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**NEGOTIATION OF ETJ DEVELOPMENT AGREEMENTS
FROM THE DEVELOPER'S PERSPECTIVE**

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I. Introduction

Development Agreements between landowners and Texas municipalities are increasingly being used to entitle land in the extraterritorial jurisdiction ('ETJ') of a municipality. While there are many types of Development Agreements being used in Texas, this paper will focus on developer considerations for negotiating one type of Development Agreement: the ETJ Development Agreement authorized under Section 212.172 of the Texas Local Government Code (hereinafter sometimes "Development Agreement" or "ETJ Development Agreement").¹ Additionally, there is a discussion of the recent Shavano Park case, which involves an ETJ Development Agreement and the concept of impermissible contract zoning.

II. Section 212.172 Texas Local Government Code: Agreements Governing Land in a Municipality's Extraterritorial Jurisdiction

Section 212.172 of the Texas Local Government Code authorizes a Texas municipality smaller than 1.9 million in population to enter into development agreements with a landowner in its ETJ. The governing body of the municipality may make a written contract with the landowner to:

- (1) Guarantee the continuation of the extraterritorial jurisdiction status of the land and its immunity from annexation;
- (2) Extend the municipality's planning authority over the land by providing for a development plan 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 municipality of certain land use and development regulations in the same manner the regulations are enforced within the municipality's boundaries;
- (4) Authorize enforcement by the municipality 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:

¹ Other types of Development Agreements include, but are not limited to: (1) Economic Development Agreements under Chapter 380 of the Local Government Code; (2) PUD, Planned Unit Development Agreements under Section 42.046 of the Local Government Code; (3) Development Participation Agreements under Section 212.071 of the Local Government Code; (4) Tax Increment and Tax Abatement Agreements under Chapters 311 and 312 of the Tax Code; and (5) Public-Private Partnership Agreements between Texas municipalities and landowners/developers for the sale or lease and development of municipally owned land. 2260936.1

- (a) Streets and roads,
 - (b) Land drainage, and
 - (c) Water, wastewater, and other utility systems;
- (6) Authorize enforcement of environmental regulations;
 - (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 consideration the parties consider appropriate.

Development Agreements under this statutory provision have to be in writing, contain an adequate legal description of the land, be approved by the governing body of the municipality and the landowner, and be recorded in the real property records of each county in which any part of the land is located. (Sec. 212.172 (c) Tex. Local Gov't Code)

The total duration of these Development Agreements and any successive renewals or extensions may not exceed 45 years. (Sec. 212.172 (d) Tex. Local Gov't Code)

These Agreements are binding upon the municipality and the landowner and on their respective successors and assigns for the term of the Agreement. The Agreement does not create any encumbrance to title as to, any end buyer of a fully developed and improved lot within the development, except for land use and development regulations that may apply to a specific lot. (Sec. 212.172 (f) Tex. Local Gov't Code).

Development Agreements under this statutory provision constitute a “permit” under Chapter 245 of the Texas Local Gov't Code, which is the state “grandfathering” statute that “locks in” a municipality’s ordinances, rules and regulations, with certain exceptions, to those in effect on the date the application for the first “permit” is filed with the municipality.

III. Developer Issues and Considerations

A. Does My Land Meet the Statutory Prerequisites?

There are two essential prerequisites to utilizing this statute: (1) the municipality must be less than 1.9 million in population; and (2) the land involved must be located within the ETJ of the municipality.

The only Texas municipality whose population is over 1.9 million is the City of Houston. Thus land located within the City of Houston’s ETJ is not eligible to utilize this statute.

The land must be located within the ETJ of the municipality. Land inside a municipality’s corporate limits is not eligible to utilize this statute, nor is land located in the portion of a county outside of a municipality’s ETJ.

B. Is an ETJ Development Agreement Under the Right Approach For My Development?

Even if the statutory prerequisites are met, a developer should carefully weigh the pros and cons of utilizing this statute. While there may be many benefits which accrue from a successful negotiation and approval of a Development Agreement under this statute, there may be some practical costs or downsides that should also be considered.

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