CHAPTER 380
ECONOMIC DEVELOPMENT AGREEMENTS

The Right Stuff?

For those of you old enough to remember, *The Right Stuff* was a book written in 1979 (later adapted to film in 1983) that examined the physical and mental characteristics of astronauts and their willingness to accept the enormous risks associated with strapping themselves atop a rocket, lighting it, and riding it into orbit to further the nation's early space flight program. The moniker *The Right Stuff* was adopted as the phrase used to identify whether someone had the right characteristics to not only serve as an astronaut – but to thrive and succeed as an astronaut under the harsh demands commanded by space flight. Although as cities and economic development corporations we are not lighting rockets and hurling astronauts around the earth at 17,500 mph, using *The Right Stuff* analogy is somewhat appropriate for discussing whether Chapter 380 has all the necessary characteristics – or the right stuff – to facilitate successful economic development agreements.

What is our focus?

Let's also talk a little bit about the focus of this paper and the presentation you will hear during your attendance at this year's *virtual* TML Economic Development Conference. First, I am not approaching this paper or its presentation sibling as if I'm talking to a room full of lawyers. (How boring would that be?) While some of you in the virtual audience *are* lawyers – city attorneys, EDC attorneys and the like – I suspect that half if not most of you are economic development-minded individuals either working for a city, an EDC, a TIRZ or perhaps elected officials wanting to know more (or brush up) on economic development topics. Second, this paper is meant to give you a high-level overview of Chapter 380 and its uses so that you can approach your next (or maybe your first) economic development project with a base of practical Chapter 380 knowledge. Finally, this is an introduction (or perhaps fundamental refresher for some) to Chapter 380 concepts and is not intended to make you an expert on the subject simply after reading this paper or hearing my accompanying presentation. While Chapter 380 is a short, straight-forward and approachable statute, using it and understanding its application and implications takes some study outside and beyond this paper. As for me, I am constantly reviewing the Chapter 380 statute (and it has not changed since the 80th Legislative Session in 2009), its interpretation and application in every economic development program is an opportunity to further hone, refine and tweak how it's used. While the basic Chapter 380 agreements I draft are similar in form and structure they almost always are unique in some way or form – the current hopefully better than the last. Your focus should be not how to draft the perfect Chapter 380 agreement, but rather to understand what it's for, and how to use it for a successful economic development incentive agreement.

We need to talk a little bit of law to get things started.

<u>The general rule applicable to how you spend public tax dollars is…you cannot spend public money for a private purpose because the Texas Constitution places limits on a city's expenditures of public funds</u>. This general rule applies to home rule cities and general law cities alike. Before 1987, Article VIII, section 3 of the Texas Constitution required that "[t]axes shall be levied and collected by general laws and <u>for public purposes only</u>."[1] (emphasis added) Likewise, the Texas Legislature "ha[d] no power to authorize any county, city or town…to

[1] TEX. CONST. art. III, § 52.

lend its credit or to grant public money or thing of value in aid of or to any individual, association, or corporation whatsoever…."[2] Accordingly, a city could spend its public funds only to carry out a municipal purpose, although the fact that there is an incidental benefit to a private person or another entity from the expenditure did not invalidate the underlying expenditure.[3] *This rule applied to all public funds whether derived from tax revenues or other sources.*[4] In other words, Texas had no constitutional authority to incentivize businesses to undertake projects in certain areas with the intent to spark economic development in those areas.

Things changed in 1987 when Texas Assistance for Economic Development, otherwise known as Proposition 4, was approved and added Article III, Section 52-a of the Texas Constitution. Section 52-a authorizes the Legislature to create economic development programs and make loans and grants of public monies in association with such programs. In other words, the state of Texas then had the authority to incentivize projects that brought jobs creation and retention, capital investment, increased ad valorem and sales tax, and other economic benefits.

Two years later in 1989, the Legislature then extended to cities the authority to create economic development programs with the addition of Chapter 380 to the Texas Local Government Code. By enacting Section 380.001, the Legislature intended to authorize municipalities to perform any of the functions that Article III, Section 52-a permitted the Legislature to delegate.[5] Chapter 380 agreements, as they are now commonly called, serve to memorialize the economic development programs that municipalities create and undertake and are a broad economic development paint brush that serves as a conduit for many types of economic development programs, incentives, etc.

So what does this Chapter 380 animal look like anyway?

Chapter 380 of the Texas Local Government Code is one of the shortest yet most powerful statutes there is in a *city's* economic development arsenal. It truly is a "gateway" statute in that all grants or loans of municipal funds for an economic development purpose must pass through the Chapter 380 mechanism in the form of a "Chapter 380 Economic Development Agreement" (or some variation thereof). So many times, elected officials and city staff ask, "Have you ever done a 380 Agreement?" Fortunately, a Chapter 380 Agreements is not like bigfoot in that seeing one is a rare sighting. Instead, "380 Agreements" are quite common and are nothing to fear. The tricky part about Chapter 380 Agreements is adequately memorializing each party's respective obligations, ensuring that the grant or loan of public funds is a proper use of the funds pledged, making sure the city gets what it is bargaining for and – probably most importantly – making sure the city gets its money back in the event things go south (also known as a "claw back").

At this point in the Chapter 380 discussion, it is important to note that Chapter 380 of the Texas Local Government Code only applies to cities; not economic development corporations (aka "EDCs") or other similar entities. It's not that EDC's cannot partner with its authorizing city to participate in a more comprehensive economic development….they can. However, EDCs must satisfy their own legal requirements associated their economic incentive programs (see Texas Local Government Code Chapters 501 thru 505) which the applicable statutes refer to as "projects" versus "programs."

[2] TEX. CONST. art. III, § 51.
[3] *Barrington v. Cokinos*, 338 S.W.2d 133 (Tex. 1960).
[4] TEX. CONST. art. III, § 52.
[5] Tex. Atty. Gen. Op. DM-185 (1992).

Now that we've made this important distinction, let's start with a look at the Ch. 380 statute itself.[6]

* * *

The statute…(drum roll please)

<u>Tex. Loc. Govt Code – Sec. 380.001</u>

ECONOMIC DEVELOPMENT PROGRAMS.

(a) The governing body of [any] municipality may establish and provide for the administration of one or more programs, including programs for making loans and grants of public money and providing personnel and services of the municipality, to promote state or local economic development and to stimulate business and commercial activity in the municipality. For purposes of this subsection, a municipality includes an area that:

(1) has been annexed by the municipality for limited purposes; or

(2) is in the extraterritorial jurisdiction of the municipality.

(b) The governing body may:

(1) administer a program by the use of municipal personnel;

(2) contract with the federal government, the state, a political subdivision of the state, a nonprofit organization, or any other entity for the administration of a program; and

(3) accept contributions, gifts, or other resources to develop and administer a program.

(c) Any city along the Texas-Mexico border with a population of more than 500,000 may establish not-for-profit corporations and cooperative associations for the purpose of creating and developing an intermodal transportation hub to stimulate economic development. Such intermodal hub may also function as an international intermodal transportation center and may be colocated with or near local, state, or federal facilities and facilities of Mexico in order to fulfill its purpose.[7]

<u>Sec. 380.002</u>

ECONOMIC DEVELOPMENT GRANTS BY CERTAIN MUNICIPALITIES.

(a) A <u>home-rule</u> municipality with a population of more than 100,000 may create programs for the grant of public money to any organization exempt from taxation under Section 501(a) of the Internal Revenue Code of 1986 as an organization described in Section 501(c)(3) of that code for the public purposes of development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development or expansion of commerce in the state. The grants must be in furtherance of those public purposes and shall be used by the recipient as determined by the recipient's governing board for programs found by the municipality to be in furtherance of this section and under conditions prescribed by the municipality. (emphasis added)

(b) A <u>home-rule</u> municipality may, under a contract with a development corporation created by the municipality under the Development Corporation Act (Subtitle C1, Title 12), grant public money to the corporation. The development corporation shall use the grant money for the development and diversification of the economy of the state, elimination of unemployment or underemployment in the state,

[6] The author has noted areas of emphasis or clarification in the statute with [brackets].

[7] Added by Acts 1989, 71st Leg., ch. 555, Sec. 1, eff. June 14, 1989. Amended by Acts 1999, 76th Leg., ch. 593, Sec. 1, eff. Sept. 1, 1999. Amended by: Acts 2005, 79th Leg., Ch. 57 (H.B. 918), Sec. 1, eff. May 17, 2005.

and development and expansion of commerce in the state. (emphasis added)

(c) The funds granted by the [home-rule] municipality under this section shall be derived from any source lawfully available to the municipality under its charter or other law, other than from the proceeds of bonds or other obligations of the municipality payable from ad valorem taxes.[8]

Sec. 380.003

APPLICATION FOR MATCHING FUNDS FROM FEDERAL GOVERNMENT.

[Any] municipality may, as an agency of the state, provide matching funds for a federal program that requires local matching funds from a state agency to the extent state agencies that are eligible decline to participate or do not fully participate in the program.[9]

And that's the end of the entire Ch. 380 statute!

* * *

Breaking down Chapter 380 – what are "programs" that incentivize economic development?

The Chapter 380 statute empowers a city's governing body to "establish and provide for the administration of one or more *programs* which may include [but are not limited to] the making of loans and the giving of grants of public money and providing personnel and services of the city, to promote state or local economic development and to stimulate business and commercial activity in the city."[10] Most of the time, or at least in my experience, Chapter 380 agreements are usually just about money – meaning the city is giving an economic development applicant some kind of financial grant, tax reimbursement (ad valorem and/or sales and use), and not about municipal personnel or services. However, more and more – especially during this year when COVID-19 has been wreaking havoc on every community across Texas – I am seeing cities getting creative with their economic development incentives by relying more on what they can *do* with their equity resources (i.e., personnel and services) instead of how much money they can contribute to a project.

For example, people are increasingly looking for ways they can repurpose existing facilities instead of tearing down and rebuilding new. Sometimes these existing facilities are in need of road and other infrastructure improvements, which some cities can accomplish in-house. Widened and resurfaced entry roads, water line extensions and other "equity projects" are just some of the ways cities are finding to help keep economic incentives alive in a time when local governments are forced to do with less. In the end, there is no specific recipe for what a Chapter 380 incentive agreement must look like; it really depends on what *your* city is trying to accomplish with *your* economic development program. The key is to demonstrate that your program promotes state or local economic development and stimulates business and commercial activity in your city. But what are these *programs* that Section 380.001 refers to?

In 1992, the Texas Attorney General declined to determine specifically which incentives, when offered singularly or in combination, constitute a "program… to promote state or local economic development."[11] Furthermore, neither Article III, Section 52-a of the Texas Constitution, nor Chapter 380 of the Texas Local Government Code specifically reference any programs or measures but merely requires the program to

[8] Added by Acts 1991, 72nd Leg., ch. 16, Sec. 13.06(a), eff. Aug. 26, 1991. Amended by Acts 1991, 72nd Leg., 1st C.S., ch. 4, Sec. 25.02, eff. Aug. 22, 1991; Acts 2001, 77th Leg., ch. 56, Sec. 1, eff. Sept. 1, 2001. Amended by: Acts 2007, 80th Leg., R.S., Ch. 885 (H.B. 2278), Sec. 3.26, eff. April 1, 2009.

[9] Added by Acts 1995, 74th Leg., ch. 1051, Sec. 1, eff. June 17, 1995.

[10] Tex. Loc. Gov't Code § 380.001(a); see also Tex. Tax Code § 311.010(h) empowering a TIRZ board

[11] Tex. Atty. Gen. Op. DM-185 (1992).

promote economic development.[12] However, since the unique brevity of Chapter 380 affords cities the opportunity to provide an array of incentives to draw businesses, industries, and developers to their community, the answer to the "what is a program" question is...whatever your city *says* the program is. Keep in mind, however, that your economic development *program* is not the same thing as the economic development *incentive*. Remember this – your *program* is the <u>*why*</u>*;* your *incentive* is the <u>*what*</u>*.*

Since Chapter 380 prescribes only the purpose of the required program, and not the procedure for establishing or the process for administering it, the usefulness of Chapter 380 as a tool for economic development is limited only by the creativity of the city utilizing it – subject however to other applicable laws. Let's think about this in terms of a specific example.

Think about the following scenario:

> *The proprietor of an entertainment and activity venue approaches a city regarding its interest in a new site for expanding their new indoor bungee jump concept (let's call it "Bungee World"). In other states, the proprietor has a demonstrated track record of success and business synergy that generates both a primary and secondary increases in local sales tax revenue, not to mention an increase in ad valorem property taxes and possible tourism. ("heads in beds?") The proprietor asks the city "what economic development incentives might the city offer to entice it to select this particular city location over another?"*

Many economic incentive discussions start out discussing the *incentives* (the *what)* and then back into the *program* (the *why*) later…and there is nothing wrong with that approach. After all, financial grants (or tax credits) is usually what a potential new development is looking for, so the discussion of financial incentives is a very organic way of approaching a potential economic development project. This may be especially true in communities where there may not be a strong economic development agenda and the notion of a new proprietor riding into town on their white sales tax horse might be more of an anomaly than routine. For those communities that know what they want – the *program* (the *why*) may already be well defined thru previous strategic planning efforts and the proposed project may be a good fit for pre-established program criteria. Either way, the fact that a city may be asked about incentives (the *what*) first is perfectly normal in the absence of a targeted economic development recruitment program.

Let's go back to our previous economic development scenario mentioned earlier:

> *Bungee World's proprietor comes to the city asking for the moon (as economic development suitors often do). It wants a tax abatement (which is a subject for another discussion), permit fee waivers, cash incentive grants, and sales tax reimbursements. The city collects a two cent total sales tax of every taxable dollar transacted in the city but it shares those two pennies with its Type-B EDC. The city gets one and one-half cents ($0.015) and its EDC get a half-cent ($0.005). While the city does not have the financial resources necessary to fund an upfront cash grant, the EDC is stable and is ready, willing and able to consider such an arrangement (or "project") subject to city's approval of course. The city's governing body would prefer the proprietor prove its worth before anyone forks over any cash grant incentives or reimbursements, but it understands that the proprietor might need some green up*

[12] Tex. Atty. Gen. Op. GA-0529 (2007)

front in order to get the project off the ground and be sufficiently enticed to select this city for its new location over another. The city, the EDC and the proprietor settle on a proposed list of incentives which include the following:

- ***Infrastructure Costs.*** *An up-front cash grant for 75% of the estimated cost of the infrastructure (e.g., utility lines, etc.) needed to build the project with a commitment to pay 100% of the actual infrastructure costs upon receiving the proprietor's application for reimbursement post-construction up to $100,000.00; and*

- ***Permit / Inspection Fees.*** *A cash reimbursement of the permit and inspection fees the proprietor pays to the city to build the project upon receiving the proprietor's application for reimbursement post-construction; and*

- ***Sales Tax Revenue****. Reimbursement of a percentage of the sales tax generated by Bungee World (both to the city and the EDC) based upon an agreed-upon schedule over five (5) years; and*

- ***Marketing / Promotion Costs.*** *A cash reimbursement for marketing costs associated with promoting Bungee World in an amount certain over a five (5) year period.*

In order to gain preliminary approval from the city's governing body and the EDC, the parties memorialize their initial incentive agreement in a non-binding letter of intent ("LOI"). Both the city's governing body and the EDC's board of directors approve the initial incentive package and authorize the city staff and the city/EDC's legal counsel (who might be the same attorney) to prepare a proposed incentive agreement.[13]

So now what?

Drafting the Chapter 380 Agreement – creating the program (the "why") and memorializing the incentives (the "what")

Despite there being no specific procedure nor a defined process for establishing and administering a Chapter 380 program, a city must be cognizant of certain elements that should be included in its Chapter 380 agreement. One of the most crucial elements of the agreement is the economic development program the agreement serves to fulfill. So start with the *why*…why is the City (and its EDC) willing to offer any incentives to this new development? What is it going to do for the city and the surrounding community?

STEP 1: The Program

Chances are that by the time you get to the part where you start drafting your Chapter 380 agreement, you already have a pretty good idea of the economic development incentives that are going to be in play (refer to your LOI). So the question is – what is your city incentivizing any why? Is your incentive simple in that you are just giving a cash grant or reimbursing sales tax in order to incentivize a new sales tax producing retail development? Is your incentive more complex in that you are luring a new large industrial development that is going to create new jobs and give relocation stipends for new employees, bring a significant increase in *ad valorem* taxes, or make contributions to the city

[13] Tex. Gov't Code § 551.087 allows a city or an EDC to deliberate in executive session over economic development negotiations with one or more business prospects. Depending on the significance of any one particular project, a city (or an EDC) may want to discuss some or all aspects of a proposed project or development under the protection of executive session until such time formal agreements are approved and executed, at which time they become available to the public upon request.

for community amenities? (*Yes, Chapter 380 also allows cities to accept contributions, gifts, or other resources – which is discussed later in this paper*.) Whatever the incentive(s), you should tailor the program to those incentives. Consider this as a potential recital you could include within your Chapter 380 agreement:

> *"WHEREAS, in accordance with Chapter 380, Texas Local Government Code, and Article III, Section 52-a, of the Texas Constitution and other applicable law, the City hereby establishes an economic development program for increasing retail sales tax revenue whereby the City agrees to make a grant of public money to the Developer to advance the public purposes of developing and diversifying the City's economy by introducing a new retail use to the City's existing sales tax producing profile of commercial retail businesses; and"*

This particular "program creation" language, which notably is contained within the Chapter 380 agreement itself, is used to create a program for the purpose of satisfying the statutory requirement for a particular incentive. In other words, the program that is created with the use of a recital contained within the agreement itself is incentive specific and may have no other relation to any other incentives pledged before or since the immediate agreement you are working on. While this is only one example of how a program may be created, the important point here is that Chapter 380 Agreements should guarantee that the public funds or resources behind the economic development program will serve to benefit a public purpose. In other words, no public monies should be earmarked, pledged, dedicated, or otherwise paid to a program partner for a private purpose that is not associated with the economic development purpose.

Programs can also be created in other ways and then referenced later in Chapter 380 agreements that further the program's purpose – such as by way of adopting tax abatement criteria or other economic development policy, or in conjunction with an EDC that may be holding an annual public hearing or adopting a comprehensive resolution for the categories of proposed projects. The take away point here is that it does not necessarily matter how your particular program gets created – whether it is created contemporaneously with the preparation and approval of the Chapter 380 agreement itself, or separately as part of some other economic development policy, strategic plan, resolution or otherwise. The important point to remember here is to thoughtfully create a program that is suited to your particular Chapter 380 agreement and its incentives.

STEP 2: The 380 Agreement

Part two of this discussion focuses on the specific parts your Chapter 380 agreement should include.

Who are the parties to the incentive agreement? That's a pretty basic (and usually easy) question, right? Well, *sometimes*. The truth is, the city and its staff may get so wrapped up in the incentive details that they forget to think about the procedural mechanics of who is actually going to write the check, approve the expenditure, or both. Is the city really going to pay public funds to a third-party for a public purpose? If so, then proceed with drafting your Chapter 380 agreement. But what if the EDC is going to fully fund the negotiated incentive obligations? Do you need a Chapter 380 agreement if the city isn't writing any checks? Let's go back to the incentives the parties memorialized in their LOI from our example *Bungee World* project to determine who needs to be a party to the agreement.

- ***Infrastructure Costs.*** *Who is paying? If the city / EDC was not specific in its LOI as to which entity was going to pay what (after all, why should the proprietor care who pays for the incentive so long as it gets paid), then now is the time to sort that out. Let's assume the EDC is going to pay for the reimbursement of the proprietor's infrastructure costs. In that case, the EDC does not need a Chapter 380 agreement because it is not a city but that doesn't mean the EDC's reimbursement can't be made a part of the underlying Chapter 380 agreement as a performance standard.*[14] *The issue here, though, is that the EDC is going to have to satisfy its own procedural requirements regarding the funding of the reimbursement – especially if the ultimate reimbursement amount is in excess of $10,000 and depending on the size of the city. (Again, an economic development incentive topic for discussion another day.)*

- ***Permit / Inspection Fees.*** *Since the city is going to be the permitting / inspecting authority for an in-city construction project like Bungee World, any cash reimbursement of the permit and inspection fees the proprietor pays to the city to build the project would likely be reimbursed by the city. In that case, the city will accomplish its grant according to Chapter 380 based on the reimbursement schedule and criteria agreed upon as between the parties.*

- ***Sales Tax Revenue****. Reimbursement of a percentage of the sales tax generated by Bungee World could be structured a couple of different ways. When an EDC is involved, sometimes the city prefers that the entire reimbursement come from the EDC's funds instead of the city funding its portion of the reimbursement and the EDC funding theirs. But for the purpose of this paper, let's assume the city and the EDC each fund their own respective reimbursements – in which case you'll need to utilize Chapter 380 for the city's reimbursement grant and EDC mechanisms for the EDC's reimbursement grant.*

- ***Marketing / Promotion Costs.*** *When it comes to reimbursing marketing or promotion costs – those incentive funds can come from hotel occupancy tax funds if the subject development is something that puts "heads in beds." However, those funds are used at the city's discretion, so again Chapter 380 is going to be your mechanism for granting those incentive funds.*

The main point of this section is that whatever entity it is that is responsible for funding the incentives, and/or has the responsibility for approving when incentives are distributed, should be parties to the agreement.

Where'd you get the power to do that?

In the course of drafting your Chapter 380 agreement, you want to make sure you memorialize the fact that Chapter 380, the Texas Constitution, and whatever other applicable laws you need to site, are included in the initial recitals of your agreement. You also want to memorialize when the city's governing body (and if necessary the EDC's board of directors)

[14] This is often referred to as a "Performance Agreement," which can be incorporated into a Chapter 380 Agreement and called a "Chapter 380 Economic Development, Performance and Reimbursement Agreement."

considered and authorized the execution of the Chapter 380 (and Performance) Agreement.[15]

Outline the economic value, performance obligations, and default provisions of Chapter 380 agreement.

Your Chapter 380 agreement should clearly define and articulate the economic value of your incentive program so that the parties each have a clear understanding of their respective expect benefit to be gained. Stating the economic value also helps to tie in your incentive with your program, whatever that may be. Stating or otherwise explaining the economic value of your agreement does not have to be complicated – it can be a short paragraph that explains the increased value expected from the particular incentive agreement, or could be a summarization and reference to a more complex economic development study that was relied upon to generate interest and ultimately support the project (e.g., think housing studies, sales tax leakage studies, etc.)

In terms of performance obligations, the parties' respective performance obligations – be those sales tax or ad valorem payment compliance, reimbursement timelines, reporting, etc. – should be clearly stated such that a person not involved can clearly discern who is supposed to do what by when. The performance section of the agreement should also outline obligations that will bind the incentive recipient to fulfilling certain economic growth benchmarks established by the city. Achieving the benchmarks will satisfy the public purpose requirement and thus justify the city's contribution of public funds and resources to a private business partner or developer. The obligations that may be included in the agreement may include expanding the tax base (ad valorem, sales tax, or both), creating permanent jobs, or other enhancements that will induce local economic development or stimulate business and commercial activity.

I like to give this portion of your agreement "the stranger test" which involves giving the performance section of your agreement to uninvolved person – maybe an associate or paraprofessional in your office who has not been involved in the nitty gritty of your agreement and ask that they read the performance obligations and then point out steps that might be missing.

Stating the parties' performance obligations is important because if performance is not clear, then neither will the default discussion be when one side thinks the other side has breached the agreement – and when there is significant money involved – the parties will definitely fight over who has to pay and who does not. Conscientious drafting on the front end can save you a lot of frustration and attorney's fees on the back end.

The city always (as least in theory) gets its money back.

No one ever things about divorce when they are getting married, but they should – and in the context of economic development Texas law requires that Chapter 380 agreements provide municipalities a way to get its money back if the city's economic development partner defaults or otherwise does not deliver on their performance obligations under the agreement or the contemplated program fails to serve a public purpose.

Consequently, a city must always include a "recapture" or "claw-back" provision to every Chapter 380 agreement if the incentive recipient fails to meet their performance obligations associated with their Chapter 380 agreement.

[15] The "performance" aspect of the Chapter 380 Agreement may come into play when an EDC is offering incentives and is part of the underlying Chapter 380 agreement.

The recapture provision serves as additional motivation for the incentive recipient to ensure that its project complies with a public purpose as well as serving as a safeguard for the city to ensure that it is not in conflict with the Texas Constitution by providing public funds or resources for private purposes. Therefore, as an event of default for failure to materially perform the terms of the agreement, the city should include in its remedies the ability to recapture all public funds or resources that the incentive partner has received under the Chapter 380 agreement. This, however, requires that the city explicitly outline the obligations mentioned above along with a tangible means for measuring whether the incentive partner has complied with its obligations.

How else can a city use a Chapter 380 Agreement?

In the midst of all the discussion about how municipalities can use Chapter 380 to *give* grants of public funds, it is equally important to remember that Chapter 380 may also provide for a city's *receipt* of funds in conjunction with economic development incentives. Municipalities may also give of their personnel for services to administer an agreement as well as contract with other federal, state, political subdivisions and other nonprofit organizations to administer their economic development programs.[16] (see below)

Sec. 380.001

(b) The governing body may:

(1) administer a program by the use of municipal personnel;

(2) contract with the federal government, the state, a political subdivision of the state, a nonprofit organization, or any other entity for the administration of a program; and

Furthermore, there are no restrictions on the source of funds used to establish and administer the programs.[17]

Finally, one of the least used provisions of Chapter 380 is the part where a city can also accept monetary contributions, gifts and other "resources" in conjunction with an economic development program / incentive.

Sec. 380.001

(b) The governing body may:

(3) accept contributions, gifts, or other resources to develop and administer a program.

What's that you say???? That's right – an arrangement where an economic development partner *actually pays the city* instead of it being the other way around.[18] That's right – it can happen. Although it is rare, such an arrangement may enable a city to do more creative agreements – such as those where PILOT (Payments In Lieu of Taxes) payments are used in conjunction with a Chapter 380 agreement to accomplish the same type of arrangement that a Chapter 312 property tax abatement might otherwise accomplish.

Does a city have any liability exposure when doing a Chapter 380 agreement?

Because a city's actions are dictated by state and local regulations, it must ensure that it checks all boxes required by such regulations to take any action. Fortunately, the brevity of Chapter 380 means fewer required boxes to check, but nonetheless important. Therefore, as described above, a validly executed 380 Agreement must implement a properly established economic development program that promotes a public

[16] Tex. Loc. Gov't Code § 380.001(b)(1) and (2).
[17] Tex. Loc. Gov't Code § 380.001(b)(3).
[18] Tex. Loc. Gov't Code § 380.001(b)(3).

purpose by promoting economic development and stimulating business or commercial activity in the area.

Furthermore, because Chapter 380 essentially only regulates the purpose of economic development programs, a city establishing an economic development program need only concern itself with the regulations applicable to the specific functions of the program independent of the program itself.

For example, if a city enters into a Chapter 380 agreement providing for a grant or loan by the city, the grant or loan expenditure must be in strict compliance with the city's budget.[19] If an agreement requires expenditure to occur after final approval of a budget not providing for the expenditure, then the expenditure must meet the public necessity requirement for an emergency budget amendment or it cannot be made until the adoption of the next annual budget.[20]

Not only are there these and potentially other regulations applicable to the expenditure of program funds, there are also certain regulations applicable to the source of program funds.[21] For example, general law municipalities are not able to issue debt to fund an economic development program, and home-rule municipalities may do so only if their charter so provides. However, there are few regulations applicable to funding economic development programs which leaves plenty of room for ingenuity.

Let's wrap up with a little more law on the municipal liability issue.

On April 1, 2016, the Texas Supreme Court issued is opinion in the case in *Wasson Interests, Ltd. v. City of Jacksonville* (click the case title to go to the actual opinion) where the Supreme Court ruled against the City of Jacksonville and opened the door to potential contractual liability for cities in many new and different contexts – including those involving economic development agreements.[22]

Ordinarily, municipalities are immune from suit unless the Texas Legislature expressly waives governmental immunity. The *Wasson* case however is an example of a court disregarding this notion and creating a non-legislative waver of governmental immunity that otherwise has never existed. Specifically, the *Wasson* court concluded that the governmental-proprietary distinction normally found in Texas Tort Claims Act cases also applied to contract cases. This is significant because when a city engages in a proprietary function its governmental immunity is waived and exposes the city to unlimited damages. In the context of economic development incentive agreements, this new twist in the established body of governmental immunity law could expose a city to potential liability for damages that may arise out of such an agreement event to the extent those damages exceed the stated and agreed upon value of the economic development agreement itself. (See our prior discussion about memorializing the economic value of a Chapter 380 agreement.)

Final thoughts.

Chapter 380 of the Local Government Code offers municipalities nearly limitless potential for economic development. Even when a city cannot fund an economic development program with cash on hand, the broad funding possibilities sometimes allow for funding of a project with the revenues the project itself generates. Although there may be reasons why another economic development tool is more appropriate in certain situations, they can often

[19] Tex. Loc. Gov't Code § 102.009(b).
[20] Tex. Loc. Gov't Code § 102.009(c).
[21] Tex. Loc. Gov't Code § 380.002(c).

[22] http://www.search.txcourts.gov/SearchMedia.aspx?MediaVersionID=303e7805-f844-4791-9a04-473efeeac6d9&coa=cossup&DT=OPINION&MediaID=eb01fbc6-8b01-45b3-a943-950f63b05088

be combined with a Chapter 380 economic development program to create economic development that is greater than the sum of its parts. Whatever your particular program and incentive are, be sure you create a proper program, memorialize your incentive's economic value, the parties' performance obligations, and do what you can to insulate your city against any liabilities beyond the matters contemplated by your particular deal.