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July 19, 2006

Office of the Attorney General
P. O. Box 12548
Austin, Texas 78711-2548

RQ-0514-GA

FILE # MI-44905-06
I.D. # 44905

Via CM RRR 7004 2510 0006 2331 9696

REQUEST FOR ATTORNEY GENERAL OPINION AND BRIEF IN SUPPORT

Dear Sir/Madam:

I am writing pursuant to Section 402.043 of the Texas Government Code to request an opinion of the Attorney General. I am the elected Criminal District Attorney for Kaufman County.

Issues

- (1) Whether the County may opt out of Chapter 312 of the Tax Code, the Property Redevelopment and Tax Abatement Act (PRTAA), by treating an economic development agreement with a private company as an agreement to "rebate" taxes instead of as an agreement to "abate" taxes;
- (2) Whether the County may reach an agreement under the PRTAA to abate taxes for a duration of more than 10 years; and
- (3) Whether the County may disgorge funds obtained by levy.

Statement of Facts

On June 23, 2003, Kaufman County and the City of Terrell, a municipality in the County, reached an economic redevelopment agreement with Venus Initiative, LLC, a private company. See Appendix. The agreement purports to bind the County, under Section 381.004 of the Texas Local Government Code, to "rebate" ad valorem taxes paid by the company and its affiliates on property located in a reinvestment zone in Terrell. The agreement binds the County for 20 years. The County agreed to "rebate" 100% of the taxes collected from Venus Initiative during the first four years, 80% during years five and six; 70% during years seven and eight; 60% during years nine and 10 and 50% during years 11-20.

Argument

Conclusion

The answer to each question is "NO."

Discussion

Issue No. 1

The County may NOT opt out the PRTAA by characterizing an agreement to abate as an agreement to "rebate."

A County may enter into a tax abatement agreement only as authorized by the legislature. Tex. Const. art. VIII §§ 1-b and 1-g(a); Tex. Loc. Gov't Code § 381.004(g); Tex. Tax. Code, Chapter 312 (the Property Redevelopment and Tax Abatement Act or "PRTAA").

The term "abatement" is not defined in the PRTAA. However, the PRTAA uses the term "exempt from taxation" interchangeably with the term "abatement." See Tex. Tax Code §§ 312.204(a) and 312.402(a) (stating that taxing unit may enter into tax abatement agreement "to exempt" property from taxation) and compare, e.g., sections 312.002 and 312.004 (using the term "abatement" in context as a noun); see also, e.g., Tex. Atty. Gen. Op. GA-0304 (2005) (using "exempt from taxation" language with reference to abatements under the PRTAA). Also, the PRTAA is located in Title Three of the Tax Code, and the Code Construction Act applies under Title Three. Tex. Tax. Code § 301.002. Under the Code Construction Act, unambiguous terms are assigned their common meaning unless such construction would lead to unintended results; also, words that have acquired a technical meaning, by the legislature or otherwise, shall be construed accordingly. Tex. Gov't Code § 311.011. In our case, the common and technical meaning of "abatement" is "[t]he act of eliminating or nullifying," which is consistent with the interchangeably used phrase "exempt from taxation." Since a rebate is a manner of "eliminating or nullifying" and "exempting from taxation," the agreement by the County to rebate taxes to Venus Initiative is an "abatement" agreement which is regulated under the PRTAA. *Black's Law Dictionary 2* (7th ed. 1999).

Moreover, the legislature is presumed to favor public interest over private interest and to make effective statutes, and "tax exemptions are to be strictly construed." Op. GA-0304. In our case, the PRTAA is thus presumed to preclude the County and Venus Initiative from opting-out of the Act. Tex. Gov't Code § 311.021.

For the reasons shown, the agreement between the County and Venus Initiative is unlawful and void to the extent that it seeks to avoid regulations regarding "abatement" agreements under the PRTAA.

Issue No. 2

The County may NOT reach an agreement under the PRTAA to abate taxes for a duration of more than 10 years.

The PRTAA was triggered when the County and Venus Initiative agreed to the tax "rebate" scheme. Tex. Tax Code §§ 1.04(12), 312.002, 312.204, 312.206, and 312.402. For agreements under the PRTAA between counties and private parties, section 312.402(a) of the Tax Code specifically adopts the duration regulations under section 312.204. It is well-

settled that "[s]ection 312.204 of the Tax Code limits a tax abatement agreement with a property owner to ten years. See Op. GA-0304 (citing Tex. Atty. Gen. Op. JC-0133 (1999) for its adoption of case law describing the purpose of the PRTAA as "increasing the local tax base in the long run and decreasing tax revenue only in the short run"); and Op. JC-0133 (noting that the goal of the PRTAA is "to increase an area's tax base, not to remove taxable property from it"), and authorities cited therein.

For the reasons shown, the agreement in our case for the 20-year tax abatement is unlawful and void.

Issue No. 3

The County may NOT disgorge tax revenue.

The Texas Constitution allows counties the exclusive power to levy ad valorem taxes for county purposes; however, the constitution provides that ad valorem tax relief, specifically including tax relief in consideration of economic redevelopment, is subject to regulation by the legislature. Tex. Const. art. VIII §§ 1-e, 1-f(2), 1-g(a). The PRTAA accordingly authorizes tax "abatement" agreements, *i.e.*, exemptions, but the legislature has not authorized the mechanism of levy followed by disgorgement, nor could it constitutionally do so. Consequently, if the agreement between the County and Venus Initiative is not unlawful for the reasons raised in Issues Nos. 1-2, the method for effectuating the agreement would still be unlawful.

Thank You,



Ed Walton
Criminal District Attorney

Copies:

Venus Initiate, LLC
c/o Raymond Walker Company
d/b/a TheWalker Companies
2100 RiverEdge Parkway
Suite 425
Atlanta, Georgia 30328
Attention: Raymond Walker

Via CM 7004 2510 0006 2331 9849

Hughes and Luce, LLP
17171 Main Street, Suite 2800
Dallas, Texas 75201
Attention: Jeff W. Dorrill

Via CM 7004 2510 0006 2331 9856

APPENDIX

EXECUTION COPY**ECONOMIC DEVELOPMENT PROGRAM AGREEMENT**

This Economic Development Program Agreement ("Agreement") is made and entered into by and between the Kaufman County, Texas (the "County") and Venus Initiative, LLC, a Texas limited liability company (the "Company").

WITNESSETH:

WHEREAS, on June 23, 2003, the Commissioner's Court of the County adopted Resolution No. _____ establishing an Economic Development Program pursuant to Section 381.004 of the Texas Local Government Code ("Section 381.004") and authorizing this Agreement as part of the Economic Development Program established by Commissioner's Court Resolution (the "Program");

WHEREAS, the Company desires to participate in the Program by entering into this Agreement;

WHEREAS, the County desires to provide, pursuant to the Program, certain incentives to the Company to develop the Project (defined below);

NOW, THEREFORE, in consideration of the mutual benefits and premises contained herein and for other good and valuable consideration (including the payment by the Company to the County of \$100 cash), the receipt and sufficiency of which is hereby acknowledged, the parties agree as follows:

1. Authorization.

The County has concluded that this Agreement is authorized by Section 381.004 of the Texas Local Government Code, and is authorized by the Commissioners Court of the County.

2. Definitions. The following definitions shall apply to the terms used in this Agreement:

"Building" means a building, having at least 500,000 square feet and a Construction Cost of at least \$14,500,000, to be constructed by or on behalf of the Company or a Company Affiliate on the Project Site.

"Company" has the meaning set forth in the introductory paragraph of this Agreement.

"Company Affiliate" means any Person directly or indirectly controlling, controlled by, or under common control with the Company. As used in this definition of "Company Affiliate," the term "control" means the possession, directly or indirectly, the power to direct or cause the direction of the management and policies of a Person, whether through ownership of voting securities, by contract, or otherwise.

"Construction Cost" means, with respect to construction of the Building, all pre-development, development, and construction (hard and soft) costs paid, payable, or actually incurred by or on behalf of the Company or a Company Affiliate with respect to construction of the Building.

"County" has the meaning set forth in the introductory paragraph of this Agreement.

"Effective Date" means July 1, 2003.

"Person" means an individual or a corporation, partnership, trust, estate, unincorporated organization, association, or other entity.

"Program" has the meaning set forth in the recitals to this Agreement.

"Project" means (a) the construction and operation of the Building on the Project Site, (b) any expansion, renovation or modification of the Building during the Term, and (c) any other development, construction, renovation or modification activity on the Project Site during the Term (i.e., irrespective of whether in connection with the Building).

"Project Fees" means impact, permitting, tap and similar fees payable to the County in connection with the development, expansion and or renovation of the Project or any portion thereof.

"Project Site" means that certain tract of real property located in Kaufman County, Texas, consisting of approximately 63 acres, more or less, as more particularly described on Exhibit A hereto.

"Rebate Term Year" means each calendar year during the Term that begins after the issuance of the certificate of occupancy by the City of Terrell with respect to the Building. The first Rebate Term Year that begins after the issuance of the certificate of occupancy by the City of Terrell with respect to the Building is "Rebate Term Year 1," and each later Rebate Term Year is numbered successively.

"Tax Code" means the Texas Tax Code, as amended from time to time.

"Term" has the meaning set forth in Section 3 of this Agreement.

3. Term.

This Agreement shall be effective as of the Effective Date and shall remain in full force and effect until December 31 of the twentieth year following the year that a Certificate of Occupancy is issued by the City of Terrell with respect to the Building (the "Term"). In addition, for the purpose of the rebate provided under Section 5 hereof, the Term shall include that period beyond the Term to the date the County makes the rebate payment under Section 5 for the last year of the Term.

4. Development Incentives. The County shall waive all Project Fees imposed during the Term. To the extent such Project Fees cannot be waived under applicable law, the County shall rebate all such Project Fees to the Company within two days after payment.

5. Tax Incentives. The County shall, for each Rebate Term Year, rebate (in cash) to the Company a percentage of County ad valorem taxes paid by the Company and Company Affiliates with respect to the Project, including but not limited to the Project Site, the Building, all other improvements on the Project Site and all tangible personal property (including, without limitation, inventory) on the Project Site, as follows:

<u>Rebate Term Year</u>	<u>Percentage of County Taxes Rebated</u>
Rebate Term Years 1-4	100%
Rebate Term Years 5-6	80%
Rebate Term Years 7-8	70%
Rebate Term Years 9-10	60%
Rebate Term Years 11-20	50%

Each rebate for each Rebate Term Year shall be paid to the Company not later than fifteen (15) days after the Company pays its County ad valorem taxes for such Rebate Term Year with respect to property located on the Project Site.

6. Default.

(a) If the County should default with respect to any of its obligations hereunder and should fail, within thirty (30) days after delivery of written notice of such default from the Company to cure such default (provided that such 30-day cure period shall be extended to ninety (90) days if the default is not curable within such 30-day period after good faith efforts to cure the default by the County), then the Company, by action or proceeding at law or in equity, may be awarded its damages for such default. Notwithstanding anything to the contrary contained herein, any waivers or payments required by the County which are not timely, shall incur interest at the lesser of (i) fifteen percent (15%) per annum, or (ii) the highest rate per annum allowed by applicable law from the date such amount is due until paid.

(b) Notwithstanding anything to the contrary contained herein, the Company shall have no liability to the County under this Agreement for any reason, including any failure by the Company to complete the Project.

7. Mutual Assistance.

The County and the Company shall take all reasonable measures, which are necessary or appropriate to carry out the terms and provisions of this Agreement and to aid and assist each other in carrying out such terms and provisions.

8. Section or Other Headings.

Section or other headings contained in this Agreement are for reference purposes only and shall not affect in any way the meaning or interpretation of this Agreement.

9. Attorneys Fees.

In the event any legal action or proceeding is commenced to enforce or interpret provisions of this Agreement, the prevailing party in any such legal action shall be entitled to recover its reasonable attorneys' fees and expenses incurred by reason of such action.

10. Entire Agreement.

This Agreement contains the entire agreement between the parties with respect to the transactions contemplated herein.

11. Amendment.

This Agreement may only be amended, altered, or revoked by written instrument signed by the Company and the County.

12. Successors and Assigns.

This Agreement shall be binding on and inure to the benefit of the parties, their respective successors and assigns. The Company may assign all or part of its rights and obligations hereunder (a) to any Company Affiliate (or any Person that leases back the Building to the Company or Company Affiliate) without the approval of the County, and (b) to any Person other than a Company Affiliate with the prior written approval of the County, which approval shall not be unreasonably withheld or delayed.

13. Notice.

Any notice and/or statement required and permitted to be delivered shall be deemed delivered by depositing same in the United States mail, certified with return receipt requested, postage prepaid, addressed to the appropriate party at the following addresses, or at such other addresses provided by the parties in writing;

Company:

Venus Initiative, LLC
c/o Raymond Walker Company
d/b/a TheWalker Companies
2100 RiverEdge Parkway
Suite 425
Atlanta, Georgia 30328
Attention: Raymond Walker

With a copy to:

Hughes & Luce, LLP
1717 Main Street, Suite 2800
Dallas, Texas 75201
Attention: Jeff W. Dorrill

County:

County Judge
Kaufman County
100 W. Mulberry St.
Kaufman, Texas 75142

With a copy to:

14. Interpretation.

Regardless of the actual drafter of this Agreement, this Agreement shall, in the event of any dispute over its meaning or application, be interpreted fairly and reasonably, and neither more strongly for or against any party.

15. Applicable Law.

This Agreement is made, and shall be construed and interpreted under the laws of the State of Texas and venue shall lie in Dallas County, Texas.

16. Severability.

In the event any provision of this Agreement is illegal, invalid, or unenforceable under present or future laws, then, and in that event, it is the intention of the parties hereto that the remainder of this Agreement shall not be affected thereby, and it is also the intention of the parties to this Agreement that in lieu of each clause or provision that is found to be illegal, invalid, or unenforceable a provision be added to this Agreement which is legal, valid and enforceable and is as similar in terms as possible to the provision found to be illegal, invalid or unenforceable.

17. Counterparts.

This Agreement may be executed in multiple counterparts, each of which shall be considered an original, but all of which shall constitute one instrument.

KAUFMAN COUNTY, TEXAS

By: Wayne Gent
Wayne Gent, County Judge

ATTEST:

Laura A. Hughes
LAURA HUGHES, COUNTY CLERK

VENUS INITIATIVE, LLC
a Texas limited liability company

By: Jeff W. Hunt
Name: Jeff W. Hunt
Title: Authorized Agent

APPROVED AS TO FORM AND LEGALITY:

Ed Walker
DISTRICT ATTORNEY

Date: 9/11/03

THE STATE OF TEXAS
COUNTY OF KAUFMAN

§
§
§

BEFORE ME, the undersigned authority, on this day personally appeared Wayne Gent, County Judge of KAUFMAN COUNTY, a municipal corporation, known to me to be the person acknowledged to me that the same was the act of the said KAUFMAN COUNTY, TEXAS, that he was duly authorized to perform the same by appropriate order of the Commissioners Court of the County of Kaufman and that he executed the same as the act of the said County for the purposes and consideration therein expressed and in the capacity therein stated.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 9th day of Sept, 2003.



Linda K. Cade
Notary Public in and for
the State of Texas

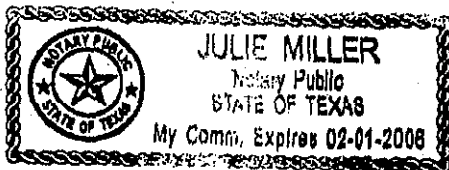
Linda K. Cade
Notary's Printed Name

THE STATE OF TEXAS
COUNTY OF DALLAS

§
§
§

BEFORE ME, the undersigned authority, on this day personally appeared Jeff W. Dorrill, authorized agent, of Venus Initiative, LLC, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed, in the capacity therein stated and as the act and deed of Venus Initiative, LLC.

GIVEN UNDER MY HAND AND SEAL OF OFFICE this 2nd day of Sept, 2003.



Julie Miller
Notary Public in and for
the State of Texas

Julie Miller
Notary's Printed Name

**EXHIBIT A
TO
ECONOMIC DEVELOPMENT PROGRAM AGREEMENT**

Project Site

DESCRIPTION, of a 63.091 acre tract of land situated in the Ransom Sowell Survey, Abstract No. 443, Kaufman County, Texas; said tract being part of a 376.634 acre tract of land described in Special Warranty Deed to Terrell Economic Development Corporation as recorded in Volume 1657, Page 240 of the Deed Records of Kaufman County, Texas (D.R.K.C.T.); said 63.091 acre tract being more particularly described as follows:

COMMENCING, at a point for the north corner of said 376.634 acre tract of land, said point being on or near the centerline of Airport Road and being in the northeast line of said Ransom Sowell Survey;

THENCE, South 43 degrees, 49 minutes, 24 seconds East, along or near the centerline of said Airport Road and the northeast line of said Ransom Sowell Survey, a distance of 203.46 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for corner;

THENCE, South 20 degrees, 58 minutes, 27 seconds West, traversing a strip of land for future right-of-way, a distance of 101.36 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for the POINT OF BEGINNING;

THENCE, South 43 degrees, 34 minutes, 38 seconds East, a distance of 1151.54 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for corner; said point being the beginning of a tangent curve to the left;

THENCE, southeasterly, along said tangent curve to the left through a central angle of 05 degrees, 46 minutes, 31 seconds, a radius of 1200.00 feet, an arc distance of 120.96 feet, on a chord bearing and distance of South 46 degrees, 27 minutes, 54 seconds East, 120.91 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for corner;

THENCE, South 49 degrees, 21 minutes, 09 seconds East, a distance of 64.29 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for corner;

THENCE, South 20 degrees, 58 minutes, 27 seconds West, a distance of 1992.35 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for corner;

THENCE, North 69 degrees, 01 minute, 33 seconds West, a distance of 1212.00 feet to a 1/2-inch iron rod with "Pacheco Koch" cap set for corner;

THENCE, North 20 degrees, 58 minutes, 27 seconds East, a distance of 2555.20 feet to the POINT OF BEGINNING;

CONTAINING, 2,748,258 square feet or 63.091 acres of land, more or less.