

CAUSE NO. \_\_\_\_\_

RESPONSIBLE URBAN  
DEVELOPMENT FOR HOUSTON

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IN THE DISTRICT COURT

Plaintiff,

vs.

\_\_\_<sup>th</sup> JUDICIAL DISTRICT

THE CITY OF HOUSTON and  
AINBINDER HEIGHTS, LLC

Defendants.

HARRIS COUNTY, TEXAS

**PLAINTIFF RESPONSIBLE URBAN DEVELOPMENT FOR HOUSTON’S  
ORIGINAL PETITION**

TO THE HONORABLE JUDGE OF THIS COURT:

Plaintiff Responsible Urban Development for Houston (“RUDH”), files this petition complaining of Defendants the City of Houston (hereafter the “City”) and Ainbinder Heights, LLC (“Ainbinder Heights”), and in support thereof, shows the Court as follows:

**I.  
DISCOVERY CONTROL PLAN**

1. Discovery is intended to be conducted under Level 2 of Tex. R. of Civ. P. 190.

**II.  
JURISDICTION AND VENUE**

2. Jurisdiction is proper in this Court pursuant to Tex. Const. Art V, § 8, Texas Civil Practice & Remedies Code § 65.021, and Texas Government Code §§ 24.007 & 24.008.

3. Venue is proper in the district courts of Harris County, Texas, under Tex. Civ. Prac. & Rem. Code Ann. § 15.002, because Defendants are residents of Harris County, Texas, and all or a substantial part of the events or omissions giving rise to Plaintiff’s claim occurred in Harris County, Texas.

4. Sovereign immunity does not bar Plaintiff's claims for relief in this case because Plaintiff is not seeking monetary damages. There is no sovereign immunity to a declaratory judgment to establish Plaintiff's rights or to challenge the legality or constitutionality of certain actions and ordinances of the City of Houston.

### **III. PARTIES**

5. Plaintiff RUDH is a Texas Non-Profit Corporation that has its principal offices in Harris County, Texas. Plaintiff RUDH has members who are residents and taxpayers in the City of Houston.

6. Defendant the City of Houston (hereafter "City") is home rule city under the laws of the State of Texas and may be served with process at The Office of the City Secretary, 900 Bagby, Public Level, Houston, Texas 77002.

7. Defendant The Ainbinder Heights, LLC is a Texas Limited Liability Company that does business in Harris County, Texas and may be served with process through its registered agent Barton L. Duckworth, 2415 West Alabama, Ste. 205, Houston, Texas 77098.

### **IV. FACTS**

8. In this lawsuit, RUDH challenges the validity of an agreement between the City and Ainbinder Heights pursuant to section 380 of the Texas Local Government Code in which the City promises to repay Ainbinder Heights for public infrastructure upgrades required to establish a Walmart Supercenter-anchored development on Yale St. and Koehler St. in Houston's West End community, just south of the historic Houston Heights. RUDH also challenges the constitutionality of the City's ordinance that sets forth the City's program to promote economic development pursuant to section 380 of the Texas Local Government Code.

9. Section 380 agreements are relatively new to Houston, but have been the subject of major controversy elsewhere. Intended to free municipalities of the requirements of traditional tax-increment incentive programs, section 380 agreements have drawn scrutiny for devoting public funds solely for the benefit of private developers. For instance, in Austin, Texas, a massive sixty-four million dollar sales and property tax rebate section 380 agreement with the developer of a high-end retail center called the “Domain” was opposed by local businesses as an unnecessary subsidy to out of state retailers. A local businessman brought a lawsuit challenging the agreement and organized a ballot proposition seeking a charter amendment stopping the Domain agreement and restricting the City of Austin from entering into any future agreements pursuant to section 380 of the Texas Local Government Code.

10. The section 380 agreement by and between the City and Defendant Ainbinder Heights violates section 380 of the Local Government Code because the agreement does not promote economic development. In fact, Ainbinder Heights has stated publicly that it does not need the 380 Agreement in order to build the development. The City has also conceded that the City, not Ainbinder Heights, proposed the 380 Agreement as alternative financing for infrastructure improvements. Furthermore, the City’s section 380 “program” violates the Texas Constitution because it gives the City absolute discretion to recommend 380 agreements to the Houston City Council without any reference to any criteria or standards.

**A. The Legal Authority for Section 380 Agreements**

11. Section 380 Agreements give municipalities the extraordinary power to transfer public funds to private entities in order to promote economic development and stimulate commercial activity free of the rigorous constraints of traditional tax increment incentives and tax abatements. This extraordinary power is intended to be constrained by a “program”

developed by the municipality to ensure that public funds actually serve a public purpose.

**1. The Texas Constitution and Section 380 of the Texas Local Government Code Allow a Municipality to Create a Program to Promote Economic Development and Stimulate Commercial Activity**

12. In November 1987, the voters of Texas approved an amendment to the Texas Constitution that allowed the legislature to “provide for the creation of programs and the making of loans and grants of public money . . . for the public purposes of development and diversity of the economy of the state.” Tex. Const. Art. III, Sec. 52-a.

13. In 1989, the Texas Legislature, under the authority of Tex. Const. Art. III, Sec. 52-a, passed Chapter 380 of the Local Government Code. This chapter allows a city to “establish and provide for the administration of one or more programs, including programs for making loans and grants of public money . . . to promote state and local economic development and to stimulate commercial activity in the municipality.” Tex. Loc. Gov’t Code § 380.001. Expenditures pursuant to chapter 380 programs must serve a public purpose.<sup>1</sup> **Further, any transaction providing public monies must contain “sufficient controls” “to insure that the public purpose [is] carried out.”**<sup>2</sup>

**2. The City’s “Program” Under Section 380 of the Local Government Code**

14. On July 8, 1999, the City Council passed Ordinance 99-674 (hereafter “the Ordinance”). A true and correct copy of the Ordinance is attached as Exhibit “A” and is incorporated by reference. The Ordinance provides for the creation of an economic development program under Chapter 380 to be administered by the City Planning Department (hereafter “380 Program”).

15. The Ordinance establishes an application process for “assistance eligibility” to

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<sup>1</sup> TEX. CONST. art. III, § 52(a). *See also, Texas Mun. League Intergovernmental Risk Pool v. Tex. Workers’ Comp. Comm’n*, 74 S.W.3d 377, 384 (Tex. 2002).

<sup>2</sup> Tex. Att’y Gen. Op. No. JM-1255 (1990) at 8-9.

“qualified applicants”, the details of which are contained in “Exhibit A” to the Ordinance, entitled “Criteria for Chapter 380 Assistance” (hereafter “the Criteria”). A true and correct copy of the Criteria is attached as Exhibit “B” and is incorporated by reference. As dictated by the Criteria, an applicant for 380 Program assistance must make an application that is “reviewed by the Director of the Planning and Development Department [] and staff on a case by case basis.” “Eligible projects which are **recommended** by the Director will be submitted to City Council for consideration of the proposed project and assistance package . . .” (emphasis added).

The Criteria requires:

- a. Documented creation of at least twenty-five new full time jobs (40-hours per week), and retention of such jobs for a period of no less than five years;
- b. Construction of substantial new real property improvements of at least \$2,500,000 in value, or extensive renovation of existing improvements, on land owned or acquired by the applicant;
- c. Assistance packages shall have a maximum term of ten years.

In order to be considered for assistance, an applicant must provide:

- a. Letter from applicant describing the proposed project, its impact on the community and its fiscal effect upon the City, and outlining requested financial assistance;
- b. Business plan including, but not limited to, executive summary, company history, historical and proforma financial information and resumes of the company principal(s);
- c. Phase I environmental Survey of the real property to be developed;
- d. Survey of the real property to be developed;
- e. Preliminary plans for the proposed real property improvements or renovations;
- f. Two proceeding years’ financial Statements for the applicant entity; and
- g. Nonrefundable application fee of \$500.00 to partially defray the cost of staff time to process and review application. The director may waive this fee for applicants which are non-profit entities.

16. However, the Ordinance provides for an *exception* to the application process and the eligibility requirements of the Criteria. The Ordinance states that “the Director [of the Planning and Development Department] may propose an application for assistance [to the City Council] **which does not meet all the Criteria** if, in the opinion of the Director, the application is **otherwise meritorious**.” (emphasis added). The phrase “otherwise meritorious” is not defined in the Ordinance or the Criteria.

#### **B. The Ainbinder Heights Walmart Development and the 380 Agreement**

17. Ainbinder Heights is an entity created and controlled by Barton Duckworth and Michael Ainbinder, which is planning to develop two parcels of land in Houston’s West End neighborhood, just south of the historic Houston Heights. One large twenty-acre parcel abuts Yale St. and was formerly the site of the Heights Armature Works and a Trinity Steel plant. This parcel will be the site of a 152,000 square foot Walmart Supercenter, as well as over 34,000 square feet of typical strip mall retail space. A smaller parcel straddles Yale St. and Heights Blvd. parallel to the twenty-acre tract that will also have just over 28,000 square feet of retail space. Ainbinder Heights originally intended to develop the properties into a large mixed use development. Those plans were abandoned in favor of a suburban style strip mall with a big box anchor store.

18. In June of 2010, the Houston Chronicle first reported that the anchor store would be a Walmart Supercenter. Opposition to the development was immediate after the announcement of a Walmart Supercenter. Starting out first as a Facebook page that grew to over 6,000 members, opponents organized Plaintiff RUDH to give a unified voice to the many concerns over the impact a suburban-style strip mall and Walmart Supercenter would have on the West End and historic Houston Heights neighborhoods.

## **1. The Ainbinder Heights 380 Agreement Provides Over Six Million Dollars of Public Funds to Pay for Required Infrastructure Improvements for a Walmart Supercenter Strip Mall Development**

19. Shortly after the first reports of the Walmart development emerged, the media began reporting that the City was in negotiations with the developer to enter into an agreement pursuant to section 380.001 of the Texas Local Government Code (referred to herein as the “380 Agreement”). The reports that the City was in negotiation with Ainbinder Heights were true. The City negotiated the 380 Agreement to provide an amount in excess of six million dollars in public funds to reimburse Ainbinder Heights for certain public and private infrastructure improvements required for the development. Despite strong opposition from RUDH and the community at large, Houston City Council approved the 380 Agreement.<sup>3</sup> A true and correct copy of the 380 Agreement is attached and incorporated hereto as Exhibit “C”.

20. Before the Council approved the 380 Agreement, citing as sources the Mayor and/or her staffers or other City officials, numerous press articles implied that only tax revenues generated by the development would pay for the infrastructure improvements.<sup>4</sup> The truth is, however, that there is no requirement in the 380 Agreement, unlike traditional tax abatement and reimbursement schemes, that only tax revenues generated by the development would be used to

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<sup>3</sup> The 380 Agreement was amended by Houston City Council to remove a provision allowing Ainbinder Heights and the Mayor’s Office to increase the dollar amount of the reimbursement without any limits or approval from Houston City Council. This was in response to RUDH’s criticism that the 380 Agreement was a “blank check” to the developer.

<sup>4</sup> <http://www.chron.com/news/article/Proposed-Walmart-moves-forward-near-Washington-1709474.php>;  
<http://www.chron.com/neighborhood/heights-news/article/Developer-could-receive-tax-benefits-for-1609601.php>;  
<http://offthekuff.com/wp/?p=30641>; <http://houston.culturemap.com/newsdetail/08-26-10-inside-the-walmart-meeting-a-night-of-jeers-parker-patience-and-tax-break-debate/>; <http://www.chron.com/business/article/Deal-in-works-over-Heights-area-Wal-Mart-1587769.php>;  
[http://blogs.houstonpress.com/hairballs/2010/08/heights\\_walmart\\_meeting.php](http://blogs.houstonpress.com/hairballs/2010/08/heights_walmart_meeting.php);  
<http://houston.culturemap.com/newsdetail/09-02-10-mayor-annise-parker-refuses-to-defend-the-380-agreement/>;  
[http://blogs.houstonpress.com/hairballs/2010/09/heights\\_walmart\\_meeting\\_2.php](http://blogs.houstonpress.com/hairballs/2010/09/heights_walmart_meeting_2.php);  
<http://www.chron.com/news/houston-texas/article/Mayor-Parker-defends-incentives-to-lure-1700527.php>;  
[http://www.39online.com/news/local/kiah-walmart-380-story\\_0\\_4364513\\_story](http://www.39online.com/news/local/kiah-walmart-380-story_0_4364513_story);  
<http://houston.culturemap.com/newsdetail/09-14-10-want-a-look-at-the-heights-walmart-380-agreement-see-the-documents-as-city-council-prepares-to-vote/>; <http://www.chron.com/news/houston-texas/article/Heights-critics-call-Walmart-deal-blank-check-1696844.php>;

reimburse Ainbinder Heights. Rather, the 380 Agreement actually requires the City to unconditionally repay Ainbinder Heights in full fifteen months after the Walmart anchor opens to the public. **The reimbursement is not dependant on the development actually being a success.**

21. City-generated documents reveal the City Council was supplied with misleading statements as to what funds would be used to reimburse Ainbinder Heights. In the “Request for Council Action” on the 380 Agreement drafted by Chief Development Officer Andrew Icken, Mr. Icken incorrectly states: “The rebates will be equal to the incremental increases in Taxes in the economic impact area from the base year (year prior to project commencement) and a pre-determined time period stipulated in each development agreement”; and “The City will reimburse the Developer for the Public Infrastructure costs by rebating the increase in ad valorem and sales taxes from the projects base year . . .” A true and correct copy of the “Request for Council Action” is attached hereto as Exhibit “D” and incorporated by reference. Tim Douglass of the Mayor’s office also makes misstatements in emails to Council members and citizens.<sup>5</sup>

22. Under the 380 Agreement, the City is obligated to repay Ainbinder Heights for certain public and private infrastructure improvements Ainbinder Heights constructs and are

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<sup>5</sup> **“We are capturing the increase in property and sales tax by the developer to reimburse him for public infrastructure and community enhancements that he will first build using his own funds.”** – September 7, 2010 email from Douglass to Sallie Alcorn of CM Costello’s office. **“The City will repay the developer for the public improvements from the incremental increases in property and sales taxes in the impacted area.”** – September 3, 2010 email from CM Costello’s office to taxpayers. **“And, if they don’t increase the property and sales taxes collected from this property, then there is nothing from which to pay.”** – October 1, 2010 email from Douglass to Sallie Alcorn of CM Costello’s office. **“There is no pot of \$6 million dollars that would be reprogrammed to some other part of the city of Houston. The way the project works is the developer has to spend their money, they have to spend it off campus for a project designated by the city ... They have to actually do the project and submit the invoices to us and then we reimburse from the increment that they generate. Basically it goes against the taxes that they pay.”** Mayor Annise Parker - (*September 21, 2010 City Council Meeting Part 2 of 4 at 40:05*)



primarily required for the traffic increases to be caused by the planned Walmart Supercenter. The preliminary list of improvements generally include the cost of road and drainage improvements but also include over one million dollars to pay Ainbinder Heights for a right of way to extend Koehler St. across the smaller parcel of land in between Yale St. and Heights Boulevard and over three hundred thousand dollars for onsite drainage detention.<sup>6</sup> With the exception of a few “community amenities”,<sup>7</sup> the bulk of the infrastructure improvements in the 380 Agreement must be built in order to meet the increased demand on roadways and drainage infrastructure. The existing roads and public drainage infrastructure are insufficient to support a suburban-style, Walmart anchored retail strip mall development.

23. The 380 Agreement requires the City to repay Ainbinder Heights in full fifteen months after the Walmart anchor opens to the public **regardless of actual tax generation**. The 380 Agreement, if the City has not paid Ainbinder Heights within fifteen months of the anchor opening, *requires* the City to set-up a special trust fund into which the City must deposit the *equivalent of* ad valorem taxes generated by the project for the benefit of the developer. Despite this language, which appears to create a classic tax reimbursement scheme, the City’s obligation to reimburse Ainbinder Heights under the Agreement is “absolute,” and not dependant on tax generation.

**2. The City Abandoned its 380 Program When it Simply Gave Ainbinder Heights a 380 Agreement, Even Though Ainbinder Heights Never Applied for One and is Committed to Build With or without it**

24. As noted above, the City is required to ensure that a 380 Agreement promotes

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<sup>6</sup> Ironically, the City never required onsite drainage detention, and no onsite drainage detention has been planned for the development.

<sup>7</sup> The 380 Agreement proposes doing minor cosmetic restoration work to two historic bridges and making minor aesthetic improvements to the esplanade on Heights Boulevard between I-10 and Center St. The 380 Agreement also provides for \$50,000.00 for the renovation of West End Park which is two blocks from the rear of the proposed Walmart Supercenter.

economic development and has enacted the 380 Program (albeit an insufficient one) to have controls in place to ensure that the 380 Program does, in fact, promote economic development. The City has established the 380 Program with the Criteria and an application process. However, the City completely abandoned their own 380 Program and, at best, used the 380 Agreement as an impermissible financing arrangement to pay for infrastructure upgrades. At worst, the 380 Agreement was nothing more than public funds expended to improve the profit margins on a private real estate development.

25. As opposition to the Ainbinder Heights development grew into outrage over the thought of public funds being used to subsidize the developer's infrastructure upgrade costs, the City organized a public meeting at the George R. Brown Convention Center to address the rapidly growing opposition to the development and to the use of public funds to pay for infrastructure improvements needed for the development.

26. At the public meeting, hundreds of concerned citizens packed the convention center exhibit hall. When concerned citizens voiced opposition to the 380 Agreement, Mayor Annise Parker asked one of the principals of Ainbinder Heights whether the development would be built without the 380 Agreement. Ainbinder Heights responded that the development would be built **with or without the 380 Agreement**. Ainbinder Heights would later reiterate its position to the Mayor herself via a letter on September 14, 2010. The letter is attached hereto as Exhibit "E" and incorporated by reference.

27. RUDH strongly opposed the 380 Agreement. RUDH conducted its own economic study, which showed that there would be no net job creation from the introduction of a Walmart Supercenter to the area. At best, retail dollars and jobs would be shifted from one

retailer to Walmart, but no new retail employment would be created. The City ignored RUDH's economic study and simply declared that its Criteria had been met.

28. RUDH also argued that the 380 Agreement could not possibly promote economic development when Ainbinder Heights stated publicly that it was committed to build the development with or without the 380 Agreement. In response, the City revealed that Ainbinder Heights did not seek assistance from the City, but, instead, the City offered the 380 Agreement to Ainbinder Heights as a way to “use the developer’s money” to pay for infrastructure improvements.<sup>8</sup> RUDH subsequently learned through public information requests that Ainbinder Heights never even submitted the documentation required, nor did the City require documentation with respect to the application process required by the City’s section 380 ordinance.

29. In a response to a legal inquiry to the City Attorney questioning whether the 380 Agreement could be promoting economic development when the development will proceed without it, the City claimed that the 380 Agreement promoted economic development, as required by state law, not by enabling or assisting Ainbinder Heights to construct its Walmart Supercenter development, but by constructing roads and drainage improvements. The City Attorney’s legal memo to the Council is attached hereto as Exhibit “F” and incorporated by reference.

30. Further investigation by RUDH would reveal a cozy relationship between the City, Walmart and Ainbinder Heights with regards to the Walmart development and the controversial 380 Agreement. Internal emails from the City revealed that the City’s economic

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<sup>8</sup> Mayor Annise Parker would go as far as falsely claiming on Houston Public Radio that the 380 Agreement would be a way to use the developer’s money “interest free”. The 380 Agreement imposes interest on the tax reimbursement scheme.

development office had sided with Ainbinder Heights against community opposition to the Walmart development. Andy Icken, the City's Chief Development Officer, disparagingly referred to opponents of the development as "the effete [sic] in the Heights". Mr. Icken's deputy, Tim Douglass referred to Council Member Ed Gonzalez as being "a little squishy" and needing "hand-holding" from Mayor Annise Parker because Council Member Gonzalez opposed the Walmart development and the 380 Agreement. The City's Development Office even went as far as recommending a public relations firm for Ainbinder Heights to help counter opposition to the development, as well as working very closely with Walmart's public relations representative, Jeri Brooks (a former communications staffer for Mayor Anise Parker's mayoral campaign) in preparing a presentation to try to dissuade the public from opposing the Ainbinder Heights development and the 380 Agreement.

31. Most troubling of all was the revelation that principals of Ainbinder Heights, Michael Ainbinder and Barton Duckworth, held a post-election fundraiser for Mayor Parker, and those with an interest in the development contributed a combined total of \$30,000.00 to her 2009 campaign and have again contributed to Mayor Parker's 2011 campaign.

32. Accordingly, in light of the foregoing, RUDH seeks to strike down the 380 Agreement as being an unconstitutional gratuitous transfer and failing to comply with section 380 of the Texas Local Government Code. RUDH also seeks to have the City's 380 Program declared unconstitutional for failing to provide sufficient controls to ensure that 380 agreements are not abused as either an end run around bond finance procedures or as political favors returned to well connected developers.

**IV.**  
**DECLARATORY JUDGMENT**

**A. The 380 Agreement is a Gratuitous Transfer that Violates Chapter 380 of the Texas Local Government Code and the Texas Constitution**

33. Article III, section 52(a) provides:

[T]he Legislature shall have no power to authorize any county, city, town or other political corporation or subdivision of the State to lend its credit or to grant public money or thing of value in aid of, or to any individual, association or corporation whatsoever....

TEX. CONST. art. III, § 52(a).

34. Section 52(a)'s prohibiting the Legislature from authorizing a political subdivision “to grant public money” means that the Legislature cannot require *gratuitous* payments to individuals, associations, or corporations. *Texas Mun. League Intergovernmental Risk Pool v. Tex. Workers’Comp. Comm’n*, 74 S.W.3d 377, 384 (Tex. 2002) (citing *Edgewood Indep. Sch. Dist. v. Meno*, 917 S.W.2d 717, 740 (Tex.1995) (Edgewood IV); *Bexar County Hosp. Dist. v. Crosby*, 160 Tex. 116, 327 S.W.2d 445, 447 (1959); *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699, 709 (1959); *Byrd v. City of Dallas*, 118 Tex. 28, 6 S.W.2d 738, 740 (1928)).

35. Moreover, section 52(a) does not prohibit payments to individuals, corporations, or associations so long as the statute requiring such payments: **(1)** serves a legitimate public purpose; and **(2)** affords a clear public benefit received in return. *Texas Mun. League Intergovernmental Risk*, 74 S.W.3d at 384 (citing *Edgewood IV*, 917 S.W.2d at 740; *Bullock v. Calvert*, 480 S.W.2d 367, 370 (Tex.1972) (citing *Davis v. City of Lubbock*, 160 Tex. 38, 326 S.W.2d 699 (1959)); *Brazos River Auth. v. Carr*, 405 S.W.2d 689, 694 (Tex.1966); *Byrd*, 6 S.W.2d at 740).

36. A three-part test determines if a statute accomplishes a public purpose consistent with section 52(a). Specifically, a municipality must: **(1)** ensure that the statute's predominant

purpose is to accomplish a public purpose, not to benefit private parties; **(2)** retain public control over the funds to ensure that the public purpose is accomplished and to protect the public's investment; and **(3)** ensure that the political subdivision receives a return benefit. *See Atkinson v. City of Dallas*, 353 S.W.2d 275, 279 (Tex.Civ.App.-Dallas 1961, writ ref'd n.r.e.); *Gillham v. City of Dallas*, 207 S.W.2d 978, 983 (Tex.Civ.App.-Dallas 1948, writ ref'd n.r.e.). *See generally* Mike Willatt, *Constitutional Restrictions on Use of Public Money and Public Credit*, 38 TEX. B.J. 413, 421 (1975).

37. Chapter 380 requires that a city establish and provide for the administration of an economic development program before making grants and loans for economic development. Tex. Loc. Govt Code § 380.001. A city that wants to provide a Chapter 380 grant or loan must establish a program to implement the incentive and that program should be planned and outlined in a written document. Without safeguards and a demonstrable benefit to the municipality, economic development incentives fail constitutional muster.

38. The 380 Agreement fails to comply with section 380 of the Texas Local Government Code and the Texas Constitution because the Ainbinder Heights development will be built with or without the assistance of the 380 Agreement. Simply put, the City does not promote “economic development” by providing tax payer assistance that the developer does not need and never even requested in the first place.

39. Furthermore, the Mayor and other City officials have stated publically and on multiple occasions that the City sought Ainbinder Heights for Chapter 380 assistance, as opposed to Ainbinder Heights applying for such assistance as required by the Criteria. By seeking out Ainbinder Heights, and waiving the 380 Program Criteria on Ainbinder Height’s behalf, the City failed to ensure that the 380 Agreement’s predominant purpose were to accomplish a public

purpose, and not to benefit a private real estate developer and their multi-billion dollar anchor tenant. It is the requirement of implementing the Criteria that alone assures that a public purpose is being promoted by a section 380 grant of public money.

40. Further, a section 380 agreement cannot merely be used as a creative financing vehicle for funding infrastructure improvements. The City cannot use section 380 agreements as an end-run around municipal bond financing procedures. A section 380 agreement must directly stimulate economic development and cannot do so indirectly through merely improving public infrastructure.

41. The City failed to implement those procedures and guidelines whose very purpose was to ensure the predominant purpose of the transfer was to accomplish a public purpose. Instead, the City relied on the unfettered discretion of a single unelected bureaucrat's interpretation of the words "otherwise meritorious." Furthermore, written communications from City officials caused confusion to many Council members, robbing them of information necessary to make an educated vote on the Agreement. Accordingly, RUDH seeks a declaration that the 380 Agreement is illegal and void.

**B. The City's 380 Program Violates the Texas Constitution and Section 380 of the Texas Local Government Code**

42. The attorney general has stated that any transaction providing public monies must contain **sufficient controls** to insure that the public purpose is carried out. Article 52-a of the Texas Constitution provides that expenditure of funds under a chapter 380 program must be for "economic development," and for the "public purposes of development and diversification of the economy of the state, the stimulation agricultural innovation, the fostering of growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state." Chapter 380.001 states that expenditures must "promote state or local economic

development and to stimulate business and commercial activity in the municipality.” The City’s Chapter 380 ordinance at issue here must therefore contain “sufficient controls” to ensure program expenditures promote one or more of the stated purposes. In this case, The City’s Ordinance setting forth its section 380 program actually has **no controls**. Complete discretion is left to the whim of a single unelected city official.

43. The Ordinance properly states its purpose: “to promote state or local economic development and to stimulate business and commercial activity in the municipality,” and establishes “guidelines for Chapter 380 assistance eligibility” meant to ensure promotion of a public purpose. Those guidelines and application procedures are the Criteria described in detail above, and attached hereto as Exhibit “B”.

44. Rather than the Criteria being mandatory under the program, however, language in the Ordinance allows the guidelines and application process to be waived **at the sole discretion of the Director of Planning and Development**. The Ordinance states: “the Director [of the Planning and Development Department] **may propose** an application for assistance [to the City Council] which does not meet all the Criteria if, in the opinion of the Director, the application is **otherwise meritorious**.” Thus, interpreting this provision in light of the rest of the Ordinance, the Director may at his or her whim recommend a program to the Council that meets **none** of the Criteria.

45. The Constitution and Chapter 380 require more of a municipality than optional guidelines that can be tossed aside at the discretion of a single unelected official; rather the requirement that expenditures be for a public purpose places an affirmative obligation on municipalities to draft procedures *and actually implement those procedures* for expenditures under chapter 380 to be legal.



46. As evidenced by how the City gave a six million dollar 380 Agreement to a well connected political donor about to enter into a real estate deal with the most powerful retailer in the United States **without requiring any adherence to any application procedure or demonstration of any criteria**, the City's 380 program provides absolutely no safeguards to ensure that public funds are used to actually promote economic development and to prevent gratuitous transfers of public funds to private parties. Under Tex. Const. Art. 11, § 5, a home-rule municipality is prohibited from adopting ordinances that are inconsistent with state law. Thus, RUDH seeks a declaration that the Ordinance is void because it violates the Texas Constitution and section 380 of Texas Local Government Code.

#### **VII. ATTORNEY'S FEES**

47. Plaintiff incorporates by reference herein the preceding paragraphs for all purposes as if set forth in full.

48. The conduct of the City and Ainbinder Heights as described in this Petition has necessitated the Plaintiff retaining the undersigned attorneys to prepare and prosecute its claims. Plaintiff is entitled to recover from the City and Ainbinder Heights reasonable attorney's fees for the preparation and prosecution of this action, pursuant to Chapter 37 of the Texas Civil Practice and Remedies Code.

#### **VIII. INJUNCTIVE RELIEF**

49. In addition to declaratory relief, Plaintiff seeks a permanent injunction restraining the City from giving any effect to or complying with the 380 Agreement and from proposing any further 380 agreements under the Ordinance.

**X.**  
**PRAYER FOR RELIEF**

WHEREFORE, PREMISES CONSIDERED, Plaintiff respectfully requests that Defendants be cited to answer and appear herein, that upon a final trial on the merits the Court grant plaintiff the following relief:

1. A declaration that the Ordinance and 380 Agreement complained of are unconstitutional and void as a matter of law;
2. After a trial on the merits, the issuing of a permanent injunction prohibiting the City from entering into any future 380 agreements under the Ordinance and prohibiting the City from giving any effect to or complying with the 380 Agreement;
3. An award for plaintiff's reasonable and necessary costs and attorney's fees; and
4. Any other and further relief to which plaintiff is justly entitled.

Respectfully submitted,

**JACKSON & ELROD, LLP**

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