

I. The Economic Development Sales Tax

Using Sales Tax to Promote Economic Development

The use of the sales tax for economic development purposes has been one of the most popular and effective tools used by cities to promote economic development. Since the authorization for the local option tax took effect in 1989, more than 586 cities have levied an economic development sales tax. These cities have cumulatively raised in excess of \$573 million annually in additional sales tax revenue dedicated to the promotion of local economic development. Of these cities, 101 have adopted a Type A economic development sales tax, 367 cities have adopted a Type B economic development sales tax, and 118 cities have adopted both a Type A and a Type B sales tax.

History of the Economic Development Sales Tax

In 1979, the Texas Legislature passed the Development Corporation Act of 1979 (Texas Revised Civil Statutes Article 5190.6). The Development Corporation Act of 1979 (the “Act”) allowed a municipality to create nonprofit development corporations that could promote the creation of new and expanded industry and manufacturing activity within the municipality and its vicinity. The development corporations operated separately from the municipalities, with boards of directors that would oversee their efforts. These corporations, in conjunction with industrial foundations and other private entities, worked to promote local business development. However, prior to 1987, the efforts of these entities were dependent on funding from private sources, which was often difficult to obtain. At that time, development corporations could not legally receive funding from the state or local governments because of a Texas constitutional prohibition against the expenditure of public funds to promote private business activity.¹

In November 1987, the voters of Texas approved an amendment to the Texas Constitution providing that expenditures for economic development could serve a public purpose and were therefore permitted under Texas law.² This amendment states in pertinent part:

Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversification of the economy of the state.

Pursuant to this constitutional amendment, the Texas Legislature has enacted several laws that would allow state and local government funds to be used to promote economic development.

First, in 1989, the Texas Legislature amended the Act by adding Section 4A, which allowed the creation of a new type of development corporation. The legislation provided that a Section 4A development corporation could be funded by the imposition of a local sales and use tax dedicated to economic development. The tax could be levied only after its approval by the voters of the city at an election on the issue.

¹ See Tex. Const. art. III, § 52.

² Tex. Const. art. III, § 52-a.

The proceeds of the Section 4A sales tax were dedicated by statute to economic development projects primarily to promote new and expanded industrial and manufacturing activities. This authority became popularly referred to as the Section 4A economic development sales tax. The Section 4A tax was generally available to cities that were located within a county of fewer than 500,000 and that had room within the local sales tax cap to adopt an additional one-half cent sales tax.

In 1991, the Texas Legislature made a number of changes to the Section 4A sales tax authorization. The new law allowed the tax to be adopted at any rate between one-eighth and one-half of one percent (in one-eighth percent increments). It additionally allowed cities to offer a joint proposition to be voted on that would authorize both a Section 4A economic development sales tax and a sales tax for property tax relief.

Also in the 1991, the Legislature authorized a new type of sales tax, a Section 4B sales tax. This legislation authorized a one-half cent sales tax to be used by certain cities to promote a wide range of civic and commercial projects. The legislation authorized 73 Texas cities to propose a Section 4B sales tax. Between 1991 and 1993, 19 cities adopted the new Section 4B sales tax.

The popularity of the Section 4B sales tax led the Texas Legislature in 1993 to broaden its availability to any city that was eligible to adopt a Section 4A sales tax. In other words, most cities in a county of less than 500,000 could adopt either the Section 4A or the Section 4B sales tax if they had room in their local sales tax. Until recently, only cities within El Paso County and Travis County were ineligible by statute to adopt either the Section 4A or the Section 4B tax. Now, cities located within El Paso County and Travis County are authorized to adopt a Section 4B tax.³ As of this publication, at least 586 cities have either a Section 4A or a Section 4B sales tax for economic development.

Historically the Act had been located in the Texas Revised Civil Statutes Article 5190.6, and the identification of “4A” and “4B” sales tax structures were in fact references to Sections 4A and 4B of the Act. In 2007, the 80th Legislature authorized the recodification of several civil statute provisions by topic, including those pertaining to planning and development. Under H.B. 2278 (80th Leg., R.S.), the Act was codified in the Local Government Code and was renamed the “Development Corporation Act.”⁴ As of April 1, 2009, which was the effective date of this change, economic development corporations adopting what was formally known as a “4A” or “4B” sales tax have come to be referred to as “Type A” or “Type B” corporations, as appropriate.

Differences Between Type A and Type B Sales Tax

There are a number of important differences between Type A and Type B sales taxes for

³ Tex. Loc. Gov't Code § 505.002.

⁴ *Id.* § 501.001.

economic development.⁵ In broad terms, Type A and Type B taxes can be distinguished on the following grounds: 1) the authorized use of the tax proceeds; 2) the oversight procedure regarding project expenditures; and 3) the means for adopting and altering the tax by election. These general differences are outlined below. Further distinctions are covered throughout this chapter of this handbook.

Differences in the Authorized Use of the Tax Proceeds

The Type A tax is generally considered the more restrictive of the two taxes in terms of authorized types of expenditures. The types of projects permitted under Type A include the more traditional types of economic development initiatives that facilitate manufacturing and industrial activity. For example, the Type A tax can be used to fund the provision of land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements that are for the creation or retention of primary jobs for projects such as manufacturing and industrial facilities, research and development facilities, military facilities, including closed or realigned military bases, recycling facilities, distribution centers, small warehouse facilities, primary job training facilities for use by institutions of higher education, and regional or national corporate headquarters facilities.⁶ The Type A sales tax may also fund business-related airports, port-related facilities, and certain airport-related facilities 25 miles from an international border,⁷ as well as eligible job training classes, certain career centers and certain infrastructural improvements which promote or develop new or expanded business enterprises.⁸

The Type B tax also can be used to fund the provision of land, buildings, equipment, facilities, expenditures, targeted infrastructure and improvements that are for the creation or retention of primary jobs for projects such as manufacturing and industrial facilities, research and development facilities, military facilities, including closed or realigned military bases, transportation facilities, sewage or solid waste disposal facilities, recycling facilities, air or water pollution control facilities, distribution centers, small warehouse facilities, primary job training facilities for use by institutions of higher education, regional or national corporate headquarters facilities,⁹ eligible job training classes, certain career centers and certain infrastructural improvements that promote or develop new or expanded business enterprises.¹⁰ However, unlike the Type A tax, the Type B tax can additionally fund projects that are typically considered to be community development initiatives. For example, authorized categories under Type B include, among other items, land, buildings, equipment, facilities, expenditures, and improvements for professional and amateur sports facilities, park facilities and events, entertainment and tourist facilities, and affordable housing.¹¹ Also, the Type B tax may be expended for the development

⁵ *But see id.* §§ 504.101, 505.101. Section 505.101 states that a Type B corporation “has the powers granted by this chapter and by other chapters of this subtitle and is subject to the limitations of a corporation created under another provision of this subtitle. To the extent of a conflict between this chapter and another provision of this subtitle, this chapter prevails.” Section 504.101 contains similar language that applies to Type A corporations.

⁶ *Id.* § 501.101.

⁷ *Id.* § 504.103.

⁸ *Id.* §§ 501.102-.104, .162.

⁹ *Id.* § 501.101.

¹⁰ *Id.* §§ 501.102-.104, .162.

¹¹ *Id.* §§ 505.152-.153.

of water supply facilities or water conservation programs. In order to undertake a water supply facility or water conservation program, the facility or program has to be approved by a majority of the qualified voters of the city voting in an election called and held for that purpose.¹² Additionally, certain Type B development corporations are allowed to do projects that promote new and expanded business development.¹³

Differences in the Oversight Structure and Procedures

Although both Type A and Type B monies are overseen by the development corporation's board of directors and by the city council, they differ in the structure and type of oversight required for each.

With regard to structure, the Type A board has at least five members with no statutory criteria for their selection¹⁴, while a Type B board consists of seven members with certain statutory requirements.¹⁵ For instance, Type B board members have a residency requirement in the Act. A city council may place certain individuals who are not city residents onto Type B boards in two (2) very limited instances:¹⁶ first, in a city of fewer than 20,000 in population, a Type B director may either be a resident of the city, a resident of the county in which the major part of the area of the city is located, or reside in a place that is within 10 miles of the city's boundaries and is in a county bordering the county in which a major portion of the city is located.¹⁷ Second, a person may serve on a Type B board if that person was a Type A director at the time that a Type A corporation was dissolved, and the Type A corporation was replaced with a Type B corporation.¹⁸ Also with respect to Type B structure, no more than four of the seven Type B directors may also be city officers or employees.¹⁹

Regarding oversight procedures, both Type A and Type B boards pursuing projects are required to obtain city council approval of the project. There is no requirement for additional public notice or a public hearing on individual projects undertaken by the Type A corporation, but Type B corporations are subject to certain additional procedural requirements: they must provide public notice of the project and hold a public hearing prior to pursuing a project and the public has 60 days to petition for an election to be called on whether to pursue the project.

Differences in the Means for Adopting and Altering the Tax

Finally, there are differences in how Type A and Type B taxes may be created or altered by election. A Type A tax is authorized by an election that has mandatory statutory wording for the

¹² *Id.* §§ 505.154, .304.

¹³ *Id.* §§ 505.156-.158.

¹⁴ *Id.* § 504.051(a).

¹⁵ *Id.* § 505.051.

¹⁶ *Id.* § 505.052.

¹⁷ *Id.*

¹⁸ *Id.* § 505.052(d). (Since the directors of a Type A corporation are not required to be residents of the city, this change in the law would allow a non-resident to serve as a Type B director in this limited circumstance. However, in a city with a population greater than 20,000, the Type B board member must be a resident of the city.)

¹⁹ *Id.* § 505.052(c).

ballot proposition. There is also authority for a Type A tax to be adopted in conjunction with a sales tax for property tax relief under one combined proposition at the same election. Once adopted, the Type A tax continues in existence until repealed by action of the voters. The Type A tax can be increased, reduced, or repealed at subsequent elections within the statutory range provided for the tax.

Conversely, the Type B tax has no required statutory wording for the ballot proposition. It can be adopted by a general ballot proposal for the adoption of a Type B sales tax for economic development. In most cases, however, cities place a long list of the authorized categories for expenditure in the ballot wording that adopts the Type B tax. Before the 79th legislative session, there was no authorization for a Type B tax to be combined onto one ballot proposition with a sales tax for property tax relief. If the voters wanted both taxes, they had to approve the items as separate ballot propositions. As of September 1, 2005, a Type B tax can be combined into one ballot proposition with a sales tax for property relief or any other special purpose municipal sales tax.²⁰

Up until 2017, there was no authorization for a Type B tax rate to be increased or reduced at subsequent elections. However, legislation passed in 2017 that authorizes a Type B tax to be increased or reduced by election within the statutory range provided for the tax.²¹ For corporations created on or after September 1, 1999, the Type B corporation may also be dissolved by petition of the voters and an election on the issue.²² In that case, the Type B tax would continue until the prior debt obligations of the Type B corporation had been paid in full.

Type A and Type B Economic Development Sales Tax

Eligibility to Adopt a Type A Tax

A city is eligible to adopt the Type A tax, with voter approval, if the new combined local sales tax rate would not exceed two percent and:²³

- the city is located in a county with a population of fewer than 500,000; or
- the city has a population of less than 50,000 and is located within two or more counties, one of which is Bexar, Dallas, El Paso, Harris, Hidalgo, Tarrant, or Travis; or
- the city has a population of less than 50,000 and is within the San Antonio or Dallas Rapid Transit Authority territorial limits but has not elected to become part of the transit authority.²⁴

It should be noted that participation in a rapid transit authority does not invalidate a city's ability to adopt a Type A tax if adoption of the tax would not place the area within the city above its

²⁰ Tex. Tax Code § 321.409.

²¹ Tex. Loc. Gov't Code § 505.2566

²² *Id.* § 505.351 - .352.

²³ *Id.* § 504.254.

²⁴ *Id.* § 504.002.

statutory cap for the local sales tax rate.²⁵

If a city is eligible to adopt a Type A tax, the city council may propose any sales tax rate that is an increment of one-eighth of one percent.²⁶ The city may not adopt a sales tax rate that would result in a combined rate of all local sales taxes that would exceed two percent.²⁷

Eligibility to Adopt a Type B Tax

A city may impose the Type B tax, with voter approval, if the new combined local sales tax rate would not exceed 2 percent and if the city fits into one of the following categories:²⁸

- the city would be eligible to adopt a Type A sales tax (see earlier section on Eligibility to Adopt a Type A Tax);
- the city is located in a county with a population of 500,000 or more and the current combined sales tax rate does not exceed 8.25 percent at the time the Type B tax is proposed; or
- the city has a population of 400,000 or more and is located in more than one county, and the combined state and local sales tax rate does not exceed 8.25 percent.

An eligible Type B city includes a city “that is located in a county with a population of 500,000 or more,” and the Act also provides that an eligible city includes a city “located in a county with a population of 500,000 or fewer.” Consequently, every Texas city appears to be eligible to adopt a Type B sales tax provided the city’s combined local sales tax rate does not exceed two percent.²⁹ Further, it should be noted that participation in a rapid transit authority does not invalidate a city’s ability to adopt a Type B tax if adoption of the tax would not place the city above its statutory cap for the local sales tax rate.³⁰

If the city is eligible to adopt a Type B tax, the city council may propose any sales tax rate that is an increment of one-eighth of one percent.³¹ The city may not adopt a sales tax rate that would result in a combined rate of all local sales taxes that would exceed two percent.³²

²⁵ *Id.* § 504.259. *See also* Tex. Transp. Code § 452.6025. (Allowing a city located in a county in which a chapter 452 regional transportation authority has territory to call an election to be added to the transit authority provided a majority of the votes cast in the election favor the proposition. If the proposition is approved, the Type A sales tax can be reduced “to the highest rate that will not impair the imposition of the [regional transportation] authority’s sales and use tax.”)

²⁶ Tex. Loc. Gov’t Code. § 504.252(b).

²⁷ *Id.* §§ 504.252(b), 504.254.

²⁸ *Id.* § 505.002.

²⁹ *Id.* §§ 504.002, 505.002.

³⁰ *Id.* § 505.257. *See also* Tex. Transp. Code § 452.6025. (Allowing a city located in a county in which a chapter 452 regional transportation authority has territory to call an election to be added to the transit authority provided a majority of the votes cast in the election favor the proposition. If the proposition is approved, the Type B sales tax can be reduced “to the highest rate that will not impair the imposition of the [regional transportation] authority’s sales and use tax.”)

³¹ Tex. Loc. Gov’t Code § 505.252(b).

Economic Development Corporation Projects

The Development Corporation Act provides a wide variety of purposes for which Type A and Type B tax proceeds may be expended. Some of these projects require the creation or retention of primary jobs.³³ Other statutory provisions require that the Type A and Type B corporations meet the requisite revenue amounts, population, and other requirements specified by the Act without having to create or retain primary jobs. A few projects do not require either the creation or retention of primary jobs or that certain criteria be met. It is important to emphasize that any activities of an economic development corporation must always be in furtherance, and attributable to, a “project”.³⁴

Type A and Type B Projects Which Must Create or Retain Primary Jobs

In 2003, the Texas Legislature amended the definition of “project” to require that certain projects result in the “creation or retention of primary jobs”.³⁵ Accordingly, most Type A and Type B projects must now create or retain primary jobs. Yet, not all projects contain this requirement. “Primary job” is defined to mean a job that is “available at a company for which a majority of the products or services of that company are ultimately exported to regional, statewide, national, or international markets infusing new dollars into the local economy” and that meets any one of a specific list of sector numbers of the North American Industry Classification System (NAICS).³⁶

The enumerated sector numbers are:

111	Crop Production
112	Animal Production
113	Forestry and Logging
11411	Commercial Fishing
115	Support Activities for Agriculture and Forestry
211 to 213	Mining
221	Utilities
311 to 339	Manufacturing
42	Wholesale Trade
48 and 49	Transportation and Warehousing

³² *Id.*, Tex. Tax Code. § 321.101(f), Tex. Loc. Gov’t Code § 505.256 (Making Chapter 321 of the Tax Code applicable to a Type B tax).

³³ The definition of “project” was significantly amended in the 78th Legislative Session. Changes made applied only to projects that were undertaken or approved after June 20, 2003. Any projects undertaken or approved before June 20, 2003 are governed by the law that was in effect on the date the project was undertaken or approved.

³⁴ Tex. Att’y Gen. Op. No. JC-0118 (1999) (Ruling under the former statute, Sales and use taxes levied under Section 4B of the Development Corporation Act of 1979, Tex. Rev. Civ. Stat. Ann. art. 5190.6 (Vernon 1987 & Supp. 1999), may only be used for project costs; they may not be used for “promotional” costs unrelated to projects).

³⁵ Tex. Loc. Gov’t Code. §§ 501.101, 505.155. (Section 505.151 incorporates Type A projects under Chapter 501 as authorized projects for Type B corporations.)

³⁶ *Id.* § 501.002(12).

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51 (excluding 512131 and 512132)	Information (excluding movie theaters and drive-in theaters)
523-525	Securities, Commodity Contracts, and Other Financial Investments and Related Activities; Insurance Carriers and Related Activities; Funds, Trusts, and Other Financial Vehicles
5413, 5415, 5416, 5417, and 5419	Scientific Research and Development Services
551	Management of Companies and Enterprises
56142	Telephone Call Centers
922140	Correctional Institutions;
928110	National Security and for corresponding index entries for Armed Forces, Army, Navy, Air Force, Marine Corps, and Military Bases.

For more information on the North American Industry Classification System, please visit: <http://www.census.gov/eos/www/naics/>.

Section 501.101 of the Act specifically allows funding for the land, buildings, equipment, facilities, expenditures, targeted infrastructure, and improvements that are for the creation or retention of primary jobs that are found by the board of directors of the Type A and Type B corporation to be required or suitable for the development, retention, or expansion of the following eight types of projects:

Manufacturing and industrial facilities. A primary purpose of the economic development sales tax is to promote the expansion and development of manufacturing and industrial facilities which create or retain primary jobs.

Research and development facilities. Economic development corporations can help provide research and development facilities which create or retain primary jobs.

Military facilities. Economic development corporations can help promote or support an active military base, attract new military missions to a military base in active use; or redevelop a military base that has been closed or realigned.

Recycling facilities. With the recent federal and state statutory encouragement of recycling enterprises, a growing number of businesses are emerging to meet these needs, and cities will be competing to attract these businesses. Recycling facilities which create or retain primary jobs are permissible projects.

Distribution centers. In cities with access to major airports or ports, and in areas that have passed the Freeport exemption, the environment is often favorable for the location of distribution centers. Funding distribution centers which create or retain primary jobs is allowable under the Act.

Small warehouse facilities. Again, in cities with access to major airports or ports, and in areas that have passed the Freeport exemption, the environment is often favorable for the location of warehouse facilities capable of serving as decentralized storage and distribution centers. Small warehouse facilities projects which create or retain primary jobs are permissible projects.

Primary job training facilities for use by institutions of higher education. The Development Corporation Act allows the funding for “primary job training facilities for use by institutions of higher education”. The term “institution of higher education” is defined under Section 61.003 of the Texas Education Code to include any public technical institute, public junior college, public senior college or university, medical or dental unit, or other agency of higher education as defined under Section 61.003.

Regional or national corporate headquarters facilities. “Corporate headquarters facilities” is defined to mean “buildings proposed for construction or occupancy as the principal office for a business enterprise’s administrative and management services.”³⁷ Accordingly, Type A and Type B corporations may fund corporate headquarter facilities, provided the facilities create or retain primary jobs.

Additionally, only Type B corporations may provide land, buildings, equipment, facilities and improvements found by the board of directors to promote or develop new or expanded business enterprises that create or retain primary jobs, including a project to provide:

- Transportation facilities (including but not limited to airports, hangars, airport maintenance and repair facilities, air cargo facilities, related infrastructure located on or adjacent to an airport facility, ports, mass commuting facilities and parking facilities)³⁸,
- Sewage or solid waste disposal facilities,³⁹
- Air or water pollution control facilities,⁴⁰
- Facilities for furnishing water to the public,⁴¹

- Public safety facilities,⁴²
- Streets and roads,
- Drainage and related improvements,

³⁷ *Id.* § 501.002(4).

³⁸ *Id.* § 501.101(2)(D). *See also id.* § 504.103 (Section 504.103 limits Type A corporation from doing certain projects.)

³⁹ *Id.* § 501.101(2)(E). *See also id.* § 504.103 (Section 504.103 limits Type A corporation from doing certain projects.)

⁴⁰ *Id.* § 501.101(2)(G). *See also id.* § 504.103 (Section 504.103 limits Type A corporation from doing certain projects.)

⁴¹ *Id.* § 501.101(2)(H). *See also id.* § 504.103 (Section 504.103 limits Type A corporation from doing certain projects.)

⁴² *Id.* § 505.155.

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- Demolition of existing structures,
- General municipally owned improvements,
- Any improvements or facilities that are related to any of those projects and any other projects that the board in its discretion determines promoted or develops new or expanded business enterprises that create or retain primary jobs.

Type A and Type B Projects Which Are Not Required to Create Primary Jobs

The following categories are authorized Type A and Type B projects that are not conditioned upon the creation or retention of primary jobs.

Job training classes. Certain job training required or suitable for the promotion or development and expansion of business enterprises can be a permissible project. Type A and Type B corporations may spend tax revenue for job training classes offered through a business enterprise only if the business enterprise agrees in writing to certain conditions. The business enterprise must agree to create new jobs that pay wages that are at least equal to the prevailing wage for the applicable occupation in the local labor market area, or agree to increase its payroll to pay wages that are at least equal to the prevailing wage for the applicable occupation in the local labor market area.⁴³

Job-Related Skills Training for Certain Cities. Type A and Type B corporations located in a city with a population of 10,000 or more, and that are located in a county that borders the Gulf of Mexico or the Gulf Intracoastal Waterway or the United Mexican States and in which four cities with a population of 70,000 or more are located, and has or is included in a metropolitan statistical area of this state that has an unemployment rate that averaged at least two percent (2%) above the state average for the most recent two (2) consecutive years, may spend Type A or Type B sales tax revenue for job training that consists of providing job-related life skills sufficient to enable an unemployed individual to obtain employment; and providing job training skills sufficient to enable an unemployed individual to obtain employment.⁴⁴

Certain infrastructural improvements which promote or develop new or expanded business enterprises. “Project” also includes expenditures found by the board of directors to be required or suitable for infrastructure necessary to promote or develop new or expanded business enterprises. However, the infrastructure improvements are limited to streets and roads, rail spurs, water and sewer utilities, electric utilities, gas utilities, drainage, site improvement, and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico.⁴⁵ Accordingly, Type A and Type B corporations may assist with limited infrastructural improvements that the board finds will promote or develop new or expanded business development.

⁴³ *Id.* § 501.162. *See id.* § 501.102.

⁴⁴ *Id.* § 501.163.

⁴⁵ *Id.* § 501.103.

Career Centers. Certain career centers can be provided land, buildings, equipment, facilities, improvements and expenditures found by the board of directors to be required or suitable for use if the area to be benefited by the career center is not located in the taxing jurisdiction of a junior college district.⁴⁶

Commuter Rail, Light Rail or Motor Buses. A Type A and Type B corporation, as authorized by the corporation's board of directors, may spend tax revenue received under the Act for the development, improvement, expansion or maintenance of facilities relating to the operation of commuter rail, light rail, or motor buses.⁴⁷

In addition, there are three categories that are not required to create or retain primary jobs, but for which there are revenue amount, population and other requirements specified in the Act:

Airport Facilities. Type A and Type B corporations located wholly or partly within twenty-five miles of an international border, in a city with population of less than 50,000 or an average rate of unemployment that is greater than the state average rate of unemployment during the preceding twelve month period, may assist with land, buildings, facilities, infrastructure and improvements required or suitable for the development or promotion of new or expanded business enterprises through transportation facilities including airports, hangars, railports, rail switching facilities, maintenance and repair facilities, cargo facilities, marine ports, inland ports, mass commuting facilities, parking facilities, and related infrastructure located on or adjacent to an airport or railport facility.⁴⁸

Infrastructure for Airports, Ports, and Sewer or Solid Waste Disposal Facilities. Type A and Type B corporations located in a city wholly or partly in a county that is bordered by the Rio Grande with a county population of at least 500,000, and having wholly or partly within its boundaries at least four cities that each have a population of at least 25,000, may provide certain assistance with infrastructure necessary to promote or develop new or expanded business enterprises, including airports and port facilities, provided Type A or Type B sales tax revenues do not support the project.⁴⁹ This provision also allows for providing assistance for sewer facilities and solid waste facilities. However, only Type B corporations can provide assistance to these facilities because Type A corporations are not allowed to do those types of projects.⁵⁰

Hurricane Ike Disaster Relief. Type A and Type B corporations located wholly or partly within the Hurricane Ike disaster area may provide assistance towards Hurricane Ike disaster area bonds. Type A and Type B corporations authorized to participate in Hurricane Ike disaster area bond projects must be located wholly or partly in one of thirty-four Texas counties. (See footnote, below.) For these eligible corporations, the

⁴⁶ *Id.* § 501.105.

⁴⁷ *Id.* § 502.052

⁴⁸ *Id.* §§ 501.106, 504.103(c).

⁴⁹ *Id.* § 501.107.

⁵⁰ *Id.* § 504.103.

term “project” is defined to mean the undertaking of costs which are eligible to be paid from the proceeds of qualified Hurricane Ike disaster bonds. The term “project” does not include qualified residential rental projects, or projects the costs of which are payable from qualified mortgage bonds.⁵¹

Type A Only Projects Which Are Not Required to Create Primary Jobs

Section 504.103 of the Local Government Code specifically allows economic development corporations to undertake two categories of projects without the requirement of creating or retaining primary jobs. The primary purpose of these projects is to provide:

Business airports (general aviation business service airports that are an integral part of an industrial park); and

Port-related facilities (port-related facilities to support waterborne commerce).

Type B Only Projects Which Are Not Required to Create Primary Jobs

Sections 505.152 through 505.154 of the Act specifically permit expenditures of Type B tax proceeds for land, buildings, equipment, expenditures and improvements suitable for the following types of projects:

Professional and amateur sports and athletic facilities. Professional and amateur sports and athletics facilities, including stadiums and ballparks, are permissible Type B projects.⁵²

Entertainment, tourist and convention facilities. Entertainment, tourist, and convention facilities, including auditoriums, amphitheaters, concert halls, museums and exhibition facilities are permissible Type B projects.⁵³

Public parks and related open space improvements. Public parks, park facilities and events, and open space improvements are permissible Type B projects.⁵⁴

Affordable housing. Projects required or suitable for the development and expansion of “affordable housing” as defined by federal law (42 United States Code Section 12745) are permissible Type B projects.⁵⁵

Water supply facilities. Any water supply facilities, including dams, transmission lines, well field developments, and other water supply alternatives can be permissible Type B

⁵¹ *Id.* § 501.452. The 34 counties that are subject to this section are: Angelina, Austin, Brazoria, Chambers, Cherokee, Fort Bend, Galveston, Gregg, Grimes, Hardin, Harris, Harrison, Houston, Jasper, Jefferson, Liberty, Madison, Matagorda, Montgomery, Nacogdoches, Newton, Orange, Polk, Rusk, Sabine, San Augustine, San Jacinto, Shelby, Smith, Trinity, Tyler, Walker, Waller, and Washington.

⁵² *Id.* § 505.152.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* § 505.153.

projects.⁵⁶ Nonetheless, to undertake a water supply facility project, a majority of the qualified voters of the city voting in an election called and held for that purpose must approve the water supply project.⁵⁷ The ballot proposition for the election shall be printed to provide for voting for or against the proposition:⁵⁸

**The use of sales and use tax proceeds for infrastructure relating to
(insert description of water supply facility).**

Water conservation programs. Water conservation programs, including incentives to install water-saving plumbing fixtures, educational programs, brush control programs, and programs to replace malfunctioning or leaking water lines and other water facilities can be permissible Type B projects.⁵⁹ As with water supply facilities, to undertake a water conservation program a majority of the qualified voters of the city voting in an election called and held for that purpose must approve the water conservation program.⁶⁰ The ballot proposition for the election shall be printed to provide for voting for or against the proposition:⁶¹

**The use of sales and use tax proceeds for infrastructure relating to
(insert description of water conservation program).**

Airport Facilities. Type B corporations may undertake a project which is required or suitable for the development or expansion of airport facilities, including hangars, airport maintenance and repair facilities, air cargo facilities, and related infrastructure located on or adjacent to an airport facility, if the project is undertaken by a corporation created by an eligible city: (i) that enters into a development agreement with an entity in which the entity acquires a leasehold or other possessory interest from the corporation and is authorized to sublease the entity's interest for other projects authorized by this subdivision; and (ii) the governing body of which has authorized the development agreement by adopting a resolution at a meeting called as authorized by law.⁶²

Additionally, certain Type B corporations have been given more latitude in deciding what types of projects that they can do without the requirement of creating or retaining primary jobs but they must meet the requisite conditions.

Revenue Requirement. Type B corporations in cities that have not generated more than \$50,000 in sales and use tax revenues in the preceding two (2) fiscal years may provide land, buildings, equipment, facilities, and improvements found by the board of directors to be required or suitable for the development, retention, or expansion of business

⁵⁶ *Id.* § 505.154.

⁵⁷ *Id.* § 505.304.

⁵⁸ *Id.*

⁵⁹ *Id.* § 505.154.

⁶⁰ *Id.* § 505.304.

⁶¹ *Id.*

⁶² *Id.* § 505.1561.

enterprises, provided the city council authorizes the project by adopting a resolution following two (2) separate readings conducted at least one (1) week apart.⁶³

Population Requirement. A Type B corporation in a city with a population of 20,000 or less may provide land, building, equipment, facilities, expenditures, targeted infrastructure, and improvements found by the board of directors to promote new or expanded business development provided that, for projects which require an expenditure of more than \$10,000, the city council adopts a resolution authorizing the project after giving the resolution at least two (2) separate readings.⁶⁴

Landlocked Communities. For Type B corporations located wholly or partly in a county with a population of two million or more that has within its city limits and extraterritorial jurisdiction fewer than 100 acres that can be used for the development of manufacturing or industrial facilities in accordance with the zoning laws or land use restrictions of the city, the term “project” also includes expenditures found by the board of directors to be required for the promotion of new or expanded business enterprises within the landlocked community.⁶⁵

Undertaking Projects Located Outside of the City

Section 501.159(a) of the Local Government Code provides that an economic development corporation may undertake projects outside of the city limits with permission of the governing body that has jurisdiction over the property. If the project is located completely within the jurisdiction of another municipality, the corporation would need approval of the city council for that municipality.

Uses of Type A and Type B Taxes

Use of a Type A Tax for Infrastructural Improvements

Type A tax proceeds are not intended to fund the general infrastructural needs of a city.⁶⁶ For example, Section 504.103 of the Act states that Type A tax proceeds cannot be used to undertake a project the primary purpose of which is to provide transportation facilities, solid waste disposal facilities, sewage facilities, facilities for furnishing water to the general public or air or water pollution control facilities. Section 504.103 further states that Type A tax proceeds may be used for these types of facilities only if the expenditure would “benefit property acquired for a project having another primary purpose.”

⁶³ *Id.* § 505.156.

⁶⁴ *Id.* § 505.158.

⁶⁵ *Id.* § 505.157.

⁶⁶ *See* Tex. Att’y Gen. LO-95-072 (1995) (V.T.C.S. article 5190.6, Section 4B authorizes the board of directors of a development corporation organized under V.T.C.S. article 5190.6 to determine whether the construction of sanitary sewer lines in an existing residential subdivision would promote or develop new or expanded business enterprises. Although it seems unlikely that the construction of sewer facilities in a residential subdivision would promote or develop new or expanded business enterprises, this office cannot exclude the possibility as a matter of law. The board’s determination would be reviewed under an abuse of discretion standard.)

In 2003, the Texas Legislature amended the Act to allow Type A corporations to expend sales tax proceeds for specific infrastructural improvements necessary to promote or develop new or expanded business enterprises.⁶⁷ This provision authorizes and limits expenditures for streets and roads, rail spurs, water and sewer utilities, electric utilities, gas utilities, drainage, site improvements and related improvements, telecommunications and Internet improvements, and beach remediation along the Gulf of Mexico.⁶⁸

Use of Type A Tax for Type B Projects

In 1997, the Texas Legislature amended the Development Corporation Act to allow the voters of an area to approve at an election the use of Type A economic development sales tax funds for a project authorized under Type B.⁶⁹ This alternative was authorized to allow cities with a Type A tax to propose Type B projects to the voters without having to repeal or reduce the Type A tax and adopt a Type B tax.

As noted, any use of Type A funds for a Type B project must be approved by the city's voters at an election held on the issue and a public hearing must be conducted before the city holds the election. If the city already has a Type A tax, it only needs to have the voters approve at the election the use of Type A tax proceeds for a particular Type B project or a category of Type B projects. The city would need to list each project or category of projects on a separate ballot proposition for the voters' approval. Unfortunately, state law does not define what constitutes a separate category of projects. A city should consult with its local legal counsel before it drafts its ballot wording for such an election.

If the city chooses to propose the use of Type A funds for Type B purposes, it must hold a public hearing prior to the election.⁷⁰ At the public hearing, the city's residents must be informed of the estimated cost and impact of the proposed project or category of projects. The city must publish notice of the hearing in a newspaper of general circulation in the city at least 30 days before the date set for the hearing. The notice must include the time, date, place and subject of the hearing and must be published on a weekly basis until the date of the hearing.

In an election to approve the use of Type A funds for a Type B purpose, the law requires that a specific Type B project or category of projects be clearly described on the ballot.⁷¹ The ballot proposition must be clear enough for the voters to discern the limits of the specific project or category of projects to be authorized. State law does not indicate what type of limits must be identified. At a minimum, the proposition should clearly identify what types of project are anticipated. Additionally, if Type A funds are to be used to pay maintenance and operating costs (and not just initial construction cost, etc.) of a Type B project, then the ballot proposition must state that fact.

⁶⁷ Tex. Loc. Gov't Code § 501.103.

⁶⁸ *Id.*

⁶⁹ *Id.* § 504.152.

⁷⁰ *Id.* § 504.153.

⁷¹ *Id.* § 504.152(b).

1. The Sales Tax for Economic Development

A city may ask the voters to consider the use of Type A funds for a Type B purpose at the same election in which the voters are considering the creation of the Type A tax itself.⁷² The city would use one ballot proposition for the adoption of the Type A tax and a separate ballot proposition to approve the use of Type A funds for a Type B purpose. A city may also have the voters consider authorizing the use of Type A funds for several different Type B projects or categories of projects at the same election. As noted earlier, each project or category of projects would need to be placed on a separate ballot proposition for the voters' approval. There does not seem to be any authorization for a city to have the voters consider the use of Type A funds for several different Type B projects or categories of projects within one ballot proposition, unless the city proposes a combined ballot proposition to repeal or reduce the Type A tax and in the same proposition adopt a Type B tax. If an election on a Type B project or category of projects fails to win voter approval, the city must wait at least one year before holding another election on that particular project or category.⁷³

Additionally, even when undertaking a properly authorized Type B project, a Type A corporation is governed by all the normal rules applicable to Type A corporations.⁷⁴ For instance, if the ballot proposition originally authorizing the Type A tax contained an expiration date for the tax, voter authorization of the use of Type A funds for a Type B purpose would not eliminate the expiration date of the tax.

During the 82nd Legislative Session, the Legislature passed a bill that would allow Type A corporations to do Type B projects if:

- The city that created the Type A corporation also has a Type B corporation; and
- The population of the city is 7,500 or less.⁷⁵

The city will have to pass an ordinance allowing the Type A corporation to do Type B projects. These Type A corporations would not have to have an election to do Type B projects. Also, by ordinance, the city may revoke the Type A corporation's ability to do Type B projects under this bill.

Use of Type A Tax and Type B Tax for "Sports Venue" Facilities

Type A and Type B funds may be used to fund "sport venue" projects.⁷⁶ Special statutory provisions apply to "sports venue" projects. A project qualifies as a "sports venue" if it is an arena, coliseum, stadium, or other type of area or facility that meets both of the following criteria:⁷⁷

⁷² *Id.* § 504.152(c).

⁷³ *Id.* § 504.154.

⁷⁴ *Id.* § 504.156.

⁷⁵ *Id.* § 504.171.

⁷⁶ *Id.* §§ 504.152-.156, 505.201-.206.

⁷⁷ *Id.* §§ 504.151(2), 505.201(2). (Note that the definition of "sports venue" in Section 505.201 of the Local Government Code differs from that contained in 504.151 of this Act. Type B corporations have an additional limitation within its definition of "sports venue". Type B corporations cannot fund arena, coliseum, stadium, or other type of area or facility that is or will be owned and operated by a state-supported institution of higher education.)

1. The Sales Tax for Economic Development

- The primary use or primary planned use is for one or more professional or amateur sports or athletics events; and
- A fee for admission to the sports or athletics events is charged or is planned to be charged, except that a fee need not be charged for occasional civic, charitable or promotional events.

Texas law specifies that any funds authorized by the voters to be spent on a “sports venue and related infrastructure” may be spent on any on-site or off-site improvements that relate to a sports venue and that enhance the use, value, or appeal of the sports venue, including areas adjacent to it. Eligible expenditures would include any costs that are reasonably necessary to construct, improve, renovate, or expand the sports venue. The law specifically lists the following uses as examples of permissible “related infrastructure”: stores, restaurants, concessions, on-site hotels, parking facilities, area transportation facilities, roads, water or sewer facilities, parks, and environmental remediation.⁷⁸ However, each of these facilities must relate to and enhance the sports venue.

In order for a Type A or Type B corporation to do a “sports venue” project, both the Type A and Type B corporations must follow certain procedures. A city may submit to its voters a ballot proposition that would authorize the use of Type A or Type B funds for a specific “sports venue” project or category of projects, including any infrastructure related to that project or category.⁷⁹ Such a ballot proposition could contain language enabling the Type A or Type B corporation to use any Type A or Type B funds already collected to support the “sports venue” project. Before an election to authorize the use of the Type A or Type B tax for a sports venue, a public hearing must be conducted.⁸⁰ At that hearing, the city’s residents must be informed of the cost and impact of the proposed project or category of projects. The city is required to publish notice of the hearing in a newspaper of general circulation in the city at least 30 days before the date set for the hearing. The notice must include the time, date, place, and subject of the hearing and must be published on a weekly basis until the date of the hearing. Accordingly, the city will need to schedule its public hearing early enough so that it can provide at least 30 days notice of the hearing.

In an election to approve the use of Type A or Type B funds for a “sports venue” project, the law requires that a specific “sports venue” project or category of projects be clearly described on the ballot.⁸¹ The description must be clear enough for the voters to discern the limits of the specific project or category of projects to be authorized. State law does not indicate what constitutes a clear description or how to indicate the limits of the specific project. At a minimum, the ballot proposition should clearly indicate the types of projects anticipated. Additionally, if Type A or Type B funds are to be used to pay the maintenance and operating costs (and not just initial

⁷⁸ *Id.* §§ 504.151(1), 505.201(1).

⁷⁹ *Id.* §§ 504.152(a), 505.202(a).

⁸⁰ *Id.* §§ 504.153, 505.203.

⁸¹ *Id.* §§ 504.152(b), 505.202(b).

construction cost, etc.) of a “sports venue” project, then the ballot proposition must state that fact.⁸²

A city may have the voters consider the use of Type A or Type B funds for a “sports venue” project at the same election in which the voters are considering the creation of the Type A or Type B tax itself.⁸³ A city that pursues such a combined proposition should consult with its local legal counsel and the comptroller’s office on this issue. State law requires that any “sports venue” election be held on a uniform election date. If a “sports venue” project or category of projects fails to win voter approval, the city must wait at least one year before holding another election on that particular project or category.⁸⁴

Use of Type A and Type B Tax Proceeds for Training Seminars

Certain Type A and Type B economic development corporation officers and city officials are required to complete a training seminar.⁸⁵ The officials must complete a seminar once every 24 months.⁸⁶ At least one person from each of the following is required to attend a seminar each 24-month period:

- the city attorney, the city administrator or city clerk; and
- the executive director or other person who is responsible for the daily administration of the corporation.⁸⁷

The corporation is authorized to use Type A or Type B proceeds to pay for the costs of attending a seminar.⁸⁸ The certificates of completion are issued by the person, entity, or organization providing the training seminars on a form approved by the comptroller’s office.⁸⁹ The comptroller’s office may impose an administrative penalty in an amount not to exceed \$1,000 for failure to attend the seminar.⁹⁰

Specific Procedural Requirements Before a Type B Corporation Can Expend Type B Tax Proceeds

Public Notice Requirement and the 60-Day Right to Petition

A Type B corporation must publish notice of the Type B projects it plans to undertake. This is because the public has a right to submit a petition objecting to a particular Type B project.⁹¹ The petition must be submitted within 60 days of the first published notice of a specific project or type of project and must be signed by more than 10 percent of the registered voters of the city.

⁸²

Id.

⁸³

Id. §§ 504.152(c), 505.202(c).

⁸⁴

Id. §§ 504.154, 505.204.

⁸⁵

Id. § 502.101.

⁸⁶

Id. § 502.101(a).

⁸⁷

Id. § 502.101(a)(1)-(2).

⁸⁸

Id. § 502.101(d).

⁸⁹

Id. § 502.103(a).

⁹⁰

Id. § 502.103(b).

⁹¹

Id. §§ 505.160, .303.

If a petition is pursued by the public, the petition can ask that the city hold an election on the issue before that specific project or type of project is undertaken. If the petition is submitted in a timely manner and an election is required, the corporation may not undertake the project until the voters approve the project at an election on the issue. If the voters disapprove the project at the election, the Type B tax proceeds may not be used for that purpose. It is important to note that a petition cannot force an election on a project if the voters have previously approved the specific project or that general category of projects at an earlier election called under the Act.

Public Hearing Requirement for Expending Type B Tax Proceeds

A Type B corporation is required to hold at least one public hearing on any proposed project, including a proposal to expend funds on maintenance and operating expenses of a project.⁹² However, a corporation created by an eligible city with a population of less than 20,000 is not required to hold a public hearing if the proposed project is defined by Sections 501.101 through 501.107 of the Act.⁹³ If a public hearing is required, the hearing must be held before the corporation expends any Type B funds on the project. There is nothing in the Act that prohibits the Type B corporation from holding one public hearing to consider a group of Type B projects. After the projects have been considered at a public hearing and 60 days have passed since the first public notice of the nature of the projects, the development corporation is free to make expenditures related to the projects pursuant to the adopted budget, subject to other applicable requirements.

Specific Costs of a Type A and Type B Project That May be Funded

Cities need to know what types of specific expenditures are contemplated within each category available for expenditure of Type A and Type B tax proceeds. For assistance in understanding what is permitted under the Act, cities should review the definition of the term “cost” under Section 501.152 of the Act. Section 501.152 defines what costs may be applied to a Type A or Type B. It states, in pertinent part, that costs for a project may include:

Land and facility improvements: the cost of acquisition, construction, improvement and expansion of land and buildings.

Machinery and supplies: the cost of machinery, equipment, inventory, raw materials and supplies.

Financial transaction costs: the cost of financing charges, interest prior to and during construction, and necessary reserve funds.

Planning costs: the cost of research and development, legal services, development of plans and specifications, surveys, and cost estimates; and other expenses necessary or incident to determining the feasibility and practicability of undertaking the project.

⁹² *Id.* § 505.159(a).

⁹³ *Id.* § 505.159(b).

Brownfield Clean-up costs: Should the Texas Governor’s office or the Texas Commission on Environmental Quality encourage or request that a Type A or Type B corporation use sales tax proceeds to clean up contaminated property, the corporation may not undertake the project until the use is approved by a majority of the qualified voters of the city voting in an election called and held for that purpose. The ballot proposition is as follows:⁹⁴

“The use of sales and use tax proceeds for the cleanup of contaminated property.”

Administrative Expenses of a Type A and Type B Project

Section 501.152 of the Act also states that the cost of a project may include the administrative expenses and other expenses that are incident to placing a project into operation. The law states that these expenses could include “the administrative expenses for the acquisition, construction, improvement, and financing of any project.” Additionally, Type A and Type B corporations are permitted to contract with other private corporations to carry out industrial development programs.⁹⁵ Also, should a Type A or Type B corporation contract with a broker, agent or other third party for business recruitment, a written contract approved by the board of directors is required for any payment of a commission, fee, or other thing of value to the third party.⁹⁶ Failure to enter into a written contract could result in a civil penalty not to exceed \$10,000.

Maintenance and Operating Expenses of a Type A and Type B Project

It should be noted that there is a difference between “administrative expenses that are necessary to put a project into operation” and the “maintenance and operating expenses” of an ongoing project. Type A and Type B corporations have statutory authority to spend Type A and Type B funds on maintenance and operation expenses for a Type A or Type B project.⁹⁷ However, the voters are allowed to petition for an election on the issue of whether to prohibit the Type A or Type B corporation from expending Type A or Type B funds for the maintenance and operation costs of a particular project. Such a petition must be signed by 10 percent of the registered voters of the city. The petition must be presented within 60 days after the city first publishes notice that the tax proceeds are going to be used for maintenance and operations of a specific project. However, an election is not required if the voters has previously approved the use of Type A or Type B proceeds for this purpose at an earlier election under the Act.

Promotional Expenses and Prior Debts

The Act limits Type A and Type B corporations to spending no more than 10 percent of the corporate revenues (Type A and Type B tax proceeds) for promotional purposes.⁹⁸ The Act does

⁹⁴ *Id.* §§ 504.304, 505.305.

⁹⁵ *Id.* §§ 504.102, 505.102.

⁹⁶ *Id.* § 502.051.

⁹⁷ *Id.* §§ 504.302, 505.303.

⁹⁸ *Id.* §§ 504.105, 505.103. *See* Tex. Att’y Gen. LO-94-037 (Ruling under the former statute, this opinion concluded the Development Corporation of Abilene, which operated under Section 4A of the Development Corporation Act, could spend proceeds of the sales and use tax imposed under Section 4A for “promotional purposes,” subject to the proviso of subsection (b)(1) that no more than 10 percent of corporation revenue

not define the term “promotional purposes.” However, the Texas Attorney General has concluded that a promotional expenditure “must advertise or publicize the city for the purpose of developing new and expanded business enterprises.”⁹⁹ Further, a corporation is limited to spending not more than 10 percent of its current annual revenues for promotional purposes in any given year. Nonetheless, unexpended revenues specifically set aside for promotional purposes in past years may be expended along with 10 percent of current revenues without violating the cap.¹⁰⁰ Additionally, city council may disapprove a promotional expenditure.¹⁰¹ If there is some question as to whether a particular expenditure should be considered a promotional expense, the development corporation should consult with its local legal counsel.

A Type A corporation is prohibited from assuming a debt or paying the principal or interest on a debt if the debt existed before the date when the city created the development corporation.¹⁰² This limitation does not prevent a development corporation from undertaking or making future expenditures toward a project that is already in operation. It means that the corporation could not reimburse that project for its prior debts. However, the legislature has not addressed whether a Type B corporation is prohibited from paying principal or interest on a debt if the debt existed before the city created the Type B corporation.

Issuance of Bonds for a Type A or Type B Project

A Type A and Type B corporations may issue bonds, notes and other contractual obligations to fund its projects.¹⁰³ The sales tax proceeds received by the corporation may be used to pay the principal and interest on the bonds and any other costs related to the bonds.¹⁰⁴ For example, the Texas Attorney General concluded in Letter Opinion 92-86 that a Section 4A (now Type A) development corporation may finance bonds for the start-up costs of a technical college if the funds are used solely for vocational training purposes. Any bond or debt instrument of the corporation remains an obligation of the corporation and is not an obligation of the city, nor is it backed by the city ad valorem tax rate.¹⁰⁵ The city and the development corporation staff will want to visit with local bond counsel prior to the imposition of any debt obligation or debt instrument. All such bonds would need to receive approval by the Public Finance Division of the Office of the Attorney General.¹⁰⁶

could be spent for such purposes, and so long as the expenditures were otherwise consistent with the provisions of the act and state law generally).

⁹⁹ Tex. Att’y Gen. Op. No. GA-0086 (2003) at 2.

¹⁰⁰ *Id.* at 6.

¹⁰¹ *Id.* at 3-5.

¹⁰² Tex. Loc. Gov’t Code § 504.104. *But see* Tex. Att’y Gen. Op. No. DM-299 (1994). (Ruling under the former statute, this opinion indicates that Tex. Rev. Civ. Stat. art. 5190.6, § 4A(q) is not retroactive. A 4A corporation can, therefore, continue to make payments on any obligation that the corporation entered into before the enactment date of 4A(q) (in 1993). This would be true even if the obligation entered into before the enactment of 4A(q) was one that existed before the creation of the 4A corporation.)

¹⁰³ Tex. Loc. Gov’t Code §§ 501.155, .201, .214.

¹⁰⁴ *Id.* §§ 504.303, 505.104.

¹⁰⁵ *Id.* § 501.207.

¹⁰⁶ *Id.* § 501.201 (States that a development corporation may issue bonds obtaining the consent of any state department, division or agency, “other than the attorney general under chapter 1202, Government Code.”)

Creating a Type A or Type B Economic Development Corporation

Creation of a Type A or Type B economic development corporation may be initiated either by the city¹⁰⁷ or by a group of citizens.¹⁰⁸ For citizens to initiate the creation of an economic development corporation, a group of three or more individuals who are qualified voters of the city must file a written application with the city requesting approval of an economic development corporation. The city may not charge a fee for consideration of the application. If the city determines that the corporation should be created, the city must approve the corporation's certificate of formation (formerly known as articles of incorporation)¹⁰⁹ by ordinance or resolution. The ordinance or resolution must indicate what purposes the corporation can further on the city's behalf. The purposes shall be limited to the promotion and development of industrial and manufacturing enterprises to encourage employment and the public welfare. The Type A economic development certificate of formation must state that the corporation is to be governed by Chapter 504 of the Local Government Code.¹¹⁰ The Type B economic development certificate of formation must state that the corporation is to be governed by Chapter 505 of the Local Government Code.¹¹¹

The certificate of formation for all development corporations must contain the items required under Section 501.056 of the Act and must be approved by the municipality's governing body.¹¹² The city may amend the certificate of formation at its sole discretion at any time.¹¹³

The certificate of formation must be filed in triplicate with the secretary of state's office pursuant to Section 501.057 of the Act. Upon the issuance of the certificate of incorporation, the corporate existence begins. After the issuance of the certificate evidencing the filing of the certificate of formation, the board of directors must hold an organizational meeting to adopt the bylaws of the corporation and to elect officers.¹¹⁴ The initial bylaws must also be approved by resolution of the governing body of the city.¹¹⁵ The first meeting of the board of directors of the corporation should be held pursuant to the requirements under Section 501.063 of the Act.

A city can create an economic development corporation without having an election to create a sales tax. However if the city wants the economic development corporation to receive sales tax funds, then there has to be an election to adopt a Type A or Type B economic development sales tax.

Initiating an Election to Adopt a Type A or Type B Sales Tax

An election to adopt a Type A or Type B economic development sales tax may be initiated either by:

¹⁰⁷ *Id.* § 504.003(a).

¹⁰⁸ *Id.* § 501.051.

¹⁰⁹ *Id.* § 501.011.

¹¹⁰ *Id.* § 504.004.

¹¹¹ *Id.* § 505.004.

¹¹² *Id.* § 501.051(b)(2).

¹¹³ *Id.* § 501.302.

¹¹⁴ *Id.* § 501.063.

¹¹⁵ *Id.* § 501.064.

- city council approval of an ordinance calling for an election on the imposition of the tax¹¹⁶; or
- a petition signed by a number of qualified voters that equals at least 20 percent of the voters who voted in the most recent regular city election. If the city council receives such a petition, it is required to pass an ordinance to call an election on the imposition of the tax.¹¹⁷

Most cities pass the ordinance calling for a Type A or Type B sales tax election on their own motion and do not wait for the election to be initiated by a petition of the voters. If a city orders an election on the sales tax for economic development, it must follow all applicable requirements for elections contained in the Election Code, the Municipal Sales and Use Tax Act (Chapter 321 of the Tax Code), and other Texas statutes relating to elections.¹¹⁸ Notably, the following requirements must be met:

Potential Election Dates. The election must be held on a uniform election date as provided by Chapter 41 of the Election Code. There are uniform election dates in May and November. The current uniform election dates are:

- the first Saturday in May in an odd-numbered year;
- the first Saturday in May in an even-number year, for an election held by a political subdivision other than a county; or
- the first Tuesday after the first Monday in November.¹¹⁹

Time Frame for Ordering the Election. The city should order the election at least 78 days prior to the date of the election.¹²⁰ The Tax Code requires only that the city order the election at least 30 days before the date of the election.¹²¹ Nonetheless, it is advisable to provide at least 78 days' notice, since this is the requirement applicable to most other special elections in Texas and it allows time to comply with other Election Code requirements, such as early voting. In addition, the Election Code provision governing time frames for ordering an election "supersedes a law outside this code to the extent of any conflict."¹²²

¹¹⁶ *Id.* §§ 504.255, 505.256 (Stating that chapter 321 of the Texas Tax Code governs the imposition of a Type A or Type B tax), and Tex. Tax Code § 321.401(a) (An election may be called by the adoption of a city ordinance by city council).

¹¹⁷ *See* Tex. Loc. Gov't Code §§ 504.255, 505.256 (Stating that chapter 321 of the Tax Code governs the imposition of a Type A or Type B tax) and Tex. Tax Code § 321.401(c) (Requiring that the city council pass an ordinance calling for a sales tax election if a petition is presented). *See* Tex. Elec. Code ch. 277 (Requirements for petition signatures).

¹¹⁸ *See* Tex. Loc. Gov't Code § 504.255, 505.256 (Stating that chapter 321 of the Tax Code governs elections under chapter 504 and 505 of the Local Government Code) and Tex. Tax Code § 321.403 (stating that an election held under chapter 321 of the Tax Code must be held on the next available uniform election date).

¹¹⁹ Tex. Elec. Code § 41.0052.

¹²⁰ *Id.* § 3.005(c).

¹²¹ Tex. Tax Code § 321.403.

¹²² Tex. Elec. Code § 3.005(b).

Notice to be Provided of Election. The city must publish notice of the election at least once in a newspaper of general circulation in the city.¹²³ The notice must be published not more than 30 days and not less than 10 days before the date of the election. The notice must state the nature and date of the election, the location of each polling place, hours that the polls will be open, and any other election-related information required by law.¹²⁴ Also, the city is required to deliver notice of their election to the county clerk and voter registrar of each county in which the city is located not later than the 60th day before the election.¹²⁵ Then, the county is required to post the notice to the county's website not later than the 21st day before the election, if the county maintains a website.¹²⁶ If the county does not maintain a website, then the city must post notice of the election on the bulletin board used to post the city's meeting notices.¹²⁷ The notice must also include the wording of all the ballot propositions.¹²⁸ The entire notice must generally be provided in both English and Spanish.¹²⁹

Ballot for Economic Development Corporations

Type A Ballot: The Act requires specific wording for a Type A sales tax proposition ballot, as follows:¹³⁰

The adoption of a sales and use tax for the promotion and development of new and expanded business enterprises at the rate of (insert appropriate rate) of one percent.

The actual wording used on the ballot must indicate what rate is proposed for the Type A sales tax. The voters then vote for or against the proposition.

Type B Ballot: Current law does not provide any required wording for the ballot for a Type B sales tax for economic development. Before the Development Act was codified, cities would use great care to include wording that described all of the categories of projects that the city would want to have the Type B corporation to pursue.¹³¹ Cities

¹²³ *Id.* § 4.003(a)(1), (c).

¹²⁴ *Id.* § 4.004(a).

¹²⁵ *Id.* § 4.008(a).

¹²⁶ *Id.* §§ 4.003(b), 4.008(a).

¹²⁷ *Id.* § 4.003(b).

¹²⁸ *Id.* § 4.004(b).

¹²⁹ *See id.* ch. 272.

¹³⁰ Tex. Loc. Gov't Code § 504.256.

¹³¹ *See* Tex. Att'y Gen. Op. No. JC-400 (2001) (The city of Sonora's ballot adopting the 4B sales tax read as follows: "The adoption of an additional one-half of one percent sales and use tax within the City pursuant to the provisions of Article 5190.6, V.A.T.C., with the proceeds thereof to be used and applied in the manner and to the purposes authorized by Section 4B of the Act, including but not limited to public facility improvements, commercial facilities, infrastructural improvements, new and expanded business enterprises, and other related improvements, facilities to furnish water to the general public, sewage and solid waste disposal facilities and maintenance and operating costs associated with all of the above projects." JC-400 at 4).

should be sure to have their legal counsel review any proposed ballot wording prior to its use in an election proposition.

Setting a Limited Time Period for a Type A or Type B Tax

A Type A tax that is approved without a time limit is effective until repealed by election.¹³² However, a city may include in the wording of the ballot proposition a limitation on the length of time in years that a Type A tax may be imposed. For example, a city could limit the time period during which a Type A tax is imposed to four years. Once such a limit is approved by the voters, the tax may be extended beyond this time limit or reimposed only if the city has an election at which the voters authorize the extension or reimposition of the tax. If a city decides to include such a time limitation, the required ballot wording is as follows:¹³³

The adoption of a sales and use tax for the promotion and development of new and expanded business enterprises at the rate of *(insert appropriate rate)* of one percent to be imposed for *(insert number of years that the tax would be imposed)* years.

The actual wording used on the ballot must indicate what rate is proposed for the Type A sales tax and the number of years that the tax would be in effect. The voters then vote for or against the proposition.

As noted earlier, there is no required wording for a Type B tax ballot. However, an eligible city may allow the voters to vote on a ballot proposition that limits the length of time that a sales and use tax may be imposed. An eligible city that imposes a tax for a limited time under this subsection may later extend the period of the tax's imposition or reimpose the tax only if the extension or reimposition is authorized by a majority of the qualified voters of the city voting in an election called and held for that purpose in the same manner as an election held under Section 505.2565 of the Act.¹³⁴

Limiting the Types of Projects for a Type A or Type B Tax

On a ballot to adopt the Type A tax or on a ballot to increase or reduce a Type A tax, a city may also limit the use of the tax to a specific project.¹³⁵ For example, a city could limit the use of the Type A tax to a project for a specific manufacturing entity or to a specific type of project such as expenditures for an industrial park. If such a limit is approved by the voters, the city may not broaden the purposes for which the Type A tax may be used unless it holds another election. Any desired change would have to go back to the voters for approval at an election on the issue. Once the obligations for the specific project have been satisfied, the corporation is required to notify the Texas comptroller to cease collecting the Type A tax. To date, no city has limited the use of a

¹³² Tex. Loc. Gov't Code § 504.257(d).

¹³³ *Id.* § 504.257(a).

¹³⁴ *Id.* § 505.2565.

¹³⁵ *Id.* § 504.260.

Type A tax to a specific project. If a city decides to include such a limitation, the required wording of the ballot is as follows:¹³⁶

The adoption of a sales and use tax for the promotion and development of (insert description of the project) at the rate of (insert appropriate rate) of one percent.

The actual wording used on the ballot must indicate what rate is proposed for the Type A sales tax and must include a description of the project. The voters then vote for or against the proposition.

A city may limit the use of the Type B tax to a specific project.¹³⁷ However, as noted earlier, there is no required wording for a Type B tax ballot. Accordingly, there is no special wording that must be used to limit the use of the Type B tax to certain projects. If a city wants to limit the use of Type B tax proceeds to certain projects, it may choose to list only the types or categories of projects it desires on the ballot. Also, the Act provides certain authorization to expand the types of projects undertaken if subsequently approved by the eligible voters.¹³⁸

Various Joint Ballot Proposition for a Type A or a Type B Tax

Joint Ballot Proposition for a Type A Tax and a Sales Tax for Property Tax Relief

A city may include the Type A sales tax and the sales tax for property tax relief as separate ballot propositions at the same election. In 1991, the Texas Legislature allowed cities to offer the voters a joint ballot proposition on a sales tax for property tax relief and a Type A sales tax for economic development.¹³⁹ In this scenario, the voters would vote for or against one ballot proposition that covers the adoption of both taxes.

Under this joint ballot proposition, the voters are not able to pass the property tax relief sales tax without also passing the Type A sales tax for economic development. Either both taxes pass or both taxes fail. If a city decides to use such a joint proposition, the required wording on the ballot is as follows:¹⁴⁰

The adoption of a sales and use tax within the city for the promotion and development of new and expanded business enterprises at the rate of (insert appropriate rate) of one percent and the adoption of an additional sales and use tax within the city at a rate of (insert appropriate rate) of one percent to be used to reduce the property tax rate.

The actual wording used on the ballot must indicate what rate is proposed for the Type A sales tax and what rate is proposed for the sales tax for property tax relief. The voters then vote for or

¹³⁶ *Id.* §§ 504.256, .260.

¹³⁷ *Id.* § 505.2575(a).

¹³⁸ *Id.* § 505.2575(b).

¹³⁹ *Id.* § 504.261.

¹⁴⁰ *Id.*

against the proposition. If the total local sales tax has reached the legal maximum of two percent, a city may attempt simultaneously to reduce the sales tax for property tax relief and impose the Type A economic development sales tax in one ballot proposition. The city would still use the above-noted ballot wording.¹⁴¹

There is nothing that stops a city from using separate ballot items for the passage of a sales tax for property tax relief and a Type A sales tax for economic development. In this case, the voters would vote for or against the adoption of each of the two taxes and the passage of one would not influence the passage of the other. Cities, however, have historically preferred the incentive value of joining the two items onto one ballot proposition. If a city uses separate ballot propositions, it should be noted that it is not possible to make one ballot proposition dependent on the passage of a separate ballot proposition. In other words, the city could choose to offer one proposition proposing a reduction of the sales tax for property tax and a separate proposition for the adoption of a sales tax for economic development. Making the adoption of one of the propositions dependent on the passage of the other can be accomplished only where the legislature has authorized a joint proposition as described earlier.

Joint Proposition to Reduce or Abolish a Type A Tax and Adopt a Type B Tax

A city may offer a joint ballot proposition that would reduce or abolish an existing Type A tax and at the same time approve the creation of a Type B tax.¹⁴² That is, the city can have the voters approve or reject both items together by one “yes” or “no” vote. However, a city is not required to combine these two issues into one ballot proposition.

A city can still choose to have the voters vote on repealing or reducing a Type A tax and adopting a Type B tax as separate ballot propositions.¹⁴³ If the city places the items on separate ballot propositions, it is possible that one, both, or neither of the items would be approved at such an election. A city that chooses to provide these options to the voters would use the ballot wording suggested earlier for each of these items. In no case may a city offer ballot propositions that, if passed, would cause the city to exceed its two percent local sales tax cap.¹⁴⁴

Joint Proposition of a Type A or Type B Tax and Other Municipal Sales Tax

Cities are allowed to have joint ballot propositions to lower, repeal, raise or adopt municipal sales taxes.¹⁴⁵ This would include the Type A and Type B tax. If a city wants to lower the Type A or Type B tax and create a street maintenance tax, the city could combine the ballot

¹⁴¹ Tex. Att’y Gen. LO-93-104 (1993) (For a simultaneous election on the imposition, under Section 4A, V.T.C.S. article 5190.6, of a sales and use tax of one-fourth of one percent for economic development and the reduction of its previously adopted additional sales and use tax for the reduction of property taxes under Tax Code Section 321.101(b) from a rate of one-half of one percent to one-quarter of one percent, the city should use the proposition language set out in Section 4A(p), as follows: The adoption of a sales and use tax within the city for the promotion and development of new and expanded business enterprises at the rate of one-fourth of one percent and the adoption of an additional sales and use tax within the city at the rate of one-fourth of one percent to be used to reduce the property tax rate).

¹⁴² Tex. Loc. Gov’t Code § 505.255.

¹⁴³ *Id.*

¹⁴⁴ *See id.* § 505.256; Tex. Tax Code § 321.101(f).

¹⁴⁵ *See* Tex. Tax Code § 321.409.

propositions instead of having separate ballot propositions. If the joint ballot proposition does not pass, then there will be no effect on those sales taxes.

Proposition to Increase or Reduce a Type A or Type B Tax

Type A Sales Tax

A city that has imposed a Type A tax may, on its own, motion call for an election to approve an increase or a reduction of the Type A tax rate.¹⁴⁶ The election would be administered by the same procedure that was used to originally adopt the tax. The Type A tax rate would be reduced or increased if the proposition were approved by a majority of the qualified voters who voted at an election held on the issue. The rate may be reduced or increased to any rate that is an increment of one-eighth of one percent that the authorizing municipality determines is appropriate, and that would not result in a combined rate that exceeds two percent. Also, on petition of at least 10 percent of the registered voters of the city, the city may be compelled to order an election on a proposed increase or decrease of the Type A tax rate.¹⁴⁷

It should be noted that the attorney general has concluded in Attorney General Opinion DM-137 (1992) that if there is an election to reduce the Section 4A (now Type A) sales tax or to limit the length of time of its collection, the reduction or limitation may not be applied to any bonds issued prior to the date of the election.

It is not clear what ballot wording would be required for a proposition to increase or reduce a Type A tax rate. Section 504.258 of the Local Government Code states that “the ballot shall be printed in the same manner as the ballot under Section 504.256.” Section 504.256 contains the regular wording on the ballot to adopt a Type A sales tax. The ballot wording to adopt the Type A tax is as follows: “The adoption of a sales and use tax for the promotion and development of new and expanded business enterprises at the rate of (insert appropriate rate) of one percent.” A city should consult with its legal counsel, in conjunction with the comptroller’s office, if it decides to ask the voters to reduce or increase an existing Type A tax.

Type B Sales Tax

Up until 2017, there was no express statutory authority for a Type B tax to be increased or decreased after its initial adoption. The legislature passed H.B. 3045 in 2017 to authorize a Type B tax to be increased or reduced by election within the statutory range provided for the tax. The new statute is nearly identical to the statute for increasing or reducing the Type A tax.¹⁴⁸ The statute for increasing or reducing a Type B tax does not, however, contain a provision addressing ballot language for such an election, primarily because, unlike a Type A corporation, there is no required ballot language for the initial adoption of a Type B tax. A city should consult with its legal counsel, in conjunction with the comptroller’s office, if it decides to ask the voters to reduce or increase an existing Type B tax.

¹⁴⁶ Tex. Loc. Gov’t Code § 504.258.

¹⁴⁷ *Id.*

¹⁴⁸ *Id.* § 504.2566

Proposition to Abolish the Type A or Type B Tax

Type A Sales Tax

On petition of 10 percent or more of the registered voters of the city, the city can be required to order an election on the dissolution of the Type A corporation.¹⁴⁹ If the corporation is dissolved, the Type A tax may not be collected except to pay off any remaining obligations that were executed before the date of the dissolution election. The ballot for the election shall be printed to provide for voting for or against the proposition:¹⁵⁰

Termination of the (insert name of the corporation).

The election must be held on a uniform election date and the election is subject to all the applicable requirements under law for elections.

If a majority of the voters voting on the issue approve the dissolution, the corporation continues its operations only long enough to pay off any bonds that were issued before the date of the election and to the extent necessary to dispose of its assets.¹⁵¹ The Attorney General has concluded that a corporation that is dissolving is required to submit its dissolution plan to city council for its review and approval.¹⁵² However, city council may not use this approval power to prevent the corporation from performing its statutory duty to, “to the extent practicable...dispose of its assets and apply the proceeds to satisfy” the corporation’s obligations. The assets are used to pay off any liabilities, and any remaining assets are transferred to the city.¹⁵³ The corporation is required to notify the comptroller to cease collection of the tax once the corporation has satisfied all of its obligations.¹⁵⁴

Type B Sales Tax Created before September 1, 1999

For a Type B corporation created before September 1, 1999, there is no statutory authority that allows a Type B tax to be abolished after its initial adoption. The city could use its power by resolution under Section 501.401 of the Act to terminate or dissolve the development corporation. If the city takes such an action, the corporation and the tax would continue only for the time period necessary to pay off any outstanding debt.

Type B Sales Tax Created on or after September 1, 1999

For a Type B corporation created on or after September 1, 1999, the Act provides that a city must hold an election on the issue of dissolving the corporation if a proper petition is submitted to the city council.¹⁵⁵ Such a petition must request an election on the dissolution of the Type B corporation and be signed by at least 10 percent of the registered voters of the city. The petition must also meet any other legal requirements that may be applicable, including the general

¹⁴⁹ *Id.* § 504.351(a).

¹⁵⁰ *Id.* § 504.352.

¹⁵¹ *Id.* § 504.353.

¹⁵² Tex. Att’y Gen. Op. No. JC-0553 (2002) at 6.

¹⁵³ Tex. Loc. Gov’t Code § 504.353(a)(2).

¹⁵⁴ *Id.* § 504.353(c).

¹⁵⁵ *Id.* § 505.352 (Provides that the municipality shall hold the election on the next uniform election date as required by Section 3.005 of the Election Code).

petition requirements found in Chapter 277 of the Election Code. The election must be held on the first regular uniform election date that falls more than 77 days after the petition is filed with the city.¹⁵⁶ At the election, the ballot must be printed to read as follows:¹⁵⁷

Termination of the (*name of corporation*).

If a Type B corporation is dissolved pursuant to an election of this nature, the corporation will continue to operate long enough to pay off all its debts and obligations.

Once the corporation's debts and obligations are paid off, the corporation is dissolved and its property must be transferred to the city. The city must then notify the comptroller, who must stop collecting the Type B sales tax by the last day of the first calendar quarter that begins after the city has notified the comptroller.¹⁵⁸

Reporting Election Results of a Type A and Type B Tax

The Election Code requires that, no earlier than the third day and no later than the eleventh day¹⁵⁹ after the election, the governing body of the city must canvass the ballots and enter the resolution or ordinance declaring the results of the election into the minutes of a meeting. The resolution or ordinance must include the following:¹⁶⁰

- The date of the election;
- The proposition for which the vote was held;
- The total number of votes cast for and against the proposition; and
- The number of votes by which the proposition was approved.

If the proposed change in the tax rate is approved by a majority of the qualified voters of the city voting at an election on the issue, the city may levy the approved tax. The city secretary must, by certified or registered mail, send the comptroller a certified copy of the resolution or ordinance and must include a map of the city clearly showing the city's boundaries. After receiving the documents, the comptroller has 30 days to notify the city secretary that the comptroller's office will administer the tax.

¹⁵⁶ *Id.* § 505.352(b).

¹⁵⁷ *Id.* § 505.353.

¹⁵⁸ *Id.* § 505.354.

¹⁵⁹ Tex. Elec. Code § 67.003(b). *But see* Tex. Tax Code § 321.405 (Which gives the city 10 days to canvass an election on the proposed adoption of a Type A sales tax. It is not clear whether the Election Code provision or the Tax Code provision is controlling on this issue. Therefore, it is recommended that cities follow the stricter provisions of the Election Code and canvass the election between 3 and 11 days after it has taken place. Note that the Election Code may require a city to wait longer than three days to canvass, as it provides that the city must canvas not later than the 11th day after election day and not earlier than the later of: (1) the third day after election day; (2) the date on which the early voting ballot board verified and counted all provisional ballots, if a provisional ballot has been cast in the election; or (3) the date on which all timely received ballots cast from addresses outside of the United States are counted, if a ballot to be voted by mail in the election was provided to a person outside of the United States).

¹⁶⁰ Tex. Tax Code. § 321.405.

If the election fails, the city must wait one full year before bringing the issue to the voters again.¹⁶¹ However, the Election Code allows the city to hold a subsequent election on the corresponding uniform election date that occurs approximately one year later, even if the date falls several days before a full year has elapsed.¹⁶²

Effective Date of Type A or Type B Tax

Effective Date of Type A or Type B Sales Tax Election Only

The change in the sales tax rate becomes effective one full calendar quarter after notice of the election has been provided to the comptroller. The new tax rate applies to purchases on or after the first day of that calendar quarter as provided under Section 321.102(a) of the Tax Code.

May Election: Send notice to the comptroller no later than the last week in June. On October 1st, the new tax rate will take effect. The city will receive its first payment in December.

November Election: Send notice to the comptroller no later than the last week in December. On April 1st, the new tax rate will take effect. The city will receive its first payment in June.

Effective Date for Type A Sales Tax and Additional Municipal Sales Tax Election

At the same election, if the city adopts a Type A sales tax and adopts an additional municipal sales taxes, such as a sales tax for property tax relief, the city has two options with regard to the effective date of the tax. The city may opt to have the taxes take effect at the same time (the following October 1st if a full calendar quarter has passed since the election).¹⁶³ Or, alternatively, the city may choose to have the Type A tax take effect as soon as one calendar quarter has passed after the election, and have the sales tax for property tax relief take effect the following October 1st (after which a full calendar quarter has passed since the election). In this scenario, the Type A tax would generally take effect before the sales tax for property tax relief.¹⁶⁴ Some cities choose this option to maximize revenues from the tax; other cities choose to make it easier on retailers and allow both taxes to take effect at the same time in October.

Effective Date for Type B Sales Tax and Additional Municipal Sales Tax Election

At the same election, if the city adopts a Type B sales tax and an additional municipal sales tax, such as a sales tax for property tax relief, both taxes will not take effect until the following October 1st (assuming at least a complete calendar quarter has passed since the election).¹⁶⁵ If a

¹⁶¹ *Id.* § 321.406. *But see* Tex. Loc. Gov't Code §§ 504.255, .351, 505.256.

¹⁶² Tex. Elec. Code § 41.0041(a).

¹⁶³ Tex. Loc. Gov't Code § 504.255, Tex. Tax Code § 321.102(b) (While the option to have both taxes take effect on October 1 is not expressly set out in state statute, it has been the interpretation of the comptroller's office that such an option is allowed. Thus, it is currently comptroller's policy to give cities a choice with regard to the date of implementation for a Type A or Type B sales tax as outlined in this section.)

¹⁶⁴ Tex. Tax Code § 321.102(b).

¹⁶⁵ *Id.*, Tex. Loc. Gov't Code § 505.256.

complete calendar quarter has not passed since the election, the tax would not take effect until the following October 1st.

Allocation of the Sales Tax Proceeds by the comptroller

Once the sales tax is effective, the comptroller remits the sales tax proceeds from the increase in the rate to the municipality with its other local sales tax proceeds. The Municipal Sales and Use Tax Act (Chapter 321 of the Tax Code) governs the imposition, computation, administration, abolition, and use of the tax except where it is inconsistent with the statutory provisions within the Development Corporation Act.¹⁶⁶

The city, upon receiving its local sales tax allotment from the comptroller, must remit the sales tax for economic development to the economic development corporation responsible for administering the tax.¹⁶⁷ The proceeds of a sales tax for property tax relief would remain with the city.

Directors of a Economic Development Corporation

Board of Directors of a Type A Economic Development Corporation

A Type A corporation is governed by at least a five-member board of directors.¹⁶⁸ The directors are appointed by a majority vote of the city council at an open meeting. The Act does not specify any qualifying criteria for a person who serves as a director on the Type A board. A Type A director is not required to be a city resident or a property owner. The directors serve without compensation but must be reimbursed for actual expenses.¹⁶⁹ The directors are appointed to a term not to exceed six years. Further, should the certificate of formation or the bylaws not address a term of office, then the Type A directors have a six-year term of office.¹⁷⁰ However, the directors serve at the pleasure of the city council and may be removed by the city council at any time without cause.¹⁷¹

In JC-349, ruling under the former statute, the attorney general concluded that a Section 4A director could be appointed to a subsequent term. The opinion noted that neither the Development Corporation Act nor the Texas Non-Profit Corporation Act barred such reappointment. Accordingly, a city council may reappoint a director to a subsequent term, provided there is not a contrary provision in the articles of incorporation, bylaws, city charter, city ordinance or resolution.

Board of Directors of a Type B Economic Development Corporation

A Type B corporation is governed by a seven-member board of directors.¹⁷² The seven directors are appointed by a majority vote of the city council at an open meeting. Unlike Type A

¹⁶⁶ Tex. Loc. Gov't Code §§ 504.255, 505.256.

¹⁶⁷ *Id.* §§ 504.301, 505.256.

¹⁶⁸ *Id.* § 504.051(a).

¹⁶⁹ *Id.* § 501.062(d).

¹⁷⁰ Tex. Att'y Gen. Op. No. JC-0349 (2001) at 3.

¹⁷¹ Tex. Loc. Gov't Code §§ 504.051(b), 501.062 (Referring to the removal of directors).

¹⁷² *Id.* § 505.051(a).

corporation boards, the Act does place qualifying criteria for a person who serves as a director on a Type B board. If the Type B corporation is located in a city with a population of 20,000 or more, the Type B director must be a resident of the city.¹⁷³ If a Type B corporation is located in a city with a population of less than 20,000, the Type B director must:

- 1) be a resident of the city;
- 2) be a resident of the county in which the major part of the area of the city is located; or
- 3) resides in a place that is within 10 miles of the city's boundaries and is in a county bordering the county in which a major portion of the city is located.¹⁷⁴

If a city dissolves a Type A corporation and creates a Type B corporation, the Act provides that a person serving as a Type A director at the time that the Type A corporation was dissolved may serve on the newly created Type B board.¹⁷⁵ Since the directors of a Type A corporation are not required to be residents of the city, this change in the law would allow a non-resident to serve as a Type B director in this limited circumstance.

State law limits the number of Type B directors who are also city officers or employees: it states that three of the seven positions must be persons who are not city officials or city employees.¹⁷⁶ The directors serve without compensation but they must be reimbursed for actual expenses.¹⁷⁷ A director serves at the pleasure of the city council for a term of two years; however, the city council may vote to remove a director at any time without having to specify a cause.¹⁷⁸

General Provisions Regarding Type A and Type B Board of Directors

A majority of the board constitutes a quorum.¹⁷⁹ The board of directors is subject to both the Open Meetings Act and the Public Information Act.¹⁸⁰ Additionally, the Development Corporation Act requires the board to conduct all of its meetings within the city limits, unless the city is located in a county with a population of less than 30,000.¹⁸¹ If the city's Type A or Type B corporation is located in a county with a population of less than 30,000, then the board of directors may conduct a board meeting within the county.¹⁸² At one of its first meetings, the board is required to elect a president, a secretary and any other officers that the governing body of the city considers necessary.¹⁸³ The corporation's registered agent must be a resident of Texas and the corporation's registered office must be within the boundaries of the city.¹⁸⁴

¹⁷³ *Id.* § 505.052(a).

¹⁷⁴ *Id.* § 505.052(b).

¹⁷⁵ *Id.* § 505.052(d).

¹⁷⁶ *Id.* § 505.052(c).

¹⁷⁷ *Id.* § 501.062(d).

¹⁷⁸ *Id.* § 501.062(c).

¹⁷⁹ *Id.* §§ 504.053, 505.054.

¹⁸⁰ *Id.* §§ 501.072, 505.054.

¹⁸¹ *Id.* §§ 504.054, 505.055.

¹⁸² *Id.*

¹⁸³ *Id.* §§ 504.052, 505.053.

¹⁸⁴ *Id.* §§ 504.055, 505.056.

If a city collects both a Type A and a Type B sales and use tax, the city must create separate corporations and boards of directors for the Type A and Type B taxes. However, the board members of one corporation may serve on the board of the other corporation. A city may not create more than one corporation to oversee the Type A tax or more than one corporation to oversee the Type B tax.¹⁸⁵

General Powers and Duties of Type A and Type B Development Corporations

Type A and Type B economic development corporations have the following general powers and duties:

Power to Expend Tax Proceeds. The development corporation has the power to expend the proceeds of the economic development sales tax for purposes authorized by the Act. All actions of the development corporation are pursuant to a majority vote of the governing body of the board and subject to oversight by the city.¹⁸⁶ In Texas Attorney General Opinion JC-0488 (2002), ruling under the former statute, the Attorney General noted that the city's spending of sales tax proceeds was "contrary to the Act."¹⁸⁷ Rather, the opinion noted, it was for the corporation to expend the Section 4B (now Type B) tax proceeds for the purposes authorized by the Act subject to city council approval.

Powers of a Nonprofit Corporation. The corporation shall have and exercise all powers and rights of a nonprofit corporation under the Texas Non-Profit Corporation Act (Chapter 22 of the Texas Business Organization Code), except to the extent such powers would be in conflict or inconsistent with the Development Corporation Act.¹⁸⁸

Legal and Financial Transaction Powers. The corporation shall have the power to sell and lease a project,¹⁸⁹ make secured and unsecured loans,¹⁹⁰ and to sue and be sued.¹⁹¹ Further, in Texas Attorney General Opinion JC-109 (1999), ruling under the former statute, it was noted that when an economic development corporation sells real property, the corporation is not required to comply with the notice and bidding requirements contained in Chapter 272 of the Local Government Code. Nonetheless, the economic development corporation must obtain fair market value when selling real property.¹⁹² If a Type B corporation wants to purchase property for a project wholly or partly with bond proceeds, the Type B corporation is required to obtain an independent appraisal of the property's market value.¹⁹³

¹⁸⁵ *Id.* §§ 504.003(b), 505.003(b).

¹⁸⁶ *Id.* § 501.054(b)(2).

¹⁸⁷ Tex Att'y Gen. Op. No. JC-0488 (2002) at 3.

¹⁸⁸ Tex. Loc. Gov't Code § 501.054(a).

¹⁸⁹ *Id.* §§ 501.153-.154, .159.

¹⁹⁰ *Id.* § 501.155(a).

¹⁹¹ *Id.* § 501.060.

¹⁹² Tex. Att'y Gen. Op. No. JC-109 (1999) at 2.

¹⁹³ Tex. Loc. Gov't Code § 505.1041.

Status as Non-stock Corporation. The corporation is a nonprofit, nonmember, non-stock corporation.¹⁹⁴

Exemption from Federal, State and Local Taxation. In terms of state taxation, Section 501.075 of the Local Government Code provides that economic development corporations are considered public charities within the tax exemption of Article VIII, Section 2, of the Texas Constitution. Whether the corporation is exempt from various state and local taxes depends on the statutory provisions applicable to that tax. For example, the comptroller's office has treated economic development corporations as exempt from state and local sales taxes and the state franchise tax.¹⁹⁵ In order to claim these exemptions, corporations submit a copy of the corporation's certificate of formation to the Exempt Organizations Section of the comptroller's office. If a development corporation has qualified for federal tax exempt status prior to applying for state exemptions, a copy of the determination letter from the Internal Revenue Service should be sent to the comptroller at the time the corporation applies for exemption from the state sales tax and franchise tax. It should be noted that development corporations are exempt from state and local sales and state franchise taxes regardless of their tax exempt status with the Internal Revenue Service. The certificate of formation, and any IRS determination letter, should be submitted with a cover letter containing the development corporation's daytime phone number, charter number and tax identification number.

Projects owned by Type B economic development corporations are exempt from local property taxation under Section 11.11 of the Tax Code, pursuant to Section 505.161 of the Local Government Code. It is currently unclear whether the property owned by Type A economic development corporations is exempt from local property taxation. To determine whether property taxes or other state or local taxes are applicable, a development corporation may wish to visit with its legal counsel and its appraisal district.

Duty to Comply with Open Meetings Act and Public Information Act. The corporation and its board of directors are subject to the Open Meetings Act and the Public Information Act.¹⁹⁶

Limited Eminent Domain Power. A Type A corporation may not exercise the power of eminent domain except by action of the city council.¹⁹⁷ However, a Type B corporation may exercise the power of eminent domain only:

1. With approval of the action by the city; and
2. In accordance with and subject to the laws applicable to the city.¹⁹⁸

¹⁹⁴ *Id.* § 501.052.

¹⁹⁵ Tex. Tax Code §§ 151.341, 171.074.

¹⁹⁶ Tex. Loc. Gov't Code § 501.072.

¹⁹⁷ *Id.* § 504.106.

¹⁹⁸ *Id.* § 505.105.

Limited Tort Claims Act Protection. The corporation and its directors and employees are not liable for damages arising out of the performance of governmental functions of the corporation.¹⁹⁹ The corporation is considered a governmental entity for purposes of the Texas Tort Claims Act.

Limited Power to Own or Operate Project. Generally, the corporation does not have the power to own or operate any project as a business entity other than as a lessor, seller, or lender. However, the corporation does have all the powers necessary to own and operate a project as a business if the project is part of a military installation or military facility that has been closed or realigned, including a military installation or facility closed or realigned under the Defense Base Closure and Realignment Act of 1990 (10 United States Code Section 2687), or if the project is authorized by Local Government Code Section 501.106.²⁰⁰

Ability of a Home Rule City to Provide an Economic Grant of Money to the Development Corporation. The Act generally prohibits a city from lending its credit or granting any public money or thing of value to an economic development corporation. In other words, a city may not generally provide any funding or services to a development corporation unless the city is fully reimbursed for the value of the expenditure. If a city and an economic development corporation enter into a contract for the provision of city services, such as accounting services, the economic development corporation must provide consideration in exchange for city services.²⁰¹

In 2001, the Texas Legislature created an exception to this general rule.²⁰² Certain home rule cities are authorized to grant public money to a Type A or Type B corporation under a contract authorized by Section 380.002 of the Local Government Code. The Type A or Type B corporation is required to use the grant of city money for the “development and diversification of the economy of the state, elimination of unemployment or underemployment in the state, and development and expansion of commerce in the state.”²⁰³

Ability of a City to Convey Real Property to an Economic Development Corporation. There are only a few ways a city can convey real property to an economic development corporation. First, if it’s the case that the real property was conveyed to the city by gift or as part of a legal settlement and the real property is adjacent to an area designated for development by the Type A or Type B corporation, then Section 253.009 of the Local Government Code would allow the property to be conveyed.²⁰⁴ Under that provision, the city would have to convey the property to the economic development corporation “for any fair consideration” approved by the city, and the city would have to adopt an ordinance that:

¹⁹⁹ *Id.* §§ 504.107, 505.106.

²⁰⁰ *Id.* § 501.160.

²⁰¹ Tex. Att’y Gen. Op. No. JC-109 (1999) at 3-5.

²⁰² Tex. Loc. Gov’t Code. § 501.007.

²⁰³ *Id.* § 380.002(b).

²⁰⁴ *Id.* § 253.009.

1. describes the property being conveyed;
2. states that the conveyance complies with the requirements of Section 5.022 of the Property Code; and
3. states the consideration paid.

A conveyance under this provision does not have to comply with notice and bidding laws, including Chapter 272 of the Local Government Code.

Second, a city with a population of less than 1.9 million can convey real property or an interest in real property to a nonprofit organization under Section 253.011 of the Local Government Code.²⁰⁵ The term “nonprofit organization” is defined as an organization exempt from federal taxation under Section 501(c)(3) of the Internal Revenue Code of 1986. If an economic development corporation is covered by Section 501(c)(3) of the Internal Revenue Code, then the city can convey real property to an economic development corporation without complying with the notice and bidding requirements of Chapter 272 of the Local Government Code. The city can convey the property to the economic development corporation provided the development corporation agrees to use the property in a manner that primarily promotes a public purpose of the city. Further, should the development corporation at any time fail to use the property in that manner, ownership of the property would automatically revert to the city. The city shall transfer the property by an appropriate instrument of transfer. The instrument must include a provision that: (1) requires the development corporation to use the property in a manner that primarily promotes a public purpose of the city; and (2) indicates that ownership of the property automatically reverts back to the city should the corporation at any time fail to use the property in that manner.

In 2009, the Texas Legislature approved a bill authorizing a city with a population of 20,000 or less to convey real property to an economic development corporation without complying with the notice and bidding requirements of Chapter 272 of the Local Government Code.²⁰⁶ The city may convey real property to the economic development corporation provided the development corporation agrees to use the property in a manner that primarily promotes a public purpose of the city. Further, should the development corporation at any time fail to use the property in that manner, ownership of the property would automatically revert to the city. The city shall transfer the property by an appropriate instrument of transfer. The instrument must include a provision that : (1) requires the development corporation to use the property in a manner that primarily promotes a public purpose of the city; and (2) indicates that ownership of the property automatically reverts back to the city should the corporation at any time fail to use the property in that manner.

²⁰⁵ *Id.* § 253.011.

²⁰⁶ *Id.* § 253.012.

Ability of a City to Provide City Insurance Coverage and Retirement Benefits to Development Corporation Staff/Officers. An economic development corporation may participate in the following types of insurance coverage from the city:²⁰⁷ health benefits coverage, liability coverage, workers' compensation coverage, and property coverage. These coverages can be obtained under the city's insurance policies, the city's self-funded coverage, or the coverage provided under an interlocal agreement with other political subdivisions. Health benefits coverage may be extended to the economic development corporation's directors and employees and their dependents. Workers' compensation benefits may be extended to the corporation's directors, employees and volunteers. Liability coverage may be extended to protect the corporation and its directors and employees. Also, the law allows economic development corporations to obtain retirement benefits under the city's retirement program and extend those benefits to the corporation's employees. An economic development corporation may not obtain any of these insurance coverages or retirement benefits unless the city consents.

Reverse Auction Procedures for Purchasing. A reverse auction procedure is a method of purchasing where suppliers of services or goods, anonymous to each other, submit bids to provide their services or goods. The bidding is a real-time process usually lasting either one hour or two weeks. The bidding takes place at a previously scheduled time period and at a previously scheduled Internet location.²⁰⁸ Economic development corporations are authorized to use reverse auction procedures, as defined by Section 2155.062 (d) of the Government Code, for the purchase of goods or services.²⁰⁹

Performance Agreements

Economic development corporations cannot simply provide gifts of sales tax proceeds. The attorney general has noted that expenditures of sales tax proceeds must be made pursuant to a contract or other arrangement sufficient to ensure that the funds are used for the intended and authorized purposes.²¹⁰ An economic development corporation is required to enter into a written performance agreement with a business enterprise when the corporation provides funding or makes expenditures on behalf of the business enterprise in furtherance of a permissible economic development project.²¹¹ This performance agreement between the corporation and the business enterprise at a minimum must contain the following:

1. a schedule of additional payroll or jobs to be created or retained;
2. the capital investment to be made by the business enterprise; and

²⁰⁷ *Id.* § 501.067.

²⁰⁸ Tex. Gov't Code § 2155.062(d).

²⁰⁹ Tex. Loc. Gov't Code § 501.074.

²¹⁰ Tex. Att'y Gen. Op. No. JC-118 (1999) at 9 ("Expenditures for even project costs must be pursuant to a contractual or other arrangement sufficient to ensure that the funds are used for the purposes authorized."); Tex. Att'y Gen. LO-97-061 at 4-5; LO-94-037 (1994) at 3.

²¹¹ Tex. Loc. Gov't Code § 501.158.

3. the terms under which repayment must be made by the business enterprise to the economic development corporation should the business fail to meet the performance requirements specified in the agreement.²¹²

Also, the Texas Legislature requires that both governmental entities and economic development corporations put certain language in any written agreement involving public subsidies to businesses, which would include those given by economic development corporations. The language must specify that the business does not and will not knowingly employ an undocumented worker (which statement must also be in any application for the subsidy). The language also must require repayment of the subsidy at specified rates and terms of interest if the business is convicted of federal immigration violations under 8 U.S. Code Section 1324a(f) not later than the 120th day after receiving notice of the violation from the public entity or economic development corporation.²¹³

Requirement for Third-Party Contracts for Business Recruitment

Additionally, Type A and Type B corporations are required to enter into written contracts approved by the board of directors when the corporation uses a third party for certain business recruitment efforts. The written contract requirement does not apply to the payment of an employee of the Type A or Type B corporation.²¹⁴ Nonetheless, should the corporation pay a commission, fee, or other thing of value to a broker, agent, or other third party for business recruitment or development, a written contract is required.²¹⁵ Failure to enter into a written contract with a third party recruiter could result in a civil penalty up to \$10,000.²¹⁶ The Texas Legislature has authorized the attorney general to commence an action to recover the penalty in Travis County district court or in the county district court where the violation occurs.²¹⁷

Incentives to Purchasing Companies

In 2003, the Texas Legislature addressed purchasing companies and their ability to receive an incentive from a Type A or Type B corporation.²¹⁸ Type A and Type B corporations may not offer to provide economic incentives to businesses whose business consists primarily of purchasing taxable items using resale certificates and then reselling those same items to a related party. A related party means a person or entity which owns at least 80 percent of the business enterprise to which sales and use taxes would be rebated as part of an economic incentive.²¹⁹

Oversight of a Economic Development Corporation

Section 501.073 of the Act provides that the city shall approve all programs and expenditures of the development corporation and shall annually review any financial statements of the

²¹²

Id.

²¹³ Tex. Gov't Code § 2264.001 - .101.

²¹⁴ Tex. Loc. Gov't Code. § 502.051(a).

²¹⁵

Id.

²¹⁶ *Id.* § 502.051(b).

²¹⁷ *Id.* § 502.051(c).

²¹⁸ *Id.* § 501.161.

²¹⁹ *Id.* § 501.161(a).

corporation. It further provides that at all times the city will have access to the books and records of the development corporation. Additionally, Section 501.054(b)(2) of the Act states that the powers of the corporation shall be subject at all times to the control of the city's governing body. Also, Section 501.401 of the Act gives the city authority to alter the structure, organization, programs or activities of the development corporation at any time. This authority is limited by constitutional and statutory restrictions on the impairment of existing contracts. Additionally, bond covenants may restrict the restructuring or dissolution of an economic development corporation. Finally, the city council retains a certain degree of control over the corporation by virtue of its power at any time to replace any or all of the members of the board of directors of the development corporation.²²⁰

Economic Development Corporation Is Not Considered a Political Subdivision

State law typically imposes certain requirements or conditions upon political subdivisions such as cities. A frequent concern is whether state law requirements imposed upon cities also applies to Type A or Type B economic development corporations. Section 501.055(b) of the Local Government Code states that an economic development corporation "is not a political subdivision or political corporation for purposes of the laws of this state", including Section 52, Article III of the Texas Constitution. Accordingly, a statute's reference to the term "political subdivision" does not include a Type A or Type B economic development corporation.

The attorney general has considered whether certain statutes apply to economic development corporations. The Attorney General has concluded that Chapter 171 of the Local Government Code, governing conflicts of interest, does not apply to an economic development corporation.²²¹ Likewise, Chapter 272 of the Local Government Code, governing the city sale of real property, is not applicable to economic development corporations.²²² Nor is the prevailing wage law contained in Chapter 2258 of the Government Code applicable to a worker employed by or on behalf of an economic development corporation.²²³ Economic development corporations should consult their legal counsel when considering the application of a particular statute.

Annual Reporting Requirement for Economic Development Corporations

Section 502.151 of the Development Corporation Act requires both Type A and Type B economic development corporations to submit an annual, one-page report to the comptroller's office. The report must be submitted by April 1st of each year and must be in the form required by the comptroller.

The report must include the following:

- A statement of the corporation's primary economic development objectives
- A statement of the corporation's total revenues for the preceding fiscal year

²²⁰ *Id.* § 501.062(c).

²²¹ Tex. Att'y Gen. Op. No. JC-338 (2001) at 2.

²²² Tex. Att'y Gen. Op. No. JC-109 (1999).

²²³ Tex. Att'y Gen. Op. No. JC-032 (1999).

1. The Sales Tax for Economic Development

- A statement of the corporation's total expenditures for the preceding fiscal year
- A statement of the corporation's total expenditures during the preceding fiscal year in each of the following categories:
 - administration
 - personnel
 - marketing or promotion
 - direct business incentives
 - job training
 - debt service
 - capital costs
 - affordable housing
 - payments to taxing units, including school districts
- A list of the corporation's capital assets, including land and buildings (for example, industrial parks, recreation and sports facilities, etc.)
- Any other information required by the comptroller²²⁴

If a corporation fails to file the required report or include all the required information, the comptroller may impose an administrative penalty against the corporation of \$200.²²⁵ However, before imposing such a penalty, the comptroller must provide written notice to the corporation of its error or omission in filing the report. That notice must include information on how to correct the error. Once it has received notice, the corporation has 30 days to correct its reporting error before the comptroller may impose the \$200 penalty. The form may be submitted to the comptroller's office by mail or through the comptroller's office website at <https://comptroller.texas.gov/economy/local/type-ab/report.php>.

²²⁴ Tex. Loc. Gov't Code § 502.151(a).

²²⁵ *Id.* § 502.152.

