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Water, Water Everywhere: The Impact of Water Planning on Lending and Development

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I. Introduction:

Texas is blessed with a booming economy. That blessing comes with more than 1,000 people a day crossing Texas' borders with the intent to become permanent residents. On a local scale, the three largest counties that encompass the Austin metropolitan statistical area (Williamson, Travis, and Hays Counties)¹ along the I-35 corridor experience an influx of more than 150 people per day.²

According to projections by the Texas Water Development Board in the 2017 State Water Plan, Texas' population of almost 29 million today, will increase by more than seventy percent (70%) over the next five decades reaching an estimated 51 million people by the year 2070.³ Texas' booming population necessitates the development and construction of tens of 1000s of new homes statewide, together with new roads and supporting community-related infrastructure, *e.g.*, shopping malls, grocery stores, hospitals and school campuses, and new jobs. As Texas' population continues to grow at a phenomenal pace, once you get past the sticker shock of rising land prices, the major challenges for real estate development in the state to accommodate this growth, whether in an urban, suburban or rural area, are water related issues.

This paper looks at the water issues that accompany such prolific growth from the 100,000-foot elevation perspective to prepare both the developer and the lender – focusing both on the tools and impediments associated with both the water supply and the potential liability water can be for real estate development projects. In a nutshell, the paper will look at how to acquire the water a developer does want, as well as how to handle the water the developer does *not* want. Specifically, the paper will provide a high-level overview of issues related to acquisition of water supplies to support a development and flooding and drainage issues related to new real estate development, including the disposal of the wastewater effluent that flows from the new growth.

From the author's perspective, this paper is offered as an academic exercise to provoke creative thinking necessary to develop real property successfully in response to the population explosion and the climatic events in recent years that highlight the issues surrounding the water we need, and the water we do not want. Because the answers to how to address these issues in each new

¹ Hays and Williamson Counties are among the top five fastest growing counties in Texas, and both are in the top 25 fastest growing counties in the United States. See <https://www.statista.com/statistics/241711/fastest-growing-counties-in-the-us/>.

² *Austin Business Journal* available on-line at <https://www.bizjournals.com/austin/news/2018/03/22/austins-population-keeps-popping-heres-how-many.html>.

³ See 2017 State Water Plan at p. 3 (TWDB 2017) ("Quick Facts).

development must be tailored to fact specific characteristics of the particular development, the paper will identify issues and offer considerations for due diligence in development planning, design and engineering, rather than one-size-fits-all answers.

It is axiomatic that a successful project requires many steps, including planning and scoping of the project to determine the objectives of the development, creation of a site plan, and identification and pursuit of the various regulatory steps necessary to facilitate actual construction of the development. Implementation includes platting, zoning, dedication of various easements, including drainage and flood easements as appropriate, and the provision of adequate and reliable water and wastewater utility services. If not available from a municipal or regional utility supplier, the latter step will likely require permitting, engineering and construction of water and/or wastewater treatment and discharge facilities for the project. In some instances, development will also require the creation of various special purpose districts created under Article XVI, Section 59 of the Texas Constitution and various enabling acts in the Texas Government Code, Local Government Code, and Texas Water Code authorizing such Special Utility Districts including districts focused on municipal utility functions including wastewater and drainage and flooding.⁴

Following assessment of these big picture items, the next steps include on-the-ground design and engineering, as well as application for various regulatory authorizations, including subdivision platting and acquisition of permits for the property contemplated in the project development. Depending upon the location of the project property, *i.e.*, inside the corporate boundaries of a municipality or its ETJ, or outside of municipal corporate boundaries and within a county, different regulatory authority considerations and rules may come into play. Similarly, the availability of different key services, including existing drainage facilities and easements, rights-of-way or access ingress and egress and utility services, *e.g.*, wastewater collection, treatment and disposal, must be addressed. Except for instances where ingress and egress, including acceleration, deceleration and turning lanes to access the property must be addressed, the focus frequently is limited only to the subject property. Little or no attention will be paid to external or adjacent property related issues.

One of the intended lessons of this paper is the need to look at the adjacent properties, and the “neighbors,” as part of the overall due diligence in the project development process. That process needs to incorporate assessments of the potential impacts (both probable and to some extent, speculative) the development could have on those adjacent properties. This includes impacts that may be “perceived”, no matter how speculative, by the “neighbors.” As discussed in greater detail herein, emphasis on drainage and flood issues related to project development and, to a lesser extent, consideration of wastewater disposal issues associated with the new development have become heightened in recent years.⁵

⁴ See generally Texas Constitution, Article XVI, Section 59; TEXAS WATER CODE, Chapters 49 (provisions applicable to all districts), 51 (Water Control and Improvement Districts), 53 (Freshwater Supply Districts), 54 (Municipal Utility Districts), 55 (Water Improvement Districts), 56 (Drainage Districts), 57 (Levee Improvement Districts) 58 (Irrigation Districts), 59 (Regional Districts), 65 (Special Utility Districts) and Chapter 66 (Stormwater Control Districts).

⁵ *Harris County Flood Control District v. Kerr*, 499 S.W.3d 793 (Tex. 2016); *FPL Farming, Ltd. v. Environmental Processing System, LC*, 351 S.W.3d 306 (Tex. 2011). In the author’s opinion to other “events” prompt the need for this discussion because they have precipitated litigation and legislative initiatives that heighten the need for the enhanced due diligence in real property development recommended herein. A thorough discussion of those events, however, are beyond the scope of this paper. In a “nutshell” they are:

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