the agreement in the real property records of the county, so that the agreement will run with the land. *Id.* § 212.172(f).

When drafting an agreement, city officials should consider the legislative intent behind the requirement to offer an agreement. The intent is to allow a landowner who truly intends to continue using his land for agriculture, wildlife management, or timber management to remain outside a city’s limits. The provisions of a proffered agreement should reflect that intent. Drafting and offering a completely unreasonable agreement to an eligible landowner does not carry out the intent of the statute and could lead legislators to seek more restrictive provisions in the future.

On the other hand, the purpose of the requirement is to protect farmers and ranchers, and not to allow unscrupulous developers to subvert municipal regulations. To that end, according to Section 43.035(d), a provision of a development agreement entered into under that section is

void if the landowner files any type of subdivision plat or related development document for the area with a governmental entity that has jurisdiction over the area, regardless of how the area is appraised for ad valorem tax purposes. If a landowner tries to develop in violation of an agreement, the city can annex immediately.

What other issues should a city be aware of?

Contiguity: In most cases, a city may only annex an area that is contiguous to the current city limits. Section 43.035(c) provides that, for purposes of any law—including a municipal charter or ordinance relating to municipal authority to annex an area adjacent to the city—an area adjacent or contiguous to an area that is the subject of a development agreement is considered adjacent or contiguous to the city. In other words, a city is not prohibited from annexing land beyond the area that is the subject of the agreement solely because that land is not contiguous to the city limits, so long as the area touches the area that is subject to the development agreement.

Vesting: Section 43.035(e) provides that a development agreement under that provision is not a permit for purposes of the “vesting statute,” Chapter 245 of the Local Government Code.

Are examples of H.B. 1472 (Texas Local Government Code Section 43.035) development agreements available?

Yes. Some cities have already entered into agreements with landowners. Examples of those agreements are available on the Texas Municipal League’s Web site at www.tml.org by clicking on “Legal,” then “Land Use and Building Regulations.”

Each city should consult with local legal counsel regarding the appropriate terms of its agreement. Please contact Scott Houston, Director of Legal Services, with questions or comments at 512-231-7400 or shouston@tml.org.