Domain Mixed-Use Development
Compliance Report October 23, 2009
Year 2 of 20 for Chapter 380 Performance-Based Agreement

I. Overview

The Chapter 380 Economic Development Agreement ("Agreement") between the City of Austin ("City") and EGP Management, L.L.C. was executed June 13, 2003, having been authorized by Resolution 20030515-004. The First Amendment was executed April 2, 2004 after being authorized by Resolution 20040311-014. In July 2004 EPG Management L.L.C. assigned the Agreement to The Domain Shopping Center, L.P. ("Owner").

The Agreement covers the development of a 53.16 acre portion of The Domain, (the "Project") and some aspects of the operation within the Project area over approximately 20 years. Accordingly, some of the Owner's obligations under the agreement apply to the development of the Project while others apply to the operation.

Compliance with the following requirements was verified in the October 1, 2008 report and no follow up is needed:

A. Commencement of Project,

B. Financial Contributions, and

C. Permitting and Subdivision.

The following requirements are ongoing and are monitored annually:

A. Support for Local Small Businesses (Domain Fund),

B. S.M.A.R.T. Housing affordability,

C. Employment Opportunities, and

D. Sales Tax Reports.

This report considers activities that have occurred since the October 1, 2008 report. The anticipated Chapter 380 payment is based on sales taxes generated between May 1, 2008 and April 30, 2009 ($1,272,759.25) and on 2008 property taxes ($159,661.36). Monitoring for some obligations is based on completion of a project element; for example affordable housing is monitored on the anniversary of the initial lease-up or prior to a Chapter 380 payment being made. Employment opportunities between June 30, 2008 and March 31, 2009 are being monitored this year.

Requirements regarding Minority/Women Owned Business Enterprises apply during any development and are being monitored this year for Building P which was completed during 2009, and the Westin Hotel which is still under construction. The elements of S.M.A.R.T. Housing apply to all housing developed within the Project, and except for affordability, which is monitored annually, are monitored during years when housing units are completed and lease-up begins. S.M.A.R.T. Housing requirements for Building P are being monitored this year.

Part II of this report details the Owner's obligations and the respective compliance statuses. Part III reviews obligations of the Owner and the City regarding the Chapter 380 payments, and Part IV summarizes the compliance status of each obligation.

As stated in the October 1, 2008 Independent Accountant's Report on Applying Agreed Upon Procedures by Padgett Stratemann and Co., LLP (procedures 26 and 27) the Sales Tax Effective Date, defined in §2 of the Agreement, is September 3, 2007 and the Ad Valorem Tax Effective Date, also defined in §2 of the Agreement, is January 1, 2008. Accordingly, the anticipated October 2009 Chapter 380 payment will be based on Ad Valorem Tax Revenues and Sales Tax Revenues as defined in §2 of the Agreement.

II. Owner Obligations

A. ***Commencement of Project (§4.a)*** *Owner must issue a notice to proceed to commence construction by June 13, 2007, and diligently pursue construction of the Project*.

Status: Compliance has been verified previously; see October 1, 2008 report.

B. ***Support for Local Small Businesses (§4.b)*** *During the term, Owner is required to designate and allocate a $1,000,000 Domain Fund from its construction budget to assist small, local businesses to locate at the Project.*

1. Obligation: *The Domain Fund was to be fully capitalized upon commencement of Project construction (§4.b.i).*

   Status: Compliance has been verified previously; see October 1, 2008 report.

2. Obligation: *The Domain Fund is to be used to attract and facilitate the presence of small, locally owned businesses to the Project from Travis, Hays & Williamson counties (§4.b.ii).*

   Status: Compliance has been verified previously; see October 1, 2008 report.

3. Obligation: *Money from the Domain Fund is to be used for each endowment fund candidate in some or all of the following manners (§4.b.iii):*

   a. set aside for the cost of designing/constructing interior improvements of tenant's premises (§4.b.iii(a));

   b. set aside as security (collateral) for small business loans made to a tenant (§4.b.iii(b));

   c. used toward all or part of the cost of advertising for the new store location; and/or (§4.b.iii(c));

   d. subsidize the rental rate required by the Project over the term of the lease (§4.b.iii (d)).

   Status: Compliance has been verified previously; see October 1, 2008 report.

4. Obligation: *Terms of tenants' leases shall generally be for a period of five years (§4.b.iv).*

   Status: Compliance has been verified previously; see October 1, 2008 report.

5. Obligation: *Funds used toward interior improvements, relocation costs and/or rent reduction will typically be advanced to the tenant without a repayment obligation (§4.b.v).*

   Status: Compliance has been verified previously; see October 1, 2008 report.

6. Obligation: *Owner is required to provide annual reports to the City Manager and to the City's Economic Growth and Redevelopment Services Office (EGRSO) Director showing how the Domain Fund has been used the previous 12 month period. The report is to contain a performance report section including, but not limited to (§4.b.vii)):*

   a. *information on the current and long-term presence of local businesses in the Project by tracking which businesses remain in the Project and for what period of time;*

   b. *a description of the distribution of the funds;*

   c. *the balance of the funds;*

   d. *analysis of performance results in terms of cumulative and long term presence of local small businesses at the Project;*

   e. *the results of exit interviews with any small local business leaving the Domain and,*

   f. *a description of advertising targeted to promote small business inclusion.*

   Findings:

   a. As of the October 1, 2008 report, six businesses, Bettysport Partners, L.L.C.; St. Thomas, Inc.; Tea Craft, dba The Steeping Room; Luxe Apothetique; Ks Home Designs dba Loft; and Chocogelatier Austin Domain L.L.C. dba Viva Chocolato! were open for business at Domain. According to the Second Annual Domain Fund Report, all remained in business.

      As of the October 1, 2008 report, a seventh business, Spa Reveil, was completing interior improvements; according to the Second Annual Domain Fund Report, they opened for business October 23, 2008.

   b. Compliance regarding distribution and balance of the Domain Fund has been verified previously; see October 1, 2008 report.

   c. As of June 8, 2009, all seven of the businesses who benefited from the Domain Fund were open and in business at the Domain.

   d. On July 30, 2009, six of the seven businesses, St. Thomas, Inc.; Tea Craft, dba The Steeping Room; Luxe Apothetique; Ks Home Designs dba Loft; and Chocogelatier Austin Domain L.L.C. dba Viva Chocolato! remained open.

e. On August 25, 2009 the City received Addendum 1 to the Second Annual Domain Fund Report which states that Bettysport Partners, L.L.C. closed and abandoned their space on June 28, 2009.

Status: Compliant

7. Obligation: *Exit interviews are to be conducted with small local businesses leaving the Domain as long as there is a balance in the Domain Fund (§4.b.viii).*

   Finding: Domain Fund expenditures exceeding $1,000,000 were confirmed in the October 1, 2008 report. Since no balance remains in the Domain Fund, this requirement does not apply.

   Status: Not applicable

C. S.M.A.R.T. Housing (§4.c): *Owner must issue a notice to proceed to commence by June 13, 2009 and diligently pursue construction of at least 300 residential units.*

1. Obligation: *The Project's residential units must comply with S.M.A.R.T. Housing guidelines with a potential exception of not meeting the ¼ mile minimum distance from the nearest transit route, provided Owner has used reasonable efforts to fully comply with all S.M.A.R.T. Housing requirements (§4.c).*

   Findings:

   a. Compliance regarding the notice to proceed and diligent pursuit of construction has been verified previously; see October 1, 2008 report.

   b. On September 14, 2007 the City confirmed that the 416 unit multifamily housing development at Domain met the S.M.A.R.T. Housing standards at the pre-submittal stage. The same document identifies the additional approvals needed and the phases at which they must be obtained in order to demonstrate compliance with Austin Energy's Green Building Program and with the S.M.A.R.T. Housing accessibility standards.

   c. Compliance with most S.M.A.R.T. Housing requirements is confirmed prior to issuance of a Certificate of Occupancy (CO); only affordability is reviewed annually. Compliance with S.M.A.R.T. Housing requirements was verified for Residences at the Domain, the first 390 units, in the October 1, 2008 report.

   d. Correspondence from the City of Austin Neighborhood Housing and Community Development Department (NHCD) dated February 9, 2009 confirmed that Residences at the Domain was in compliance with applicable affordability requirements.

e. SPG provided evidence that the additional 26 units, Villages at the Domain, Building P, received a Three-Star rating and Notice of Final Approval from Austin Energy on May 27, 2009.

f. According to correspondence dated October 9, 2009 from Robert Buck, AIA to Javier Delgado of the City of Austin NHCD, the Building P apartments are in compliance with the S.M.A.R.T. Housing accessibility requirements.

g. On October 9, 2009 NHCD confirmed that Villages at the Domain had two units occupied by income-eligible tenants. One additional unit is reserved for an income-eligible tenant.

Status: Compliant

2. Obligation: *At least 10% of the housing units must be affordable for households at or below 65% of Median Family Income (MFI) who spend no more than 30% of their income on housing, provided sufficient economic development contributions are available from Travis County to reimburse Owner for economic impact of reducing affordability level from 80% MFI to 65% MFI and parties have agreed on the value of the economic impact (§4.c).*

Findings:

a. Contributions available from Travis County: According to §7.1 of the Chapter 381 Economic Development agreement between Travis County and Simon Property Group (SPG), SPG will receive contributions from Travis County up to the net present value of $5,000,000 when discounted at an annual rate of 7.5%. According to §7.2, each annual payment will be equal to 50% of the difference between the Ad Valorem taxes paid on the Reimbursement Year value less the taxes paid on the Effective Date value, up to the maximum payment amount defined in §7.1.

b. Parties have agreed on the value of the economic impact: The City of Austin NHCD and SPG agreed that the economic impact of reducing the affordability level from 80% MFI to 65% MFI is $1,373,096, as demonstrated in the October 1, 2008 report.

c. Affordable housing for households whose income does not exceed 65% MFI: NHCD clarified in the August 11, 2009 email from Maneesh Chaku to Terry Franz that the 39 affordable Residences at the Domain units were occupied by persons whose income did not exceed 65% MFI. According to October 9, 2009 correspondence between Villages at the Domain and Javier Delgado of NHCD, two eligible households with income not exceeding 65% MFI occupy affordable units at the complex and a third unit is reserved for such a tenant.

Status: Compliant

D. <u>Employment Opportunities (§4.d):</u> *Owner is obligated to have created at least 1,100 permanent jobs at the Project upon completion of all phases of the project. If project is phased, full-time equivalent jobs are to be created on the basis of 0.0016 jobs per square foot constructed, exclusive of residential uses.*

<u>Findings</u>:

1. Since the project is phased, the minimum number of Full Time Equivalent (FTE) jobs required is based on the retail and restaurant area constructed.

2. According to the Domain Lease Plan last updated April 14, 2009, the cumulative retail and restaurant area constructed is 551,159 square feet.

3. 551,159 square feet multiplied by 0.0016 jobs per square foot equals 882 FTE jobs required for Year 2.

4. SPG provided TER's from most commercial tenants for each of the following periods:
   a. June 30, 2008,
   b. September 30, 2008
   c. December 31, 2008 and
   d. March 31, 2009.

5. Eleven of the 69 employers whose TER's are included in the calculation of average FTE jobs for Year 2 were selected for further review based on their average numbers of employees reported for June 30, September 30 and December 31, 2008. These employers include one anchor tenant with an average number of employees over 100, six tenants with average numbers of employees between 20 and 80, two tenants with average numbers of employees between 10 and 19 and two tenants with average numbers of employees fewer than 10. The employers selected for further review are:
   a. Coach,
   b. Daily Grill,
   c. J. Crew Retail,
   d. Jasper's Restaurant,
   e. Joe Dimaggios Italian Chophouse,
   f. Lucky Brand Dungarees Store,
   g. Luxe Apothetique,
   h. Madewell,
   i. Neiman Marcus,
   j. Origins, and
   k. Victoria's Secret

6. One tenant (with an average number of employees between 20 and 80) failed to provide any support documentation. The other ten tenants reported a total of 477 FTE employees on the TER's that were reviewed. 431 FTE employees were verified using the support documentation they provided.

7. The average number of FTE jobs for Year 2 is 930. It was calculated by adding:
    a. The average verified FTE's and
    b. The average reported FTE's which were not subject to verification multiplied by 90.37%, the ratio of verified/reported FTE jobs.

Status: Compliant

E. Financial Contributions (§5.d): *Owner shall use reasonable efforts to seek contributions and grants from Capital Metro Transit Authority (CMTA) and Travis County.*

Status: Compliance has been verified previously; see October 1, 2008 report.

F. Sales Tax Reports (§6): *Owner is required to report quarterly to the City, based on reports filed by Project tenants with the State Comptroller's Office, the amount of sales tax revenues generated from the Project for the previous calendar quarter.*

Finding: As evidenced by a July 23, 2008 memorandum from Fred Evins of the City of Austin EGRSO, the City relieved SPG of this requirement, after determining that the most efficient method of gathering the information would be to seek a report directly from the Texas Comptroller of Public Accounts.

Status: Not applicable

G. Permitting and Subdivision (§8): *Prior to commencement of Project, Owner is required to identify the exact project boundaries, not to exceed 55 acres, through a subdivision plat application filed with City.*

Status: Compliance has been verified previously; see October 1, 2008 report.

H. Minority/Women Owned Business Enterprises (M/WBE) (§9): *Owner is required to use good faith efforts to cause its agents and contractors to comply with the spirit and intent of the City's M/WBE requirements and to retain a third party consultant specializing in outreach to qualified M/WBE contractors and consultants.*

Findings:

1. Building P at 3409 Esperanza Crossing was under construction as of the October 1, 2008 report; it was completed in 2009. According to the report from the City's interactive development review website, Building P passed final building inspection on May 13, 2009.

2. According to the report from the City's interactive development review website, Construction of the Westin Hotel at 11301 Domain Drive has not been completed as of August 31, 2009.

3. Building P, 3rd Party Outreach Consultant:

    a. Retail: For the retail portion of Building P, no evidence was provided that SPG retained the third party consultant specializing in outreach to qualified M/WBE contractors and consultants. Their general contractor did, however, work with Fred Evins and Edward Campos of the City to obtain an availability list of certified M/WBE contractors, invite the contractors listed to bid on Building P and track which of those vendors responded and of those, which were successful.

    b. Residential: For the residential portion of Building P, SPG retained Cloteal Davis Haynes of Haynes-Eaglin-Waters, a third party consultant specializing in outreach to qualified M/WBE contractors and consultants. Inspection of the contract confirms that the firm was hired to plan and implement M/WBE outreach for Building P.

4. Building P, Good Faith Effort: According to correspondence dated October 13, 2009 from Veronica Lara at DSMBR to Rodney Gonzales at EGRSO, SPG complied with the spirit and intent of the MBE/WBE Procurement Ordinance as outlined in the Economic Development Agreement.

5. Westin Hotel, 3rd Party Consultant: In anticipation of beginning construction on the Westin Hotel, on August 28, 2008 SPG provided a copy of the agreement between White Lodging Services Corporation and Adelante Solutions, Inc., a third party consultant specializing in outreach to qualified M/WBE contractors and consultants. Inspection of the agreement confirmed that the firm was hired to develop an outreach plan with the goal of maximizing the use of certified MBE and WBE contractors in the Domain project. SPG subsequently provided a report by Adelante Solutions, Inc. summarizing their outreach activities regarding the Westin Hotel.

6. Westin Hotel, Good Faith Efforts: According to correspondence dated October 13, 2009 from Veronica Lara at DSMBR to Rodney Gonzales at EGRSO, SPG complied with the spirit and intent of the MBE/WBE Procurement Ordinance as outlined in the Economic Development Agreement. Construction of the Westin Hotel has not been completed, therefore compliance with §9 of the Agreement will also be reviewed in Year 3.

Status: Compliant

III. Chapter 380 Payment

A. *For a period of five years beginning on the Sales Tax Effective Date, City shall pay Owner a Chapter 380 payment equal to 80% of the One Cent Sales Tax Revenues. The payment shall be based on the amount of sales tax collected by the City for the 12 month period ending the preceding April 30. For a period of 15 years following the initial five year period, City shall pay Owner a Chapter 380 payment equal to 50% of the One Cent Sales Tax Revenues. The payment shall be based on the amount of sales tax collected by the City for the 12 month period ending the preceding April 30 (§5.b.i.).*

Findings:

1. In April 2009, the City began receiving monthly Sales Tax Area Reports from the Texas Comptroller of Public Accounts stating the City of Austin sales tax revenue generated by the Project each month from May 2008 through April 2009. Reporting during this period includes revenue associated with amended returns from four businesses whose sales tax revenue was omitted from the Sales Tax Area Report provided to the City in August 2008 (which was used to calculate the October 2008 payment to SPG).

2. According to the Sales Tax Area Reports received from the Texas Comptroller of Public Accounts, the sum of City of Austin sales taxes generated by the Project from May 2008 through April 2009 is $1,552,145.43. This sales tax funded portion of the second Chapter 380 payment to SPG will be based on 80% of $1,552,145.43, or $1,241,716.34.

3. Every business included in a Sales Tax Area Report is in the Project area.

B. *An additional 2% of the One Cent Sales Tax Revenue shall become part of the Chapter 380 payments, increasing the percentages to 82% during the first five years and 52% during years 6-20 (Additional Sales Tax Payment). Within 15 days of receipt, Owner shall remit the Additional Sales Tax Payment to the City (§5.b.ii).*

Findings:

1. Compliance regarding remittance of the Additional Sales Tax Payment is reviewed for the prior year. The City received the 2008 Additional Sales Tax Payment from SPG on November 12, 2008, 13 days after SPG received the 2008 Chapter 380 payment.

2. According to the Sales Tax Area Reports received from the Texas Comptroller of Public Accounts, the sum of City of Austin sales taxes generated by the Project from May 2008 through April 2009 is $1,552,145.43. This sales tax funded portion of the second Chapter 380 payment to SPG will be based on 2% of $1,552,145.43, or $31,042.91, which SPG is required to remit to the City for deposit to the Austin Housing Finance Corporation within 15 days of receiving the Chapter 380 payment.

Status: Compliant

C. *For a period of 20 years beginning on the Ad Valorem Tax Effective Date, the City shall pay Owner a Chapter 380 payment equal to 25% of the increase in the Ad Valorem Tax over the ad valorem tax that would be due on the value of the Property and improvements as of May 1, 2003, which is deemed to be $235,228 per acre (§5.c).*

Findings: The following table summarizes the baseline valuations, 2008 valuations, City of Austin tax on the incremental improvements and the Chapter 380 payment amount associated with each Travis Central Appraisal District (TCAD) parcel comprising the Project area.

Parcel ID Prop ID	*Acres in Parcel*	*Acres in Project*	*Baseline Valuation*	*FY 08 Certified Valuation*	*Incremental Valuation*	*CoA Tax on Increment $0.4012*	*Ch. 380 Payment Amount*
0256060201 569368	32.137	32.137	$7,559,522.24	$85,327,666.00	$77,768,143.76	$312,005.79	$78,001.45
0256060302 737156	3.9144	3.9144	$920,776.48	$24,693,167.00	$23,772,390.52	$95,374.83	$23,843.71
0256060303 737157	0.9786	0.9786	$230,194.12	$14,485,380.00	$14,255,185.88	$57,191.81	$14,297.95
0256060304 737158	4.893	4.893	$1,150,971.60	$42,045,121.00	$40,894,150.40	$164,067.33	$41,016.83
0254060105 585637	15.077	11.237	$2,643,257.04	$5,137,191.65	$2,493,934.61	$10,005.67	$2,501.42
Totals:		53.16	$12,504,720.48	$171,688,525.65	$159,183,805.17	$638,645.43	$159,661.36

Travis County Tax Office's online records show that no 2008 property taxes are owed for the Project area. This property tax funded portion of the second Chapter 380 payment to SPG based on Ad Valorem Tax Revenues is $159,661.36.

D. *The total Chapter 380 payments to be paid to Owner during the term of this Agreement shall not exceed the equivalent of $25 million calculated on a net present value basis when discounted at an annual rate of 7.5%. The payments shall be adjusted over time to reflect net present value of such amount as of May 1, 2003 so that Owner will receive an amount of money equivalent to the value of its Chapter 380 payments calculated in the year 2003. Except as set forth in §4.c, if Owner receives economic development contributions from Capital Metro Transit Authority and/or Travis County, the maximum payment amount shall be reduced accordingly by up to $7,500,000, calculated on a net present value basis, using an annual discount rate of 7.5% (§5.d).*

In accordance with (§4.c), Owner may recoup the economic impact of reducing the affordability level from 80% MFI to 65% MFI through economic development contributions from Travis County. Funds received from Travis County shall be applied first to this purpose then to reducing the maximum payment amount (§5.d).

Findings:

1. As stated in the October 1, 2008 “Independent Accountant’s Report on Applying Agreed Upon Procedures” by Padgett Stratemann and Co., LLP (procedure 15), SPG and the City agreed that the cost of reducing the affordability level from 80% of MFI to 65% MFI is $1,373,096.

2. To date, the City has paid SPG a total of $878,069.98.

3. To date, Travis County has not made a Chapter 381 payment to SPG.

4. The total allowable Chapter 380 payment to SPG exceeds Chapter 380 and Chapter 381 payments to date by more than $24 million, as shown in the following summary:

Baseline payments cap:	$25,000,000.00
Travis County Ch. 381 payments to date:	$0.00
Cost of reducing affordability from 80% MFI to 65% MFI:	$1,373,096.00
Amount of Travis County payments to deduct from cap:	$0.00
Adjusted payments cap:	$25,000,000.00
City of Austin payments against cap:	$878,069.98
Difference:	$24,121,930.02
City of Austin current year payment:	$1,432,420.61

IV. Summary and Conclusion

A. Compliance Status Summary

Owner Obligation	Compliance Status
Commencement of Project	Compliance verified previously
Support for Local Small Businesses	
Capitalization	Compliance verified previously
Attract small, locally owned businesses	Compliance verified previously
Use of Domain Fund	Compliance verified previously
Lease Terms	Compliance verified previously
No repayment obligation	Compliance verified previously
Annual reports	Compliant
Exit interviews	Not applicable
S.M.A.R.T. Housing	
Requirements	
Green Building	Compliant
Accessibility	Compliant
Affordability	Compliant
Employment Opportunities	Compliant
Financial Contributions	Compliance verified previously
Sales Tax Reports	Not applicable
Permitting and Subdivision	Compliance verified previously
Minority/Women Owned Business Enterprises	
Spirit and Intent	Compliant
Third party consultant	Compliant

B. <u>Chapter 380 Payment</u>

The anticipated October 30, 2009 Chapter 380 payment to SPG will be calculated based on Ad Valorem Tax Revenues and Sales Tax Revenues as defined in §2 of the Agreement as follows:

Ad Valorem Tax Revenues:	$159,661.36
Sales Tax Revenues:	<u>$1,272,759.25</u>
Total:	$1,432,420.61

C. <u>Conclusion:</u> The City's compliance review finds that SPG is in compliance with all applicable performance requirements and is eligible for the October 30, 2009 Chapter 380 payment in the amount of $1,432,420.61.