

# **DEVELOPER DISTRICTS: One City Attorney's Perspective**

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**2008 TWCA/TRWA Water Law Seminar-  
Developer Districts: Good for Growth or a Blight on the Landscape**

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- Assistant General Counsel, Texas Municipal League (1997-1999)
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## Notable Litigation:

Lead counsel in the City of Georgetown's successful Texas Supreme Court challenge of an adverse Attorney General's Open Records decision (*Russell v. Cornyn, 2001*)

## Publications:

- *Texas Municipal Law & Procedure Manual*, Texas Municipal Clerks Association (5<sup>th</sup> Edition)
- *Religious Displays at City Hall*, Texas Town & City Magazine, Fall 2005
- *U.S. Supreme Court Validates Moratoriums*, Texas City Attorney Assn Newsletter, Summer 2002
- *Sand Dollars: The Need for Coastal Erosion Prevention & Response in Texas*, State Bar of Texas Environmental Law Journal, Winter 1999

## Presentations:

- *It's New to Me: Grandfathered Developments*, UT Land Use Law Conference, April 2006
- *Give Me A Sign: Regulating Street Graphics*, Texas City Attorney Association Semi-Annual Conference, June 2005
- *Development Agreements*, UT Land Use Law Conference, March 2005
- *Blinded by the Light: Ethical Implications of "Sunshine Laws" for Governmental Attorneys*, State Bar of Texas Annual Meeting, Government Lawyers Section, June 2004
- *Ethics Commissions*, International Municipal Lawyers Ass'n Conference, October 2004
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- College of the State Bar of Texas (an honorary program for attorneys) (2002, 2007, 2008)
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## TABLE OF CONTENTS

<b>Author's Biography</b> .....	2
<b>Introduction</b> .....	4
<b>Types of Districts</b> .....	4
<b>Benefits of Special Purpose Districts</b> .....	5
<b>Municipal Utility Districts</b> .....	5
<b>Public Improvement Districts</b> .....	8
<b>Development Agreements</b> .....	10
<b>Takings</b> .....	11
<b>Opposition</b> .....	13
<b>Conservation Developments</b> .....	14
<b>The Open Meetings Act</b> .....	15
<b>The Public Information Act</b> .....	15
<b>7 U.S.C. §1926(b)</b> .....	15
<b>Conclusion</b> .....	16
<b>Appendix A</b> .....	17
<b>Appendix B</b> .....	21

## INTRODUCTION

Municipalities are often involved in love/hate relationships with developer districts. On the one hand, districts can provide much-needed public infrastructure. On the other hand, districts can thwart expansion of municipal boundaries.

### TYPES OF DISTRICTS<sup>1</sup>

Texas has many types of districts. The four most common types of districts that provide services to residential customers are municipal utility districts (MUDs), water control and improvement districts (WCIDs), special utility districts (SUDs), and river authorities.

#### **MUDs**

Municipal Utility Districts engage in the supply of water, conservation, irrigation, drainage, fire fighting, solid waste (garbage) collection and disposal (including recycling activities), wastewater (sewage) treatment, and recreational facilities. A MUD can require its customers to sue its solid waste services as a condition for receiving other MUD services. A MUD may provide solid waste and recycling services through a private company. While they can develop, maintain, or acquire parks or recreational facilities, MUDs are prohibited from issuing bonds to pay for these facilities. They can, however, set and charge user fees.

#### **WCIDs**

Water Control and Improvement Districts have broad authority to supply and store water for domestic, commercial, and industrial use; to operate sanitary wastewater system; and to provide irrigations, drainage, and water quality services.

#### **SUDs**

Special Utility Districts provide water, wastewater, and fire-fighting services, but cannot levy taxes.

#### **River Authorities**

River authorities are “special law” districts that operate major reservoirs and sell untreated water on a wholesale basis. They may have responsibility for flood control, soil conservation, and protecting water quality. Many river authorities also generate hydroelectric power, provide retail water and wastewater services, and develop recreational facilities.

Most river authorities have no authority to levy a tax, but can issue revenue bonds based on the revenues projected to be received from the sale of water or electric power. River authorities often encompass entire river basins, reaching many counties.

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<sup>1</sup> This Section quoted directly from “Texas Water Districts: A General Guide,” Texas Commission on Environmental Quality, GI-043, PDF version (revised 12/04).

## **BENEFITS OF SPECIAL PURPOSE DISTRICTS**

Special Purpose Districts, such as MUDs and WCIDs may benefit cities by encouraging organized growth, which will attract new growth to an area.<sup>2</sup> Furthermore, developers are more likely to install infrastructure for the entire area being developed because a district has the ability to issue long term debt to reimburse developers. This provides incentives for the developer to build more than the minimum infrastructure needed for the short term.<sup>3</sup> Special Purpose Districts can also provide an economic boost for the city as development in the city's ETJ brings more sales tax revenue into the city limits.<sup>4</sup> As an added benefit to the city, much of the growth associated with a Special Purpose District is paid for by the property owners and customers of the district.<sup>5</sup>

## **MUNICIPAL UTILITY DISTRICTS (MUDs)<sup>6</sup>**

### **Introduction<sup>7</sup>**

A Municipal Utility District (MUD) is a political subdivision of the state originally intended as a mechanism for financing and constructing water and sewer services for subdivisions and other land developments in which no municipal service was available. Over the years they have acquired additional authority and often operate very similarly to a municipality, collecting ad valorem taxes, providing fire service, police, parks, and other types of services traditionally provided by municipalities.

### **Background**

In 1917, Article 16, Section 59 was added as an amendment to the Texas Constitution to allow the creation of "Conservation Districts." At that time, the public's concept of the purpose of such districts was that they would help conserve the natural resources of the state. However, within the last 40 years, the primary purpose of those districts has become the supply of water and/or sewer services to communities through issuance of bonds to finance the systems.

There are numerous types of conservation districts, including navigation districts, water improvement districts, water control and improvement districts, fresh water supply districts, irrigation districts, and special utility districts. In fact, no agency of the state has an exact count on the number of districts that exist, although it well-known that they outnumber the number of cities in the state (approximately 1220). They are "political subdivisions" of the state, meaning they have certain powers of government and are subject to the same open government, conflict of interest, and other restrictions placed on municipalities, as well as additional regulations, authorizations, and limitations applicable only to districts. Chapter 49 of the Texas Water Code

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<sup>2</sup> "Special Purpose Districts: The Basics and Their Impact on Cities," John J. Carlton, Armbrust & Brown, L.L.P.

<sup>3</sup> Id.

<sup>4</sup> Id.

<sup>5</sup> Id.

<sup>6</sup> See Appendix A for Frequently Asked Questions about Municipal Utility Districts.

<sup>7</sup> Reprinted in part from Texas Municipal Law & Procedure Manual, 5<sup>th</sup> Edition, Ch. 32. The author recognizes M. Akers for his contribution to this section.

contains provisions applicable to all general law districts and Chapter 54 contains provisions applicable only to MUDs (including the provisions for creating a MUD).

MUDs are a relative new-comer to the scene, having been first authorized by the Legislature in 1971. However, they are also the most popular and numerous, particularly near municipalities, due in part to the ease with which they may be created.

At the time MUDs were first authorized, the Legislature was attempting to respond to the needs of developers who were ready and able to build subdivisions near municipalities but were unable to obtain water or sewer services because the municipal systems lacked capacity. The creation mechanism the Legislature created has allowed a developer owning land outside the corporate limits and ETJ of a municipality to create a MUD, issue millions of dollars in bonds, and collect millions of dollars in *ad valorem* taxes from the residents of the district.

### **Authority**

The authority of MUDs has expanded over the years. In addition to water, wastewater, stormwater, and drainage service, they may now provide fire protection service, parks and recreational facilities, police protection, and other services normally provided by a municipality, such as streets and street lighting.

### **Municipal Consent<sup>8</sup>**

A MUD may not be created within the corporate limits or ETJ of a municipality without the consent from the city council. However, if the MUD is to be located in the ETJ and the municipality does not give that consent, then if 50 landowners within the proposed district petition the municipality, the municipality has 120 days in which to agree to provide the water and/or sewer service the MUD would have provided, and if it does not contract to do so, the applicants may petition the Texas Commission on Environmental Quality (512-239-1000 or [www.tceq.state.tx.us](http://www.tceq.state.tx.us)) for creation of the district within the municipality. Thereafter, the TCEQ shall allow creation of the district if it finds that the municipality either does not have the reasonable ability to serve the area or has the ability but has failed to make a legally binding commitment with sufficient funds available to do so. If the MUD is to be located solely in the corporate limits of the municipality, it must obtain the permission of the municipality, and cannot petition and go to TCEQ.

### **Creation Agreements**

The municipality's authority over the MUD is normally spelled out in a Creation Agreement between the city council and the sponsors of the MUD. The municipality may place various restrictions on the MUD, including the municipality's right to approve and inspect all construction, to limit the purposes of the MUD's bonds, and a limitation on the maximum combined *ad valorem* tax rate for the municipality and the MUD.

### **Expansion**

Once the MUD is created, it may add land if petitioned by landowners for inclusion and the MUD Board of Directors agrees to accept the land. However, a municipality may provide in its

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<sup>8</sup> See Appendix B for Advantages and Disadvantages of Having a MUD Within the Municipality.

Creation Agreement that any annexation of land by the MUD must be approved by the municipality.

After creation, a MUD may add land if it is petitioned by landowners for inclusion under terms contained in §54.072, Water Code. After notice and hearing, the MUD Board decides whether to include the land or not. A municipality may provide in the Creation Agreement that any inclusion (or exclusion) of land in the MUD must be approved by the municipality. This is particularly important if land proposed for inclusion in the MUD is located outside of the municipality and in the ETJ or corporate boundaries of another municipality, as there are additional rules that apply to districts located within the boundaries or ETJ of more than one municipality.

### **Municipal Authority Over MUDs**

The typical scenario is that a municipality that does not have existing or planned water and/or sewer utilities with capacity to serve the area of the proposed district, realizing that it will not be able to prevent creation of the district, will instead enter into a Creation Agreement. Within that agreement, the municipality may not condition its approval on the MUD's performance of certain acts, but may include various restrictions and obligations within the agreement that are enforceable under law. This authority, based in part by the type of municipality involved, is described in §54.016, Water Code. The municipality may want to also seek to include development agreement provisions allowed under LGC Subchapter G of Chapter 212.

### **Abolition**

Once the district is created, the municipality may thereafter abolish it by 2/3 vote of the city council if the council is prepared to take over all of the assets and liabilities of the MUD and to provide all of the services the MUD was providing. However, if 10% of the number of voters in the last municipality election petition to oppose abolition of the MUD, the municipality must call an election on the question.

Subchapter D of LGC Chapter 43 is devoted to annexation, abolition of, and division of districts located within cities and their ETJs. One of the more straightforward provisions is contained in LGC §43.074, which applies to districts created wholly within one municipality. That section provides that a district, including a MUD, that is located wholly in one municipality at the time of its creation, may be abolished by the city council if 2/3 of its total membership votes to adopt ordinance abolishing the district and finding that:

- (1) the district is no longer needed; or
- (2) the services and functions of the district can be furnished and performed by the municipality; and
- (3) the abolition of the district is in the best interests of the residents and property in the municipality and the district.

However, if within 30 days after the effective date of the ordinance or the date of its publication, a petition signed by a number of qualified voters of the municipality equal to at least 10% of the votes cast in the most recent election for municipality officers is filed with the municipal clerk

protesting the enactment or enforcement of the ordinance, the ordinance is suspended, any action taken under it is void, the governing body shall reconsider the ordinance, and if the city council does not repeal it, the city council shall call an election on the question of abolition of the MUD, and the ordinance does not take effect unless a majority of the votes received in the election favor the ordinance.

Assuming the district is abolished, all of the property, assets, and liabilities of the MUD vest in the municipality. The municipality assumes the bonds and other obligations of the MUD, and the municipality shall perform the services and other functions that were performed by the MUD. If a district bond or other obligation payable in whole or in part from property taxes is assumed, the city council shall levy and collect taxes on all taxable property in the municipality in an amount sufficient to pay the principal of and interest on the bond or other obligation. The municipality may issue refunding bonds in its own name to refund bonds or other obligations, including unpaid accrued interest on an obligation that is assumed by the municipality.

## **PUBLIC IMPROVEMENT DISTRICTS (PIDs)**

### **Introduction<sup>9</sup>**

Like counties, municipalities have the statutory power under LGC Chapter 372 to authorize creation of a Public Improvement District (PID). Municipalities may undertake an improvement project under the guise of a PID that covers a special benefit on a definable part of the municipality or the municipality's extraterritorial jurisdiction (ETJ) if the municipality "finds that it promotes the interests of the municipality." This chapter summarizes the formal procedural steps a municipality would have to take if it decides to form the PID and the issues raised by the owner's PID proposal.

### **Procedures for PID Formation**

To create the PID, the municipality must proceed under the following procedures set forth in LGC Chapter 372:

- (a) **Petition.** The owners of the property must submit a "petition for the establishment off a public improvement district." The petition must include:
  - (1) boundaries of the proposed district
  - (2) estimated cost of improvements
  - (3) method of assessment to pay for the improvements or bonds and the operation of the district
  - (4) description of the management structure of the PID ( i.e., whether it will be managed entirely by the municipality, by the private sector, or through a partnership between the city and private interests).
  - (5) proposed apportionment of costs between the municipality and the PID \*

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<sup>9</sup> Reprinted in part from the Texas Municipal Law and Procedure Manual, 5<sup>th</sup> Edition, Chapter 33. The author recognizes and thanks Susan Zachos, attorney at law, for her contribution to this section.

\* LGC §372.005(b) specifically identifies the ownership interests that must sign a petition in order for the petition to be valid.

- (b) **Findings on Advisability.** Once a petition meeting these requirements is filed, the city council “may make findings by resolution” as to the advisability of the proposed improvement, the estimated cost, the assessment method and the apportionment of costs between the municipality and the PID. But the municipality is not required to take any action on a petition. \*
- (c) **Feasibility Report.** The municipality may use municipal resources to prepare a feasibility report to evaluate whether the improvement, as proposed, should be undertaken. The municipality also may require a preliminary cost estimate for the proposed improvements. Presumably, the municipality also may ask the Developer or other private interests to fund the feasibility report.
- (d) **Advisory Body.** After receiving the petition, the municipality may appoint an advisory body to develop and recommend an improvement plan to the municipality. LGC §372.008(b) contains specific requirements for the make-up of the advisory body.
- (e) **Formal Hearings.** A PID may only be established after the municipality holds a public hearing on “the advisability of the improvement,” to consider among other things, each of the required elements of the petition. The hearing may extend over days, weeks or months, and may be adjourned from time to time.
- (f) **Formation of the District.** The PID can only be formed through a resolution of the city council authorizing the district “in accordance with its finding as to the advisability of the improvement.” The resolution must be issued within 6 months after the hearing is finally adjourned. The authorization takes effect after publication of notice of the resolution authorizing the PID’s formation.
- (g) **Service Plan.** The PID must have a five-year service plan, to be prepared by the advisory body or, if the municipality has not created an advisory body, by an entity chosen by the municipality. The service plan must include an “assessment plan” and must be reviewed and updated annually.

### **Not a Taxing Authority**

A PID is not a taxing authority, although it does have the power to levy “assessments” against the property, and is required to prepare the proposed assessment roll after the total cost of each PID improvement is determined. The assessment is subject to notice and hearing and, after hearing all objections, the municipality may levy the assessment. \*

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\* **CAUTION:** The statute is vague on what, if any, binding effect such a “findings” resolution in the initial stages may have on the municipality’s final decision regarding PID formation.

\* **CAUTION:** It is unknown how a PID’s performance affects a municipality’s bond rating.

## **DEVELOPMENT AGREEMENTS**

### **Old Law**

Prior to 2003, municipal lawyers sometimes disagreed on the ability of municipalities to enter into development agreements. Some contracts purport to be authorized by Local Government Code Section 42.044, which authorizes contracts with landowners in *Industrial Districts*. This statute allowed a municipality to designate an “industrial district” within “the meaning customarily given to the term but also includ[ing] any area in which tourist-related businesses and facilities are located.”<sup>10</sup> Objections were occasionally raised when this statutory mechanism was used to justify agreements covering large residential developments rather than building industrial facilities or tourist businesses.

### **New Law**

During the Spring 2003 Session, the Texas Legislature enacted House Bill 1197, which clarifies the authority of municipalities to enter into agreements with property owners in the extraterritorial jurisdiction (ETJ).

### **Scope of Agreements**

According to the new statute, agreements can be executed to:

- (1) guarantee the continuation of the extraterritorial status of the land and its immunity from annexation by the city for a period not to exceed 15 years;
- (2) extend the city’s planning authority over the land by providing for a development plan to be prepared by the landowner and approved by the municipality under which certain general uses and development of the land are authorized;
- (3) authorize enforcement by the city of certain municipal land use and development regulations (e.g., zoning and building codes) in the same manner the regulations are enforced within the municipality's boundaries;
- (4) authorize enforcement by the city of land use and development regulations other than those that apply within the municipality's boundaries, as may be agreed to by the landowner and the municipality;
- (5) provide for infrastructure for the land, including:
  - (a) streets and roads;
  - (b) street and road drainage;
  - (c) land drainage; and
  - (d) water, wastewater, and other utility systems;
- (6) authorize enforcement of environmental regulations;

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<sup>10</sup> Tex. Loc. Gov’t Code § 42.044(a).

- (7) 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;
- (8) specify the uses and development of the land before and after annexation, if annexation is agreed to by the parties; or
- (9) include other lawful terms and considerations the parties consider appropriate.<sup>11</sup>

### **Process for Agreement**

To comply with the new statute, an agreement must:

- (1) be in writing;
- (2) contain an adequate legal description of the land;
- (3) be approved by the city council and the landowner; and
- (4) be recorded in the real property records of the county.

### **Extensions**

The parties to an agreement may renew or extend it for successive periods not to exceed fifteen (15) years each. The total duration of the original agreement and any successive renewals or extensions may not exceed forty-five (45) years.

### **Binding Nature of Agreement**

The agreement between the city council and the landowner is binding on the city and the landowner and on their respective successors and assigns for the term of the agreement.

### **Vested Rights**

An agreement constitutes a permit under Chapter 245, often referred to as the “Grandfathering,” the “Vested Rights” or “Freeze” statute.<sup>12</sup>

## **TAKINGS**

### **TIAs**

Agreements might contain components that invoke the Texas Private Real Property Rights Preservation Act (the “Act”). The Act does not apply to municipalities except as set out in Texas Government Code § 2007.003(a)(3), which provides:

This chapter applies only to the following governmental actions: . . . (3) an action by a municipality that has effect in the extraterritorial jurisdiction of the municipality, excluding annexation, and that enacts or enforces an ordinance, rule,

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<sup>11</sup> Tex. Loc. Gov’t Code § 212.172.

<sup>12</sup> Tex. Loc. Gov’t Code Chapter 245.

regulation, or plan that does not impose identical requirements or restrictions in the entire extraterritorial jurisdiction of the municipality . . . .”<sup>13</sup>

Guidelines prepared by the Office of the Texas Attorney General (“Guidelines”) indicate that coverage of the Act is further limited to situations where: (1) private real property is affected; (2) the private real property is the subject of the governmental action; and (3) the governmental action restricts or limits the owner’s right to the property that would otherwise exist in the absence of the governmental action.<sup>14</sup>

### **Application to Agreements**

When a municipality proposes taking an action covered under the Act, the municipality is required to prepare a written TIA.<sup>15</sup> “A governmental action requiring a takings impact assessment is void if an assessment is not prepared” and the private real property owner may bring suit for a declaration of the invalidity of the governmental action.<sup>16</sup>

The definitions found in the Act do not shed any light on whether a Chapter 212 development agreement between a municipality and the owner of private property located in the ETJ constitutes an “action that enacts or enforces an ordinance, rule, regulation or plan” (as described in 2007.003(a)(3)). Likewise, no case or opinion addresses the meaning of these terms under the Act.<sup>17</sup> The fact that the Agreement, in part, relates to annexation might arguably exclude the Agreement from the Act’s requirements but again, no case or opinion discusses the issue.

Analyzing the facts under the additional applicability factors set out in the Guidelines, one may conclude that the agreement affects private real property, the private real property is the subject of the agreement, and the agreement will restrict or limit the owner’s right to the property that would otherwise exist in the absence of the agreement.

In sum, based on the plain language of the Act, the approval and execution of the agreement *may* be an action to which the Act applies thus triggering the TIA requirement. Because the private property owner could escape his/her obligations under the agreement by bringing suit to void the agreement, the most conservative course of action is for the City to conduct a TIA.

### **Waiver Option**

If the City wants to avoid conducting the TIA, it might consider having the property owner *expressly waive* the TIA requirements as part of the Agreement. Although the Act does not address waiver, there is evidence that certain counties are allowing developers to relinquish

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<sup>13</sup> Tex. Gov’t Code § 2007.003(b).

<sup>14</sup> See Office of the Texas Attorney General, Private Real Property Rights Preservation Act Guidelines, n. 21, available at [http://www.oag.state.tx.us/AG\\_Publications/txts/propertyguide.shtml](http://www.oag.state.tx.us/AG_Publications/txts/propertyguide.shtml) (Dec. 30, 2004).

<sup>15</sup> See Tex. Gov’t Code § 2007.043.

<sup>16</sup> See *id.* at § 2007.044; see also *Bragg v. Edwards Aquifer Auth.*, 72 S.W.3d 729, 734 (Tex. 2002) (Holding the Act creates two causes of action in favor of a property owner: (1) a statutory cause of action for a taking and (2) a cause of action based on governmental action taken without preparing a TIA).

<sup>17</sup> See Tex. Att’y Gen. ORD-2839 (2002).

rights granted under the Act by executing some type of waiver.<sup>18</sup> One downside to including such a waiver in the agreement is that it draws the property owner's attention to the issue.

To view a sample TIA form prepared by the attorneys of Allison & Bass, go to:

[www.county.org/resources/legal/pdf/CountySubdivisionRegulationSourcebook.pdf](http://www.county.org/resources/legal/pdf/CountySubdivisionRegulationSourcebook.pdf)

## OPPOSITION

Development agreements are not always popular with special interest groups, particularly environmentalist and neighborhood associations. One assertion is that government should not *legislate by contract*. Those who oppose development agreements often urge that any governmental entity must be free at all times to change the law to protect health, human life, and the public welfare. It has been said that the constitutional protections against government takings provide landowners compensation for regulatory harm, but do not tie the hands of the government to protect human welfare. Another point of criticism leveled toward the practice of entering into development agreements is the notion that the agreements circumvent the normal procedures for variances, and thus eliminate some of the procedural protections afforded citizens.<sup>19</sup>

### Legislation by Contract

It has been argued that, for more than a century, it has been “universally conceded” that municipal powers cannot be “bargained or bartered away.... Municipalities have no power . . . to make contracts . . . which shall cede away, control, or embarrass their legislative or governmental powers, or which shall disable them from performing their public duties.”<sup>20</sup> This fundamental principle is based in part on the prohibition against irrevocable or uncontrollable grants of special privileges and immunities under Article I, § 17 of the Texas Constitution.<sup>21</sup> It is also based on the necessary function of police power in government,<sup>22</sup> and the constitutional right to a republican form of government under Article I, § 2 of the Texas Constitution, which guarantees that government acts through public officeholders elected by the majority of voters<sup>23</sup>

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<sup>18</sup> The Hood County Subdivision Regulations and the Smith County Subdivision Regulations both contemplate waiver of rights under the Act.

<sup>19</sup> For a more thorough and coherent reading of arguments against development agreements, the author refers you to the Plaintiff SOS Alliance's *Brief Regarding the Development Agreements in Support of its Motion for Partial Summary Judgment and in Opposition to Defendant's Cross Motions for Partial Summary Judgments*, Cause No. 02-1748, in the 207<sup>th</sup> Judicial District of Hays County, Brad Rockwell, Deputy Director/Attorney at Law.

<sup>20</sup> *City of Brenham v. Brenham Water Co.*, 4 S.W. 143, 149 (Tex. 1887).

<sup>21</sup> *Bowers v. City of Taylor*, 24 S.W.2d 816, 817 (Tex. Comm'n App. 1930); *Gay Investment Co. v. Texas Turnpike Authority*, 510 S.W.2d 147, 149 (Tex. Civ. App. – Dallas 1974, writ ref'd n.r.e.).

<sup>22</sup> See *Texas & New Orleans RR Co. v. Miller*, 128 S.W. 1165, 1173 (Tex. Civ. App. 1910, ref'd) (if abdication of police power were allowed under the constitution, “it would simply result . . . in the destruction of the principle functions of government”), *aff'd* 221 U.S. 408 (1911); *Beer Co. v. Massachusetts*, 97 U.S. 25, 33 (1877) (legislature cannot contractually restrict its discretionary exercise of police power because “*salus populi supreme lex*”).

<sup>23</sup> *Tarrant County v. Ashmore*, 635 S.W.2d 417, 421 (Tex. 1982).

The substantive legal concern raised by some agreement opponents is that the contractual provisions represent an unconstitutional delegation of legislative authority to a private party.<sup>24</sup>

### **Procedural Bypass**

Those who challenge the legality and wisdom of development agreements sometimes raise concerns regarding the process by which the agreements are created and approved. Development agreements can be used as a means of circumventing the typical, standard permitting process utilized by the municipality. Development agreements can also address issues regarding variances or waivers requested by the developer. These agreements are not necessarily required to satisfy the normal public notice and hearing procedures, unless specifically required to do so by local municipal rules. Many of the procedural concerns can be addressed in a municipal ordinance establishing a locality's self-imposed requirements for public notices and hearings.

## **CONSERVATION DEVELOPMENTS<sup>25</sup>**

### **An Innovative Option**

Conservation developments exchange density for the permanent preservation of large tracts of open space. Clustering lowers infrastructure costs for developers by reducing the lengths of roads and utilities.<sup>26</sup>

#### **This option provides for the following:**

- Increased preservation of natural terrain & ecosystems
- Clustering of dwelling units to preserve open space
- Provision of community amenities in open space areas
- Increased housing density to better utilize central water & sewer systems
- Density bonuses to the developer for preserving open space
- Encouragement to avoid “cookie-cutter” housing patterns
- Sense of community for residents
- Contributes to the conservation of groundwater & surface water
- Contributes to the conservation of native wildlife and flora

#### **Key Features:**

- Assures large percentage of the gross site will be preserve in perpetuity in its natural, undeveloped state.
- Provides increased flexibility to the developer with respect to location and sizing of lots<sup>27</sup>

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<sup>24</sup> *FM Properties Operating Co. v. City of Austin*, 22 S.W.3d 868 (Tex. 2000); *Texas Boll Weevil Eradication Foundation, Inc.*, 952 S.W.2d 454 (Tex. 1997).

<sup>25</sup> This section was heavily influenced by the research and writings of **Walter Brown**, former City Councilman of Wimberley, former P&Z Commissioner of Austin, former Marketing Director of Faulkner Construction, and former Land Planning Consultant for City Hall Solutions, LLC.

<sup>26</sup> *Rural by Design: Maintaining Small Town Character*, Randall Arendt, (1994) p. 287.

<sup>27</sup> The author wishes to thank Shannon Mattingly, Central Texas Council of Government (CenTex COG) for her contributions to this paper.

## OPEN MEETINGS ACT<sup>28</sup>

The OMA requires that all significant actions of the district result from the vote of a quorum of the district's directors in a properly posted open meeting. To "properly post" any meeting, the directors must post a meeting notice in a place that is continually accessible to the public for a least 72 hours before the meeting. This meeting notice must state the date, hour, place, and agenda of the board meeting. The district's directors must also follows these rules in their open meetings:

- (a) Allow the public to attend and make any reasonable accommodations necessary.
- (b) Address only those items posted on the agenda
- (c) Allow any member of the public to videotape or record all or any part of the meeting. (Directors may adopt rules to specify where the recording equipment may be placed and how the recording can be made.)

Although the OMA require the board to post their agenda and to allow the public to attend meetings, this law does not entitle the public to choose agenda items or speak at the meeting.

## PUBLIC INFORMATION ACT<sup>29</sup>

The Texas Public Information Act gives you the right to inspect and copy any record that is considered "public" or "open." Under this act, also known as the "Open Records Act," your district must promptly allow you to view or duplicate any open record you ask to see. You may not remove the original copies of public records from the district's office, but you may view and copy them in the district's office. Under the Open Records Act, the district may require you to put your request in writing. The district may also charge you for making copies, sometimes including reasonable amounts for labor involved in retrieving and copying the records.

### 7 U.S.C. §1926(b)

7 U.S.C. §1926 authorizes the federal government to make loans and grants to water associations in rural areas.<sup>30</sup> Subsection (b) of this statute protects water associations taking part in this program from competition by prohibiting "the inclusion of the area served by such association within the boundaries of any municipal corporation" in such a way that would "curtail" or "limit" the service provided by or made available by the participating water association.<sup>31</sup> This statute, which was drafted with helping farmers in mind, allows participating water associations

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<sup>28</sup> This Section quoted directly from "Texas Water Districts: A General Guide," Texas Commission on Environmental Quality, GI-043, PDF version (revised 12/04).

<sup>29</sup> This Section quoted directly from "Texas Water Districts: A General Guide," Texas Commission on Environmental Quality, GI-043, PDF version (revised 12/04).

<sup>30</sup> 7 U.S.C.S §1926(a).

<sup>31</sup> 7 U.S.C.S §1926(b).

to provide services to non-farming rural residents as well as farms.<sup>32</sup> Furthermore the areas serviced or serviceable by rural water associations is not readily defined as are the areas served by an incorporated municipality. For this reason §1926(b) could pose a major obstacle to municipal annexation or development that would provide water services to rural areas.

## CONCLUSION

Legislation enacted in the 2003 Legislative Session clearly grants municipalities the statutory authority to enter into development agreements, including regions located in the ETJ. Like Planned Development Districts (aka, PDDs, or Planned Unit Developments, PUDs), development agreements can provide the government and the property owner the opportunity to be flexible and address development issues in a comprehensive manner. However, the statute is less than complete regarding procedural matters and silent on issues regarding the delegation of legislative authority. Nonetheless, it is likely that as a land planning tool, development agreements will soon be used with more frequency, and the development agreement process will continue to be refined. Development agreements can be an effective means of negotiating plans for Conservation (aka, "Cluster") Developments. Furthermore MUDs offer a way for residents living in a municipality's ETJ to obtain utility services where the municipality is unable or unwilling to provide them. MUDs may not be located solely within the corporate limits of the municipality without the municipality's consent. However, under a creation agreement a municipality may authorize a MUD to operate under restrictions set by the city council, and thus, the city maintains a great deal of control over the MUD.

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<sup>32</sup> "Water Associations and Federal Protection Under 7 U.S.C. 1926(b): A Proposal to Repeal Monopoly Status," 80 Texas Law Review 155, November 2001.

## APPENDIX A

### Frequently Asked Questions About Municipal Utility Districts

**Q: What is a Municipal Utility District or MUD?**

A: It is a political subdivision with special powers generally created to provide water, wastewater and drainage services within its boundaries.

**Q: What power(s) will the municipality retain over the MUD?**

A: The municipality will retain zoning, platting and related authority over all development within the MUD. It will also control the MUD's ability to expand, and have taxing authority over all property within the MUD.

**Q: What benefits will the MUD provide for the rest of the municipality?**

A: In addition to the land development control the municipality will retain, the development within the MUD will expand the municipality's ad valorem tax base and reduce the overall taxes within the municipality on a per \$100.00 value basis. It will increase the sales tax revenues recovered by the municipality. The MUD's installation of a centralized water system will have several benefits. First, it will reduce the need for wells to supply homes built within the development, thereby reducing the impact to the groundwater supply relied upon by existing municipal residents. It will also result in the installation of the fire protection services like fire hydrants that will enhance fire protection within the entire municipality and should provide a reduction in homeowner insurance premiums. The installation of a centralized wastewater collection system for the District will eliminate the need for construction of additional septic systems on the plateau which would likely impact groundwater quality in the rest of the municipality.

**Q: How is a MUD created?**

A: A MUD can be created by the Legislature or by petition to the Texas Commission on Environmental Quality (TCEQ).

**Q: Which creation process is being used for a proposed MUD?**

A: The TCEQ "petition" process.

**Q: How does the process work?**

A: The owner(s) of land petition the TCEQ to create the MUD pursuant to Chapters 49 and 54 of the Texas Water Code, and Chapter 293 of the TCEQ's rules.

**Q: Does the municipality have any say in the creation of the MUD?**

A: Yes. The municipality has the authority to consent to the MUD's creation and to contract with the MUD regarding certain limitations on the MUD's powers pursuant to Section 54.016 of the Texas Water Code.

**Q: How does the consent process work at the municipality?**

A: Upon receipt of the landowners' request for the municipality's consent to the creation of the MUD, municipal representatives and the municipality's attorney began negotiations with the landowner seeking creation of the MUD. These negotiations focused on confirmation of the municipality's authority to exercise land use and development regulation, and ordinance and zoning power over the land within the MUD, and the limitations on the powers of the MUD and the purposes for which the MUD can issue bonds. The negotiations also addressed services to be made available to the rest of the municipality through the MUD, including access to fire protection facilities to be developed by the MUD, and provisions for the municipality to dissolve the MUD in the future.

**Q: Can the MUD expand in the future?**

A: Yes, but only with the permission of the municipality.

**Q: Will land within the MUD be subject to the municipality's ordinances and zoning rules?**

A: Yes. The municipality will control development within the MUD.

**Q: Can land in the MUD be developed without permits from the municipality?**

A: No. All subdivision platting, and any construction, must be authorized by the municipality.

**Q: Will the municipality have any say in the design and construction of the utilities, roads and other infrastructure to be constructed within the MUD?**

A: Yes. All plans and specifications will be subject to approval by the municipality, and all construction will be subject to inspection by the municipality. The municipality will have authority to shut down any noncompliant construction until the noncompliance is corrected.

**Q: Will land in the MUD be subject to municipal taxes?**

A: Yes.

**Q: Will the MUD have rulemaking authority, and will it overrule the municipality's ordinances?**

A: The MUD will have limited rulemaking authority related to its functions, e.g., providing water, wastewater and drainage services. In the event of a conflict between a MUD rule and a municipal ordinance, the municipal ordinance will prevail.

**Q: Can the MUD provide water and wastewater services within the municipality outside of the MUD's boundaries?**

A: Only with the consent of the municipality.

**Q: How is a MUD governed?**

A: A MUD is governed by a Board of Directors, similar to the municipality's city council.

**Q: How are MUD Directors chosen?**

A: The MUD Directors are elected by qualified voters who live within boundaries of the MUD.

**Q: Can municipality residents participate in MUD elections?**

A: Yes, if they live inside the MUD.

**Q: Can people outside of the MUD participate in MUD meetings?**

A: Yes. Like city council meetings, MUD Board meetings are open to the public. The MUD must post notice of its meetings and agendas just like the municipality, and any member of the public may attend the meeting.

**Q: Are the records of the MUD open for public inspection?**

A: Yes, the MUD's records, like the municipality's, are subject to public inspection and copying pursuant to the Texas Public Information Act.

**Q: Once the MUD is created, does TCEQ have any power over it?**

A: Yes. TCEQ has continuing supervisory authority over the MUD. This includes review and approval of all MUD's bonds, plans and specifications for water and wastewater utility facilities (this is in addition to the municipality's review and approval authority pursuant to applicable municipal ordinances). Additionally, the MUD is required to perform an annual audit and file the same with the TCEQ for approval. Copies of the MUD's annual audit can be obtained by the public by requesting the same from the MUD.

**Q: Who approves the design and construction of the MUD's utility facilities?**

A: Both the municipality and TCEQ will have review and approval of all such facilities pursuant to their respective ordinances, statutes, rules and regulations.

**Q: Can the municipality take over the MUD?**

A: Yes. Texas law allows the municipality to pass an ordinance to dissolve the MUD. When it passes the ordinance, the functions, assets and liabilities of the MUD will all pass to the municipality.

**Q: Can the municipality provide water and wastewater services to residents of the municipality outside of the MUD?**

A: Yes. The municipality can decide to get into the utility business and provide those services. The municipality has no obligation to do so, however. The municipality can also contract with a third party, including the MUD, to provide those services.

**Q: Will the MUD have its own fire protection services?**

A: No. The MUD will provide infrastructure to facilitate fire protection (e.g., fire hydrants). Actual fire protection services will be provided by the local emergency services MUD just like the rest of the municipality.

**Q: Will residents of the MUD pay taxes to the municipality?**

A: Yes, MUD residents will be municipal residents and will pay the same taxes, and be subject to the same ordinances and rules applicable to the municipality. They will be subject to additional taxes and, possibly rules, imposed by the MUD for the services they receive from the MUD.

**Q: Can the MUD take over the municipality?**

A: No.

**Q: Where will the MUD dispose of its wastewater?**

A: After the MUD treats its wastewater to quality levels required by State law under its TCEQ permit, the wastewater will be disposed of by irrigation. Irrigation options include the 800(+) acres of preserve land or other areas like golf courses such as the Twin Creeks Golf Course, which currently relies upon water from Lake Travis for irrigation.

**APPENDIX B**  
**Advantages and Disadvantages**  
**of Having a MUD Within the Municipality**

**Advantages**

**Disadvantages**

- |   |  |
|---|--|
| 1. Provision of water and wastewater service  | 1. “Double” taxation   |
| 2. Higher property values as a result of service  | 2. Two levels of regulation  |
| 3. Elimination of septic system and wells   | 3. Division of citizen loyalty   |
| 4. Additional entity to provide services  | 4. More political controversy  |
| 5. MUD often donates land, parks etc. to municipality   | 5. MUD residents can become voting block that controls municipality  |
| 6. Municipality can take over MUD, establish municipal utility system and accompanying utility revenues | 6. Failure of MUD to build out leads to high MUD taxes   |
| 7. MUD can establish fire/emergency service for entire municipality                                     | 7. Increased traffic, strain on municipality services  |
| 8. Allows planned, well-managed, attractive development   | 8. MUD could fail, affecting economy of entire municipality  |
| 9. Significant expansion of municipality’s ad valorem tax base  | 9. More demand for municipality services   |
| 10. Increased sales taxes   | 10. If MUD incurs too much debt, it will deter municipality from taking over MUD   |
|   | 11. MUD authority to regulate water quality, dispose of waster, use municipality rights-of-ways, collect stand-by fees, condemn, levy impact fees, alter elevation of land, etc., may conflict with municipality authority |

