



**THE ATTORNEY GENERAL
OF TEXAS**

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Mr. Kenneth G. DeJarnett
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P. O. Box 13941
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LO-90-108

Dear Mr. DeJarnett:

You ask several questions about section 212.901 of the Texas Local Government Code, which provides:

(a) To ensure that it will not incur liabilities, a municipality may require, before it gives approval of the plans for a development, that the owner of the development provide sufficient surety to guarantee that claims against the development will be satisfied if a default occurs.

(b) This section does not preclude a claimant from seeking recovery by other means.

Before we address your specific questions, we think it will be helpful to make several comments about the language and purposes of section 212.901.

First, we note that a bill analysis prepared for the bill that became section 212.901 states:

Currently, when a real estate development is not completed due to financial or other difficulties, cities have little means to see that a partially-built project is completed. In addition, those who have performed work to provide infrastructure such as streets, utilities, and drainage may have little chance of being paid. This bill would require developers, prior to approval of development plans, to provide sufficient

surety to guarantee that claims against the development will be satisfied.

Bill Analysis, H.B. 1728, 71st Leg. (1989). Although the bill analysis states that the legislation was intended to insure that partially built projects are completed, the actual language of the statute permits a municipality to require sufficient surety only to insure that claims against the development are satisfied. It does not allow a municipality to require surety that a project will be completed.

Another aspect of section 212.901 that merits comment is the phrase "[t]o ensure that [a municipality] will not incur liabilities," which precedes the statement that a municipality may require that a developer provide sufficient surety to insure that claims against the development are satisfied. This raises the question of whether a municipality may require a surety only if it first determines that the municipality would run a risk of liability if the developer failed to satisfy claims against the development.

The legislative history cites no examples of situations in which a municipality has been held liable for the debts of a private developer. Indeed, the bill analysis makes no reference to potential municipal liability. Rather, under the heading "Purpose," it states:

The purpose of HB 1728 is to provide new law to ensure that the owner of a development must provide surety to guarantee that claims against the development will be satisfied in the event of default.

Because the focus of the legislature's concern appears to have been the satisfaction of claims against a developer rather than a municipality's potential liability for any such claims, we interpret the phrase "[t]o ensure that [a municipality] will not incur liabilities" to be nothing more than a description of an effect of requiring sufficient surety. In other words, section 212.901 does not require a municipality to make a determination that the municipality itself is at risk of liability before the municipality may require a developer to provide surety in accordance with that section.

Your first question is:

Can a municipality require a bond, either a performance and/or payment bond, from a

developer if it also requires surety from the same developer that the project will be completed? (Your emphasis.)

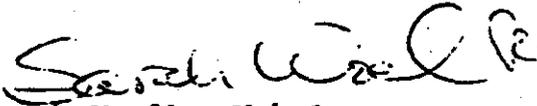
As we noted previously, section 212.901 only permits a municipality to require surety that claims will be paid, not that construction will be completed.

Your second question is:

What determines 'sufficient surety'? Does the statute permit a municipality to accept forms of guarantee, such as a letter of credit, in lieu of a performance and/or payment bond?

It is a matter for a municipality to determine whether a particular type of surety is sufficient to ensure that claims against a development are satisfied. See generally Benge v. Foster, 74 S.W.2d 542, 544 (Tex. Civ. App. - Austin 1934, writ ref'd), ("sufficient sureties" means "sureties adequate to suffice or equal to the end proposed").

Yours very truly,


Sarah Woelk, Chief
Letter Opinion Section
Opinion Committee

SW/lcd

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