Ancel Glink | Diamond Bush DiCianni & Krafthefer

Think Ancel Glink

Economic Development Toolbox for Municipal Officials

Stewart H. Diamond
David S. Silverman
Kurt S. Asprooth

2017 Edition

www.ancelglink.com

ECONOMIC DEVELOPMENT TOOLBOX FOR MUNICIPAL OFFICIALS

[Revised 2017]

TABLE OF CONTENTS

Introduction

Building a strong community and keeping it in sound economic condition are important jobs for municipal officials. Promoting commercial, industrial and residential development, and preventing the deterioration of existing homes and businesses are essential to this economic development. Adding new territory to a municipality, where new development can take place, is another method of increasing revenue for a municipality. Special taxes raise revenue without increasing property taxes. Constructing and maintaining infrastructure—sewer and water, for example—are necessary as a solid foundation for municipal development. There are many tools available to local governments to accomplish these goals. These tools include municipal bonds, impact fees, tax abatements, special service areas, tax increment financing, and others.

The purpose of this booklet is to explain these tools: what they are and what they can do. It is not intended to be a detailed instructional manual or text book. For example, if you want to remodel your house and are wondering where to get the money, you don't have to understand international monetary policy. But you do need to know that you could use the money from your savings account, or refinance your mortgage, or take a home improvement loan. Similarly, for municipal improvements, you need to know what methods of financing the project are available and which is best suited for the circumstances. That's what this booklet can help you determine.

In the context of municipal economic development, these tools comprise methods by which a municipality can encourage development by raising money and using it in ways which promote investment in the community. Economic conditions change, but even in a bad economy new investment in a municipality will, in the long run, more than pay for whatever the municipality has spent to encourage it. As a simple example, a private developer might be interested in building a new shopping center in the community, but land might be so expensive or hard to acquire that if the developer has to pay full market price for it, the project cannot make money. The municipality could decide to help the developer by acquiring the land itself using public funds on hand or anticipated future tax revenues (tax increment financing), then selling it to the developer at a reduced price. The difference between what the municipality pays for the land and what it receives from the developer is the community's investment in the project. Over a number of years, the increased sales taxes and property taxes from the new shopping center will pay back the municipal investment and then begin to generate new revenue to the municipality. In the meantime, new jobs will have been created and more private development attracted to the area of the shopping center, creating a need for more housing and additional service businesses in the community. These same

results can often be obtained from renovating or converting a vacant or rundown commercial or industrial building.

The following discussion presents, in alphabetical order, the primary tools for municipal economic development, in enough detail to enable a non-specialist to understand what each can do and when it may be used. Citations to applicable sections of the Illinois Compiled Statutes, e.g. 65 ILCS 5/xxxx, are included for those who want to read the statutory language.

The successful fulfillment of a program of economic development is generally best accomplished by a coordinated team of elected and appointed municipal officials and consultants. Some of these consultants are: land planners, appraisers, tax analysts, engineers, architects, financial analysts and bond counsel. Each of the steps, from land acquisition to plan development to construction contracts to bonds and financing, involves legal issues. The lawyers at **ANCEL GLINK** have been helping municipal clients through these processes for decades. Please contact any of the authors of this pamphlet for further information.

About the Firm

Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C. was founded more than 80 years ago. As one of the preeminent local government law firms in Illinois, our firm of more than 35 lawyers has a tradition of excellence and innovation. Ancel Glink has adhered to the principle of providing the quality of work normally associated with the largest firms within a small firm environment. Our goal is to offer our clients effective and comprehensive representation at a reasonable cost. Our legal services and strategies match our clients' needs and resources. We provide services statewide, often serving as special counsel and assisting local attorneys with complex matters. No issue is too large or too small for us to handle.

Stewart H. Diamond
sdiamond@ancelglink.com

Kurt S. Asprooth
kasprooth@ancelglink.com
Ancel, Glink, Diamond, Bush, DiCianni & Krafthefer, P.C.
140 S. Dearborn, Suite 600
Chicago, IL 60603
Phone 312-782-7606
Fax 312-782-0943
www.ancelglink.com

Economic Development Plans

Perhaps the first step that a municipality should take in furtherance of economic development is to put together a plan or policy to guide the use of the economic development tools described in this booklet.

An economic development plan should define the goals and objectives that the municipality hopes to achieve by providing economic development incentives. An economic development plan should, ideally, be based upon specific studies or data that describe the strengths and weaknesses of the economy within the municipality. In many ways, an economic development plan will resemble a municipality's comprehensive plan, as it will designate development priorities for specific areas of the municipality or certain types of property. To that end, a municipality should ensure that any newly adopted economic development plan is consistent with the municipality's existing comprehensive plan.

An economic development plan will ensure that potential developers are aware that the municipality is serious about providing incentives to achieve its economic development goals. An economic development plan will allow a developer to determine the types of the incentives that the municipality offers, and how the developer may be obtain those incentives. Establishing an economic development plan will also help ensure that a municipality provides economic development incentives on a consistent basis.

Generally, an economic development plan should set forth the municipality's role in encouraging economic development in the community, explain the types of developments that will be considered for incentives, the eligibility criteria for each specific category of incentive, the application requirements and process that a developer must follow in order to be considered for an incentive, and the evaluation and approval process for economic development incentives.

General Authority

The Illinois Municipal Code expressly provides municipalities with the authority to expend funds for economic development purposes. Specifically, Section 8-1-2.5 provides as follows:

> The corporate authorities may appropriate and expend funds for economic development purposes, including, without limitation, the making of grants to any other governmental entity or commercial

enterprise that are deemed necessary or desirable for the promotion of economic development within the municipality.

65 ILCS 5/8-1-2.5

Under this provision, which became effective in July of 2011, both home rule and non-home rule municipalities enjoy the same broad power to spend funds to promote local economic development efforts. The only practical limitation imposed by the General Assembly is that economic development funds must first be appropriated (*i.e.*, a village can't simply write a check; it must include an "economic development" line item in its annual budget).

This statutory authority allows municipalities to play an active role in determining how their communities develop. This provision does not define what qualifies as "economic development;" instead, communities are left to decide.

Under this authority, municipalities can establish and administer façade grant programs, small business loan programs, revolving loan programs, and signage replacement incentives. Similarly, municipalities can hasten progress towards environmental goals by providing economic sweeteners for investing in green infrastructure, including energy efficient heating and cooling systems and alternative fueling stations. The broad sweep of this provision presents countless opportunities for municipalities to support local business development.

Annexation Agreements

An annexation agreement (sometimes called a "pre-annexation agreement") is a device by which a municipality and a landowner seeking annexation can enter into a binding contract, prior to annexation, regarding development of the land. See 65 ILCS 5/11-15.1 The agreement provides that the property will be annexed to the municipality subject to the terms and conditions in the agreement. Most often, the municipality is interested in controlling the type and intensity of development, while the owner desires relief from existing zoning restrictions, or guarantees that zoning will not change while a proposed development is in progress. The municipality can also use the annexation agreement to specify architectural design, site plans, infrastructure improvements and virtually any other aspect of a project, and to allocate costs for municipal services. In short, a well-crafted annexation agreement can take much of the uncertainty or unpredictability out of adding a new tract of land to the municipality. In addition to those already mentioned, among the issue which may be addressed in an annexation agreement are:

- Applicability or inapplicability of various municipal ordinances, and exclusion from future amendments;
- Abatement of taxes;
- Payments in lieu of real estate taxes for exempt property;
- Permits and permit fees;
- Contribution of land or cash for municipal, park or school purposes;
- Remedies and security in the event of default.

65 ILCS 5/11-15.1-2

A public hearing before the village board or city council is required to approve an annexation agreement. Additionally, an annexation agreement must be passed by a vote of two-thirds of the corporate authorities then holding office. 65 ILCS 5/11-15.1-3. An annexation agreement can be used for land which is not yet contiguous to the municipality but which may become contiguous as the municipality expands in the future. Thus, when the municipal boundary reaches land on which an annexation agreement was previously approved, the terms of the agreement go into effect. The land can then be annexed.

Many municipalities have used this technique to control development beyond their borders. Municipalities extend streets and utilities to non-contiguous land in exchange for the owner's agreement to the terms of annexation in the future For example, the owner of a large tract of vacant, unincorporated land near a village needed water and sewer service in order to develop the land for residential use. The village was not contiguous to the tract, but was growing in that direction. The village was concerned about the density of development as it would impact village resources. **ANCEL GLINK** represented the village in negotiating an annexation agreement with the developer, which provided that, in exchange for access to village water and sewer service, the developer agreed to limit density, to contribute cash to the school districts for the new students generated by the new residences, and to pay for improving the village sewer system. When the village boundary reached the developer's land, the annexation ordinance was adopted and the full terms of the annexation agreement went into effect.

Borrowing

Municipalities often borrow money to undertake economic development projects. Just as a new business might need to borrow funds for start-up costs, a municipality might not have sufficient cash on hand to build new infrastructure or build a new fire station so that the old one can be torn down to make way for commercial development. There are many reasons a municipality might want to borrow money, and several ways of doing so. Which method to use depends on the particular circumstances. A

municipal attorney or financial advisor can assist a municipality in determining which method will be most effective.

Bonds

Municipalities can issue bonds to raise cash for public projects. A bond is a written promise to pay a specified sum of money (the "face value" or "principle amount") on a specified date or dates (the "maturity date(s)") with periodic interest at a specified rate. There is a market for municipal bonds because, generally speaking, the interest received by the bondholder is tax-exempt, and because they are relatively secure; it is unusual for a municipality to default on a bond. Several provisions of Illinois law deal with issuance of bonds by municipalities, including 65 ILCS 5/8-4-1, 5/8-5-1, and 35 ILCS 200/18-185.

Municipal bonds can be divided into two broad categories: general obligation ("GO") bonds and revenue bonds. General obligation bonds are paid from general property taxes levied by the municipality on all taxable property within its boundaries Payment is guaranteed by the "full faith and credit" of the municipality; *i.e.,* a pledge of the municipality's general taxing power for payment. Revenue bonds are paid from revenue generated by some limited source, either an "enterprise" such as a water system, or a limited tax such as a special service area tax. A third category, "alternate bonds," is a hybrid. Also called alternate source bonds and double barrel bonds, these are general obligation bonds but are payable from a designated limited enterprise or revenue source, with the full faith and credit of the municipality serving as secondary security, should the revenue source ever be insufficient to pay the debt service.

A municipality's authority to issue bonds is largely determined by its status as either home rule or non-home rule. Home rule units have virtually unlimited authority to issue bonds. Non-home rule units are limited by state law as to how much debt they may incur (8.625% of all equalized assessed value). In many instances, non-home rule municipalities are required to obtain prior voter approval of a bond issue through a referendum. In addition, many types of non-home rule revenue bonds are subject to the "back door referendum" process. That is, if a petition with a sufficient number of signatures is filed within a certain time after the bonds have been authorized, the municipality must submit to the voters the question of whether to proceed with the project and the bonds. If the voters do not approve, the bonds may not be issued.

Bonds may be issued only for a legitimate public purpose. Revenue bonds may be issued only for a purpose related to the actual source of the revenue. For example, bonds payable from water system revenues could not be used to build a municipal

sports stadium. Moreover, for non-home rule units, the purpose of the bonds must be something the municipality is expressly authorized to do by state law.

Procedures for the Issuance of Bonds

To issue bonds requiring prior referendum approval, a municipality first enacts an ordinance placing the question on the ballot. The question must specify the purpose for which the bonds proceeds will be used, the maximum amount of the issue, the maximum interest rate, and the maximum term. If the voters approve the bond issue, the municipality next enacts the bond ordinances themselves.

For bonds subject to a back door referendum, the municipality enacts the bond ordinance including a provision requiring publication of notice of the opportunity to require a referendum on the question by submission of a petition. If a petition with the required number of signatures is filed, the bonds may not be issued unless the voters approve the bond issuance at the next municipal election.

The ordinances and procedures necessary to actually issue bonds are highly technical. Many of the requirements are dictated by the banking industry in order to make the bonds marketable and tax-exempt. Most municipalities retain a financial consultant to advise on the best way to structure a bond issue, and a broker to bring the issue to market. The municipality's regular attorney, or special outside counsel, normally acts as "issuer's counsel" to represent the interests of the municipality. The interests of the bond purchasers are represented by "bond counsel" who normally prepares first drafts of all the documents and issues a written opinion on the validity and the tax exempt status of the bonds.

Private Activity Bonds

Special mention must be made of Private Activity Bonds, sometimes referred to as Industrial Development Bonds ("IDBs") or Industrial Project Revenue Bonds ("IRBs"). 30 ILCS 346/1. Broadly speaking, these are tax-exempt bonds issued by a government entity under an agreement with a private enterprise. The agreement provides that the proceeds of the bond issue will be paid to the private company for a specific project. Private investors will buy the bonds on the promise of the private enterprise to pay the debt service (principle and interest) of the bonds. Often the private company also pays a fee to the government entity. Because interest paid on PABs is exempt from income taxation, their use effectively lowers the cost of borrowing money for the private enterprise. Private activity bonds are not considered debt of the municipality. The municipality essentially acts as a conduit of the bonds for the benefit of the private entity.

IRS rules place strict controls on the tax exempt status of PABs and an annual limit on the amount of such bonds which may be issued in each state. Part of each state's allocation is made available to municipalities and other units of local government. Each eligible local government is given a portion of the allocation (its "volume cap") based on population. Thus, a municipality may issue PABs up to its annual volume cap.

If a municipality does not use its annual PAB volume cap, it may transfer that volume cap to another unit of government within the state, which can then issue more private activity bonds than it would otherwise be able to. The transferring entity earns a fee on the amount of volume cap it transfers.

Bank Loans

Banks, of course, can lend money to municipalities. In some cases there are tax and commercial advantages to the bank for making such loans. In particular, loans to government agencies and other non-profit organizations, which are referred to as "bank-qualified loans," are entitled to special tax treatment by the IRS. Banks tend to view loans to local governments as "low risk," as the chances of a default are minimal. And by lending money to a municipality, a local bank can help to build the community and encourage the municipality to take advantage of other banking services. Most municipalities have an established relationship with a local bank.

The Municipal Code expressly allows municipalities to borrow funds from banks and financial institutions. However, at least for non-home rule municipalities, any funds borrowed from a bank or financial institution must be repaid within 10 years. 65 ILCS 5/8-1-3.1. Such a loan is generally evidenced by a promissory note or similar debt instrument that is executed by the mayor or president of the municipality. Of note, however, is that a non-home rule municipality may not borrow funds from a financial institution if, when aggregated with the municipality's existing indebtedness, the municipality's indebtedness exceeds 8.625% of the value of the taxable property within the municipality. 65 ILCS 5/8-5-1.

The process of borrowing from a bank is generally less complicated and less expensive than issuing bonds. Additionally, a bank loan may not be subject to referendum and disclosure requirements which apply to some bond issues. Bank loans generally provide for fixed interest rates and fixed repayment schedules, but a variety of loan instruments may be available. This is a highly technical area, but bank-qualified loans can be a very attractive option for municipalities.

Letters of Credit

For certain types of municipal financial transactions, a letter of credit ("LOC") may be a useful tool. LOCs issued by the Federal Home Loan Bank support a wide range of business activity. Standby and confirming LOCs issued to members (and eligible non-members) can be used to facilitate residential housing finance and community lending, assist with asset/liability management, or to provide liquidity or other funding. LOCs issued by the FHLB provide the backing of a highly rated institution that ensures wide acceptance for multiple purposes including:

- Securing public unit deposits;
- Credit support for certain tax-exempt bonds and taxable bonds;
- Performance guaranty in lieu of a construction performance bond;
- Collateral for obligations arising pursuant to an interest-rate swap, interest-rate exchange, or other such comparable agreement; and
- Credit support for other financial obligations.

FHLB LOCs are most commonly used to secure deposits made by state government, municipalities and other public instrumentalities ("public units") and to provide credit support for tax-exempt bonds. An experienced financial advisor or attorney should be consulted before any decisions are made regarding LOCs.

The financial turmoil that occurred in 2007-2009 has led to many changes in the banking industry, some of which limit the availability of bank credit to municipalities. However, in appropriate situations, the local bank can still be a good partner to a municipality seeking to advance economic development in the community.

Business Development Districts

A Business Development District ("BDD") is a device which can accomplish many things. A municipality which creates a business development district is empowered to use many typical economic development tools, but without the need, in certain instances, to prove that the area is "blighted".. Rather, a municipality must only find that the BDD, on the whole, has not been subject to growth and development through investment by private enterprises and would not reasonably be anticipated to be developed or redeveloped without the adoption of the BDD plan. 65 ILCS 5/11-74.3-2(e). A BDD can also serve as a mechanism for levying an additional sales tax and hotel tax to pay costs of economic development. 65 ILCS 5/11-74.3-1.

In its simplest form, creation of the business development district requires only a public hearing and enactment of one ordinance. 65 ILCS 5/11-74.3-2. The municipality must present "a specific plan" for the business development district which must conform

to the municipality's comprehensive plan. The plan must define the boundaries of the BDD and may describe the size, location, number, configuration, use, density and other elements of a development project. As a practical matter, creation of a business development district provides an umbrella of "public purpose" under which a variety of development activities might take place, such as:

- acquiring property by purchase or by eminent domain within the BDD;
- entering into contracts with developers;
- conveying, licensing or leasing public property for business development;
- clearing land and constructing public utilities within the BDD;
- applying for and receiving capital grants and loans from federal and state agencies;
- borrowing money and issuing revenue bonds;
- hiring employees;
- using public funds for planning, and implementing plans;
- installing, repairing, constructing, or reconstructing public streets, utilities, buildings, works, fixtures, or other public site improvements; and
- creating a business development commission to oversee redevelopment activity.

For example, a municipality wanted to facilitate redevelopment of a one block area on the fringe of its business district. The area was occupied by taverns, adult entertainment establishments, liquor stores, and other marginal uses, but did not qualify as a TIF district. By designating the area as a business development district, the municipality was able to show a public purpose to support the issuance of bonds, the use of eminent domain to acquire the property, and the hiring of consultants to plan the redevelopment.

If the municipality wishes to levy the BDD sales tax, it must make adetermination that the area is "blighted," and that the area would not redevelop without public assistance. 65 ILCS 5/11-74.3-3(10). There are specific criteria that a BDD must meet in order for the BDD area to be considered "blighted." 65 ILCS 5/11-74.3-5. If these requirements are met, the municipality may levy an additional sales tax, up to 1% in 0.25% increments, in the BDD. This tax is collected by the Illinois Department of Revenue along with regular sales taxes, and remitted to the municipality. The proceeds may be used for improvements within the BDD; a portion of that tax may be transferred to an adjoining BDD.

A BDD is sometimes used as an alternative to a TIF district, when the BDD can be qualified as a "blighted area." The definition of blighted area in the BDD Act is less restrictive and complex that the definition in the TIF Act, and a BDD can accomplish many of the same objectives as a TIF district.

Connection Fees

New land developments often require a municipality to construct, expand, extend or improve its water and sewer system. In many situations, State law authorizes the municipality to recover its cost of such improvements by charging a "connection fee" to new users of the system. 65 ILCS 5/11-129-10, 5/11-139-8, 5/11-141-7, 5/11-150-1. Connection fees must be reasonable in relation to the cost to the municipality of constructing the system. The fees can include costs of not only line extensions, but treatment plants as well. Whenever new utility lines are installed, municipalities may require adjacent property owners to connect and pay the fee. If a municipality requires a developer to pay the cost of extending a water or sewer line, and the line is capable of serving additional users, the municipality may enter into a "Recapture Agreement" with the developer, to enable the developer to recover some of its costs. Recapture agreements are explained below.

Eminent Domain

Eminent domain refers to the power of the government to take private property for a public purpose. 735 ILCS 30/5-5-5. . The exercise of this power is also called condemnation which, in this context, has nothing to do with dilapidated or dangerous buildings (which is properly referred to as "demolition.")

The power to condemn land is inherent in a sovereign government and does not come from the United States Constitution. On the contrary, the Fifth Amendment to the United States Constitution actually restricts the use of eminent domain, by requiring the government to pay "just compensation" when it takes private property. Municipalities, both home rule and non-home rule, derive their power of eminent domain from the state.

As a tool for economic development, eminent domain enables the government to acquire ownership of land which is necessary for public improvements or facilities or, in some cases, where the land is to be conveyed to a private developer. For example, a new commercial development might require a new or expanded roadway for access. Or, a new fire station might be necessary to protect a newly-developing area of the community. If the owner of the land where such public facilities are to be located refuses to sell at a reasonable price, the government may bring the owner into court by a condemnation suit, where a jury will decide the fair market value of the land to be paid and the court will confirm title in themunicipality. In certain limited situations,

municipalities can use eminent domain to acquire land within or owned by another governmental entity.

The private owner can dispute the government's right to take the property. Such a challenge will usually focus on the purpose for which the land is being taken. If the purpose is for a public use, such as a street or a fire station, it will be difficult to convince the court that no public purpose is being served. However, if the government plans to take the land from one private owner and transfer it to another private owner, as often happens, the government will have to show that there is a significant benefit to the public. It has long been accepted that transfer of condemned property to a private owner does not, by itself, negate the public purpose behind the condemnation. But, there are rigid limitations of the condemnation power in such circumstances.

Taking of slums and blighted property for re-development by private enterprise is clearly a proper use of eminent domain. However, where the primary beneficiary of the transfer is the private enterprise, such as where condemnation simply enables an existing business to expand, incidental public benefit may not be enough to support the necessary finding of a public purpose. For example, a race track operator wanted to expand its facilities and needed more land to do so. A regional government development agency offered to use its eminent domain power to condemn part of an adjacent landfill site and sell it to the track. Expansion of the track would draw more spectators and generate more income for the businesses in the area. However, the Illinois Supreme Court held that this was not sufficient public benefit to justify taking property from one business and transferring it to another. *Southwester Illinois Development Authority v. National City Environmental, LLC*, 199 Ill.2d 225 (Ill. 2002). The outcome of this case might have been different if the expansion of the track had been part of the redevelopment of a large blighted area.

Since the passage of the Eminent Domain Act (735 ILCS 30/1-1-1) in 2007, specific guidelines have been established on how municipalities and other local governments exercise the power of eminent domain. If the exercise of the eminent domain authority is to acquire property for public ownership and control, then the municipality must prove that (1) the acquisition of the property is necessary for a public purpose and (2) the acquired property will be owned and controlled by the municipality or another governmental entity. 735 ILCS 30/5-5-5(b) However, if the exercise of the eminent domain authority is to acquire property for private ownership or control, or both, then the municipality must prove by clear and convincing evidence that the acquisition of the property for private ownership or control is (1) primarily for the benefit, use, or enjoyment of the public and (2) necessary for a public purpose. 735 ILCS 30/5-5-5(c). There are additional tests under the Eminent Domain Act for specific uses of eminent

domain authority, such the situation where the primary basis for the acquisition is to eliminate blight. 735 ILCS 30/5-5-5(d).

Where there is no issue about the government's authority to condemn, the most common question in an eminent domain case is the value of the land being taken. Under the Eminent Domain Act, the value of the property being taken through eminent domain is the fair cash market value of the property, which equates to the amount of money that a purchaser, willing, but not obligated, to buy the property, would pay to an owner, willing, but not obligated, to sell in a voluntary sale. 735 ILCS 30/10-5-60. This issue is decided by a jury, based on testimony from professional appraisers hired by the parties. There can be wide differences in appraisals of land value, depending on the methodology of each appraiser. The value of the property is determined as of the date the suit was filed. If the jury awards more than the government is willing to pay, the government may decide not to proceed with the condemnation, but it then must pay the attorney fees and court costs of the property owner.

Before a condemnation suit may be filed, the government must authorize use of eminent domain power and make a good faith offer to buy the property at a fair price. Thus, the government normally obtains an appraisal before filing suit in order to have a basis for negotiating a price.

Eminent domain litigation is complex and is heavily regulated by State law—the Eminent Domain Act. Only an experienced eminent domain attorney should handle such a case.

Impact Fees

Sometimes a new development is so extensive that existing municipal resources are inadequate to serve it. For example, the existing fire department equipment might be incapable of dealing with a new high rise office building, or a large shopping mall on the fringes of the community might necessitate a new fire or police substation. A new factory creating new jobs might attract so many new residents that a new school or park is necessary. One way to pay for the necessary new community services or facilities is through "impact fees" charged to the developer. 65 ILCS 5/11-12-5.1, 65 ILCS 5/11-12-8, 605 ILCS 5/5-904

Impact fees are usually cash payments from a developer to a municipality or other local government entity to offset the financial impact on the community of the new development. Some municipalities have adopted an impact fee ordinance which requires the payment of a fee, usually set according a schedule, as a condition of approval of a new subdivision, particularly a residential subdivision. Or, such fees may

be the product of negotiations between the developer and municipality. Municipalities must be careful not to get greedy about impact fees. The Illinois Supreme Court has ruled that a local government can force a developer to pay impact fees only for costs which are "directly and uniquely attributable" to the new development. *Northern Illinois Home Builders Association, Inc., v. County of DuPage*, 165 Ill.2d 25 (Ill. 1995). So, for example, the cost of a new village hall probably is not a proper subject for an impact fee unless the development project requires knocking down the old one.

Sometimes what a municipality wants from a developer is not cash, but a piece of land. If the development involves creation of a new subdivision, special rules allow the municipality to require construction of streets, sidewalks and other necessary public facilities on land which is usually then dedicated to the municipality. The municipality also can require the developer to reserve land for development as a school, park, or other public facility. The municipality, school district or park district then has one year to decide whether to buy the land. 65 ILCS 5/11-12-8.

Outside the context of a new subdivision, it is very difficult to force developers to provide land for public amenities without compensation. Requiring a developer to permanently maintain a portion of land in its natural state as a "preservation" or "scenic" area or to provide an easement for a public bike path or similar amenity for the benefit of the public has been held to constitute "taking" private property for a public purpose, a form of eminent domain, which is unconstitutional unless the developer is paid for the market value of the land.

On the other hand, most developers are willing to negotiate with municipal planners for the inclusion of public amenities in their plans. The community might be willing to trade a higher or more intensive degree of development on part of a site in exchange for more open space on another part, for example, or the municipality might agree to improve public right-of-way for the development if the developer will grant an easement for a sewer lift station, or some other public utility.

Property Tax Abatements

A municipality may abate any portion of its own real estate tax on certain types of property. 35 ILCS 200/18-165. Property tax abatement is a versatile tool that a municipality may use to encourage a business entity to establish, rehabilitate, or expand a business facility within the municipality. A written agreement normally provides that if the business entity moves or ceases business before a certain date, the abatement terminates and the abated tax must be repaid over a short period. A municipality may also abate taxes pursuant to a Redevelopment Agreement for property in a Tax Increment Finance district.

In order to abate any portion of its real estate taxes, a municipality must first determine the assessed value of all the property in the municipality. Then, a municipality may enact an ordinance by a majority vote of the corporate authorities that orders the county clerk to abate any portion of the municipality's taxes on specified real estate. The county tax collector then does not levy the designated municipal tax on that specified property.

Most property tax abatements are limited to commercial or industrial property. Property tax abatements are not available for residential property. Generally, in order for a commercial or industrial property to be eligible for property tax abatements, the commercial or industrial business must either be newly locating within Illinois or must be expanding a facility or the number of its employees at the facility, rather than simply locating from one municipality to another. 35 ILCS 200/18-165.

Additionally, most property tax abatements are limited to a period of ten years and a combined aggregate of $4 million from all taxing districts abating taxes for the same property (as other taxing districts are also empowered to abate property taxes). However, there are some classes of property that have different maximum abatements and time periods, including:

- commercial or industrial over 500 acres: $12 million and 20 years;
- academic or research property: $5 million and 15 years;
- senior housing: $3 million and 15 years;
- auto racing: no dollar limit and 10 years;
- horse racing: $5 million and 10 years.

While a tax abatement causes the taxing body to lose money in the short run, the objective is to strengthen the tax base in the long run by encouraging businesses to locate or improve their facilities in the community.

Recapture Agreements

A recapture agreement may be used to reimburse a developer for a pro rata portion of the cost of improvements required by the municipality, which benefit property or uses outside the development itself. 65 ILCS 5/9-5-1, 5/11-15.1-1. This might be a water line or sewer line or other facilities such as roadways and traffic signals. The municipality enters into a contract with the developer providing that the municipality will require additional users of the facilities within a described area outside the development to pay a fee for connection to or use of the facilities, which fees shall be reimbursed to the developer. A recapture agreement can provide an economic incentive to a

developer to put in larger or more extensive infrastructure improvements, knowing that some of the costs will likely be recovered as additional users access the infrastructure. A recapture agreement must be recorded with the county recorder of deeds so that all persons interested in the property are notified of the charge for the connection and use of the facilities constructed under the recapture agreement. 65 ILCS 5/9-5-2.

Suppose, for example, that a new subdivision requires that a new six inch water main be installed from the nearest connection point a mile away. The municipality expects that other subdivisions will be built along the intervening mile, but a six inch water main will not be large enough to serve all of the new developments. The municipality may require the first developer to build and pay for a twelve inch water main, on the condition that the municipality will force later developers to reimburse the cost of the excess capacity before connecting to the water main. Of course, the first developer is only entitled to recapture the incremental cost of the extra capacity, not the entire cost of the new water line.

Sales Tax Rebate Agreements (Economic Incentive Agreements)

Sales Tax Rebate Agreements, called "Economic Incentive Agreements" under the Municipal Code, provide an effective tool for municipalities to attract and retain businesses. A non-home rule municipality may agree to rebate any portion of retailers' occupation tax (sales tax) generated by a commercial redevelopment project over a specified time period. 65 ILCS 5/8-11-20, 5/8-11-21. However, the development must meet certain criteria before a municipality may enter into a sales tax rebate agreement with the developer. The Municipal Code requires that a municipality make specific findings regarding the condition of the property and the development in order to enter into the sales tax rebate agreement. 65 ILCS 5/8-11-20.

If the property that is the subject of the sales tax rebate agreement is vacant, then the municipality must find that (1) the property has remained vacant for at least one year, or (2) that any building located on the property was demolished within the last year and that the building was either non-compliant with building codes or that the building was unoccupied or underutilized for a period of at least one year. 65 ILCS 5/8-11-20(1).

If the property is developed, then the municipality must find that (1) the buildings on the property are no longer compliant with current building codes, or (2) the buildings on the property have remained less than significantly unoccupied or underutilized for a period of at least one year. 65 ILCS 5/8-11-20(2).

In addition to the required findings about the condition of the property, a municipality must make the following findings for all sales tax rebate agreements:

- That the project is expected to create or retain job opportunities within the municipality;
- That the project will serve to further the development of adjacent areas;
- That without the agreement, the project would not be possible;
- That the developer meets high standards of creditworthiness and financial strength as demonstrated by specific evidence (See 65 ILCS 5/8-11-20(6));
- That the project will strengthen the commercial sector of the municipality;
- That the project will enhance the tax base of the municipality; and
- That the agreement is made in the best interest of the municipality.

65 ILCS 5/8-11-20(3)-(9).

.

These findings are a prerequisite for a non-home rule municipality to enter into any agreement to share or rebate sales taxes with a developer, so they must not be overlooked. *Geisler v. City of Wood River*, 383 Ill.App.3d 828 (5th Dist. 2008).

A home rule municipality may establish its own criteria for sales tax rebate agreements, so long as it demonstrates a public purpose, such as attracting a major sales tax generating business to the community.

A typical rebate agreement provides for refunding a percentage of "new" revenue generated from the development, i.e., revenue in excess of that produced prior to the development project. Also, the nature of the improvements to be made in order to qualify for the rebate should be spelled out and a process created for documenting accomplishment of the tasks. Any such agreement should include a provision that the developer must repay the rebate if it moves, designates a "point-of-sale" outside the municipality, or ceases business within a given time. There are no statutory restrictions on the amount of sales tax that a municipality may agree to rebate. All rebate agreements must be reported to the Illinois Department of Revenue within 30 days after the agreement is executed. 65 ILCS 5/8-11-21.

In Illinois, a retailer with multiple stores can designate any one of them as the "point of sale" for all goods sold in all its stores. Sales tax is then paid only to the municipality in which the point of sale is located. Some such retailers used to threaten each municipality in which they have a store with loss of all sales tax, by shifting the point of sale to some other municipality which offered a rebate, unless the municipality agrees to kick back a large portion of the sales tax by way of a rebate. This practice pitted one municipality against another in a battle for sales tax revenue. Effective

January 1, 2004, Section 8-11-21 of the Municipal Code restricts the ability of municipalities to engage in this practice. Under Section 8-11-21, a municipality (both home rule and non-home rule) may not enter into a sales tax rebate agreement if (1) the taxes on those retail sales, absent the agreement, would have been paid to another unit of local government; and (2) the retailer maintains, within that other unit of local government, a retail location from which tangible personal property is delivered to purchasers, or a warehouse from which tangible personal property is delivered to purchasers. 65 ILCS 5/8-11-21. In 2013, a ruling by the Illinois Supreme Court (*Hartney Fuel Oil Co., v. Hamer*, 2013 IL 115130 (Ill. 2013)) further restricted the ability of retailers to artificially designate the "point of sale" to avoid paying sales taxes, and the Illinois Department of Revenue adopted rules ("Local Sourcing Rules") to implement the Court's decision. The tax must be paid in the municipality where the bulk of the business activity occurs.

Special Assessments

The Illinois Constitution empowers municipalities and counties to levy special assessments. Special assessments are similar to property taxes, but are levied in a specified geographical area and for a specified public improvement. The Local Improvement Act section of the Illinois Municipal Code (65 ILCS 5/9-1) spells out procedures for municipalities to levy special assessments to pay for construction of local public improvements. Generally, special assessments are utilized for public works projects such as roadways and infrastructure improvements (water, sanitary and storm sewer projects), but can also fund construction of alleys and sidewalks. The Act establishes a process whereby the municipality, through its Board of Local Improvements ("BLI"), determines the public improvements which are necessary within the municipality. Special assessments have become somewhat rare now, with many municipalities preferring to use special service areas instead.

Method of Financing

Imposing a special assessment requires the municipality to get approval from the circuit court. The property owners who are deemed to benefit from the particular improvement are assessed a proportionate share of the total cost of the improvement based upon benefit to the property. They are obligated to pay the municipality for their share in up to ten annual installments. Until payments are completed, the real estate remains impressed with a special assessment lien in favor of the municipality. Since no cash is immediately available for the project, the contractors, suppliers and vendors providing labor and services to construct the local improvement are paid with vouchers or negotiable bonds issued to them by the municipality. The vouchers or bonds are then usually sold by the contractors, suppliers, etc., at a discount for cash to a company

which specializes in the purchase of special assessment bonds. As and when funds are collected from the property owners, the bonds can be redeemed upon presentment to the municipality. The benefit to the municipality and the property owners of this method of financing an improvement is that the municipality need not utilize its own funds for the project. If a percentage of the benefit for an improvement can be attributed to the, "public," such as an intersection in a roadway or sewer lines which serve municipal buildings, the municipality can accept a "public benefit" assessment and repay the "loan" to itself in annual installments like any other assessee.

The Special Assessment Supplemental Bond and Procedures Act, 50 ILCS 460/1,recognizes recent changes in financial markets and practices by authorizing municipalities to issue special assessment bonds payable over 31 years and to include certain additional costs as part of the project cost. It also permits the BLI, in lieu of the court, to conduct all proceedings and take all actions otherwise performed by the court, if all owners of record consent to such alternative local procedure.

Initiation of Project

An improvement financed under the Act can be initiated either by recommendation of the Board of Local Improvements or by means of a petition from a group of property owners. Depending upon the size and type of governmental organization of the municipal body, the BLI is composed of appointed or elected officials or employees of the municipality. The Act requires that before a project is finally approved, the BLI must adopt a first resolution and then hold a public hearing pursuant to notice so that property owners have an opportunity to be heard regarding the nature and cost of the improvement. At the public hearing, the Director or Superintendent of Public Works and the municipal Engineer (or their equivalents) will present general information regarding the nature and cost of the project and the general design plans to be used. If the BLI is in favor of the project, it will submit its recommendation to the corporate authorities by a second "adhering" resolution for the passage of an ordinance authorizing both the improvement and the taking of all necessary steps for confirmation of the special assessment by the circuit court. It should be noted that the BLI can pursue a project whether or not the affected property owners approve of it. While it is ultimately better as a matter of policy to have the support of a majority, if not all, of the property owners who will be assessed a share of the cost for the project, the statute does not require their consent.

Court Proceedings

Following the passage of the ordinance authorizing the municipality to initiate the process of "making, levying and collecting" a special assessment local improvement, the

local government body initiates a court case by filing a petition in the circuit court. The petition asks the court to approve the project and the assessment roll, which identifies by legal description, tax number and title holder the various properties to be assessed and the amounts required to be paid by the participating property owners, as well as any property to be condemned for the project and an estimate of its value. Next, a court date is set for the confirmation hearing, and statutory notice is provided by means of publication and mail notice to all those property owners to be assessed. The primary purpose of the hearing is to enable those individuals upon whom the assessment is imposed to file objections to the project itself, the legality of the procedures followed by the municipality or the amounts levied against the owners, or to challenge the amount of "public benefit", if any, to be paid by the municipality. If objections are filed and cannot be resolved by agreement between the municipality and the objectors, a trial will be held. Objections to the benefit determination are heard by a jury. At that same hearing the municipality can seek to procure any easements or property rights needed to undertake the project, using its eminent domain power. Obviously, if the case is tried, the project could be delayed for several months, or longer.

Methods of Assessment

Generally speaking, the amount assessed against each property owner is determined by the cost of the project itself and the individual benefit received. Calculations of individual costs are most frequently based upon the front footage of the property immediately contiguous to the improvement and its percentage of the total front footage, converted into a dollar amount based upon the total project cost. Other methods may be used where the nature of the improvements varies or where front footage calculations alone would create an injustice. For example, adjustments can be made for "depth factors" in situations where a parcel is approximately the same width as others but is extraordinarily deep. Land which is otherwise exempt from property taxes is not exempt from special assessments, including land owned by governmental and religious organizations.

Collection of Special Assessments

After a special assessment has been approved by the court, the court clerk issues to the municipality a "warrant" for collection of the assessment. The municipality then must publish notice of the assessment and give written notice to each person on the assessment roll, requesting payment. When each person pays in full, the municipality issues a release of lien on the property. Delinquent assessments are dealt with in the same manner as unpaid property taxes.

Time Periods

There are numerous steps to be taken both prior to the initiation of the court proceeding and following the filing of the original petition requesting confirmation of the special assessment. Some of the procedures are quite technical but routine for the special assessment expert. Many of these steps, however, require approximately 30 days notice by newspaper publication and mailings to the affected property owners. Therefore, even if uncontested by the individual property owners, a special assessment can take at least six months from the BLI's first resolution to the start of construction. For example, after court approval of the assessment and selection of the contractor through bidding procedures, a notice of the award must be published and an opportunity offered to the owners to hire their own contractor. Consequently, in order to assure with some reasonable degree of certainty that a project can be bid and completed during the prime construction season, a project financed by special assessment taxation should be initiated in the late summer or early fall for implementation in the spring of the following year.

Special Characteristics

A number of characteristics unique to this financing mechanism should be mentioned. Because the contractors are paid not in cash but in vouchers subsequently sold to bond companies at a discount, the bids submitted by contractors for special assessment projects are generally inflated 10 to 20 percent to offset the discounted value of the vouchers. In addition, certain costs for engineering, administrative and legal services, as well as an interest reserve, are added to the construction estimate. Payment by the voucher and bond system, however, does permit financing when cash is not available. A benefit to assessed property owners is the opportunity to pay for their share over a period of 10 years. Although interest is imposed (at a maximum of 9%) as for any similar type of "loan," every property owner has the option of paying the entire amount assessed against the property, interest free, within the first 60 days following notice of the due date for the first installment. The same payment methods are likewise applicable to the municipality itself, if the municipality owes a share of the project cost because of a "public benefit" assessed against it by the BLI (or the court, following a trial.) For example, a municipality will often allocate as public benefit the proportional cost of constructing street improvements in an intersection which doesn't front any adjoining property. It should be noted that the Act authorizes municipalities to levy a public benefit tax not to exceed .05% for the purpose of funding the public benefit share.

Special Service Area Taxation

Municipalities are authorized by both the Illinois Constitution (Ill. Const. 1970, Art. VII, Sec. 7(6) and the Special Service Area Tax Law (35 ILCS 200/27-5, *et seq*.) to provide special services to particular areas of the community and to impose a special tax in those areas to pay for such services. This kind of financing enables municipalities to construct improvements or provide services to a limited area of the community and to levy a tax only in the area which benefits from the special service. The "special services" to be provided in a special service area can include all forms of services pertaining to the government and affairs of the municipality. As such, special service areas may be created for a broad array of physical improvements, such as storm water detention, flood basins, parking garages, streets, alleys,sidewalks, street lighting, plazas, and for a variety of services such as parking enforcement, snow removal and landscaping. Special service areas have been created in commercial areas to generate funds for promoting tourism, public transportation systems (*Grais v. City of Chicago*, 151 Ill.2d 197 (Ill. 1992), and even for the building and maintenance of shopping malls (*Coryn v. City of Moline*, 71 Ill.2d 194 (Ill. 1978). Curiously, the Act expressly authorizes special services areas for "weather modification." This provision may enable municipalities to use special service taxation for environmental protection purposes, such as control of air pollution.

Special service area tax revenues may be used to pay ongoing or recurring costs, such as for maintenance of a drainage facility or landscaping service; they may also be used to pay for capital costs, such as for building an enhanced drainage facility. They may also be pledged to pay for bonds issued to raise funds for a public improvement.

Tax Basis

A special service area tax is normally based upon the equalized assessed value of each parcel of land in the SSA. In this respect, it is similar to ordinary property taxes. But the tax may be based upon any other criterion which provides "a rational basis between the amount of the tax levied . . .and the special service benefit rendered." 35 ILCS 200/27-75. In this respect, an SSA tax can be similar to a special assessment. However, significant problems may arise in the collection of an SSA tax which is not based upon property value, and this method should not be used before consulting with county tax officials. An intergovernmental agreement may be developed to define the methodology of such tax collection and provide some compensation to the county for the work involved in making the determination of the amount of the tax.

Procedure

Compared to special assessments, the procedure for creating a special service area is relatively simple and inexpensive.

1. Proposing Ordinance. The formal process of creating a SSA begins with adoption of an ordinance "proposing" its creation. Before this "proposing ordinance" is enacted, decisions must be made about the boundaries of the proposed SSA (which must be contiguous), what special service is to be provided, whether bonds will be issued to be secured by the SSA tax revenue, and how much tax revenue will be required to pay for the service. An estimate must be made of the assessed value of the property within the proposed SSA, and a tax rate determined which is adequate to produce the required revenue. When the proposing ordinance is enacted, it must include

- a description of the boundaries of the SSA
- the maximum annual tax rate to be levied on the property in the area or, if the tax is based on anything other than property value, a special tax roll containing, (a) an explanation of the basis for calculating the tax, and (b) the amount of tax to be levied on each parcel
- a description of the special service to be provided
- if bonds are to be issued, the maximum amount of bonds, the maximum life of the bonds and the maximum interest rate of the bonds
- announcement of a date, time and place for a public hearing about the proposed SSA
- announcement that any interested person will have an opportunity at the hearing to comment or object to the special tax.

2. Notice. Once the proposing ordinance is enacted, notice must be given of the date, time and place of the public hearing. 35 ILCS 200/27-30. The public hearing must be held no less than sixty (60) days after the adoption of the proposing ordinance. Notice must be published in the newspaper not less than fifteen days prior to the hearing. Notice must be mailed, not less than ten days prior to the hearing, to the taxpayer of record for each parcel within the proposed SSA. Identifying the taxpayer of record is usually done by obtaining from the county assessor a duplicate tax bill for each property in this area. The notice must include specific information regarding the SSA (see 35 ILCS 200/27-25). It is normal to include a copy of the proposing ordinance in the mailed notice.

3. Public Hearing. The public hearing is normally conducted by the corporate authorities. Anyone may comment on any aspect of the proposed SSA. Written

objections may be filed by any interested person with the municipal clerk objecting to the SSA. 35 ILCS 200/27-35. The hearing may be continued, if necessary. No action is required by the corporate authorities, but they may, as part of the public hearing or at the first regular meeting thereafter, remove property from the proposed SSA, so long as the remaining area is still contiguous. At the conclusion of the public hearing, the corporate authorities may, but need not, call for the enactment of a second ordinance, the "establishing ordinance," described below.

4. Objection Petition. A proposed SSA may be blocked if, within sixty (60) days after the public hearing, a petition is filed with the municipal clerk, signed by 51% of the electors residing within the SSA and by 51% of the owners of all the land within the SSA. 35 ILCS 200/27-55. If such a petition is filed, the subject matter of the petition may not be proposed again by the municipality for two years. The municipal authorities are not required to assist in the petition process, but will necessarily be required to determine whether a petition meets the statutory requirements. If a petition is filed, criteria should be established to determine the validity of the petition. Issues which will arise include: What evidence of ownership will be acceptable to establish the total number, and identity, of owners as of the date of the public hearing, and thus, the number and identity of owners who must sign the petition? How will authenticity of signatures be verified? As to voters, generally the county clerk's roll of registered voters as of the date of the public hearing is used.

5. Establishing Ordinance. Following the public hearing, the corporate authorities must enact a second ordinance, the "establishing" ordinance, which finalizes all terms of the SSA, including boundaries, a description of the special services to be provided, the maximum tax rate or special tax roll, the duration of the tax if it is to end at some future date, and the amount, life and rate of any bonds to be issued. If the establishing ordinance is enacted before the expiration of the sixty day period for filing the objection petition, the ordinance should provide that it will not take effect until some date after that sixty day period, and then only if there is not a successful objection petition. The establishing ordinance must also include a legal description of the territory of the SSA, the PINs for the parcels located within the SSA, a map of the territory of the SSA, and a copy of the notice of the public hearing on the establishment of the SSA. 35 ILCS 200/27-40.

6. Recording. Within sixty (60) days of enactment, the establishing ordinance must be recorded with the county recorder of deeds. The establishing ordinance will be invalid unless it is recorded within this sixty (60) day window. 35 ILCS 200/27-40. The process of establishing the SSA is then completed.

Collecting: The Tax Levy Ordinance

Each year, the municipality must enact a tax levy for the SSA. The levy may not exceed the maximum amount stated in the establishing ordinance. The levy ordinance must be filed with the county clerk, as with all other tax levy ordinances. Collection of an SSA tax based on property value is handled exactly like all other property taxes. The SSA tax appears on each tax bill as a separate line item. However, the county tax assessor and collector may not be able, or willing, to collect a tax levied on a special tax roll rather than on assessed value of the property, leaving the municipality to devise another method of collecting the SSA tax, and resort to foreclosure proceedings if the tax is unpaid.

Modification of SSA

Once established, an SSA may be enlarged or the tax rate increased, by repeating the notice, hearing and ordinance process. 35 ILCS 200/27-50. Territory of not more than 1.5% of the total SSA may be disconnected from the SSA by petition of a majority of electors and owners filed in the circuit court, after a hearing and order of the court granting the petition. 35 ILCS 200/27-60, 35 ILCS 200/27-65.

Summary: Special Service Area or Special Assessment?

A special service area is generally the method of choice where all property within the area is to receive approximately the same improvements or services and each property is either assessed at a similar amount or the assessments vary in direct relation to the value of the benefit provided, and where a shorter time period for completion of the process is desired. If a territory is one of mixed uses or where one area is to get, for example, sewers and streets and another only sidewalks, then it will probably be necessary to utilize the somewhat more costly, lengthy and complicated special assessment process. Special assessment is also the better method when there is insufficient cash on hand to pay contractors, and where a large segment of the property to be benefited is tax exempt and so would not pay SSA taxes.

Special Taxes

In addition to property tax and sales tax, state law authorizes municipalities to levy non-property taxes on a variety of specific transactions. Some of these taxes may be useful in funding aspects of an economic development project. Among such taxes are

- Hotel operator's occupation tax, although proceeds are limited to promoting tourism and conventions (65 ILCS 5/8-3-14);

- Hotel use tax, although proceeds are limited to promoting tourism and conventions (65 ILCS 5/8-3-14a.);
- Sidewalk improvement tax (65 ILCS 5/11-84-1);
- Amusement taxes (65 ILCS 5/11-54-1, 65 ILCS 5/11-55-1);
- Automobile Renting Occupation Tax Act (65 ILCS 5/8-11-7);
- Automobile Renting Use Tax Act (65 ILCS 5/8-11-8);
- Motor Vehicle Leasing Tax (65 ILCS 5/8-11-11);
- Motor Vehicle Tax, or "wheel tax" (65 ILCS 5/8-11-4); and
- Utility Taxes (65 ILCS 5/8-11-2).

Home rule units can tax virtually anything except occupations, income, gross receipts or sales price. Note that some special taxes are administered and collected directly by the municipality. It is the responsibility of the municipality to enforce payment.

Tax Increment Financing

Tax increment financing is a method of raising funds to pay for redevelopment from the increase in property value caused by that redevelopment, and is expressly authorized under the Tax Increment Allocation Redevelopment Act. 65 ILCS 5/11-74.4-1, *et seq*. Tax increment financing "captures" the increase in property tax resulting from the improvements and channels the increased tax back into the project. The tax which is captured is not just the municipal portion of the tax bill, but the taxes levied by all the taxing districts in which the project is located: school districts, park districts, library districts included. Under tax increment financing the increased property taxes generated by the redevelopment, which would otherwise go the various taxing bodies, go instead to the municipality. The other taxing bodies do not benefit from the increased property values until the TIF expires, or unless accumulated TIF funds are declared by the municipality to be surplus, in which case the surplus funds are returned to the county collector for distribution to the other taxing bodies in proportion to their respective portion of the total tax bill.

Tax increment financing is one of the most powerful economic development tools that municipalities have at their disposal. Tax increment financing was created to allow municipalities to eradicate blighted areas by encouraging private investment in redevelopment projects. 65 ILCS 5/11-74.4-2.

A TIF project is created by action of the municipal authorities after feasibility studies, creation of a plan for redevelopment, a public hearing, a meeting of all affected taxing bodies, enactment of a series of ordinances and approval of an agreement with a developer. It is important to note that any elected or appointed municipal official or TIF

consultant who owns or controls an interest in any property within the boundaries of the proposed TIF district must disclose that fact and is prohibited from any involvement in consideration, creation or implementation of the TIF district. 65 ILCS 5/11-74.4-4(n).

When to Use TIF

A municipality initiates a TIF project when it identifies a vacant or deteriorated site which will, if it is developed, enhance the tax base and produce new tax revenue. The benefits of the redevelopment may extend beyond the boundaries of the TIF project itself if new businesses and other enterprises are attracted to the revitalized area. By definition, tax increment financing is used when the area would otherwise not be improved solely with private funds.

Eligibility

In order for redevelopment to proceed with tax increment financing it must be determined that the project is TIF eligible. There are three separate tests of eligibility.

1. Project Eligibility. The law requires that to begin a TIF development, the municipality must determine that the project would not take place without TIF funds. This is the "but for" test: But for the use of incremental tax revenue the site would not be developed. There are specific factors to be considered by the municipal authorities in making this determination.

2. Site Eligibility. The site of a TIF project must qualify as a "blighted area", a "conservation area" or "an industrial park conservation area". There are detailed criteria in the statute for defining these areas. 65 ILCS 5/11-74.4-3(a). Briefly, the factors characterizing a blighted area are that the buildings are dilapidated, obsolete, deteriorated, violate building codes, have excessive vacancies, have inadequate utilities, are overcrowded or the land is contaminated with hazardous material, is poorly planned, is in diverse ownership, is tax delinquent, the assessed value has declined for several years, the land contains quarries, mines, railroad right-of-way, is subject to chronic flooding, or is an illegal disposal site for construction, demolition or excavation material.

A "conservation area" is one which is not yet blighted but is likely to become so. Most of the buildings are at least thirty-five years old and the area has many of the same characteristics as a blighted area though to a lesser extent. 65 ILCS 5/11-74.4-3(b).

An "industrial park conservation area" must be within a designated area of higher unemployment and is a site suitable for manufacturing, industrial research or transportation facilities as defined in the statute. 65 ILCS 5/11-74.4-3(d).

3. Cost Eligibility. Only certain categories of development costs are eligible for reimbursement from incremental taxes. These are spelled out in the statute and include:

- Cost of studies, plans and professional services for architectural, engineering, legal, marketing and other services;
- Costs of marketing sites to prospective businesses, developers and investors;
- Costs of land acquisitions, site preparation, site improvements, rehabilitation or demolition of existing buildings, construction of public infrastructure;
- Costs of financing;
- Costs of job training and retraining projects;
- Certain interest costs incurred by a redeveloper;
- Costs for capital improvements necessary and directly resulting from the redevelopment project; and
- Costs mandated to be paid to school districts for their increased costs attributable to assisted housing units within the project up to 25% of the tax increment.

65 ILCS 5/11-74.4-3(q)

Specifically excluded from eligibility are costs of constructing new privately owned buildings, except for new housing units to be occupied by low income households as defined in the Affordable Housing Act.

Feasibility Study

The ordinances which the municipality enacts to formally adopt tax increment financing for a project must include findings that show the project is eligible for tax increment financing. In order to have a sound basis for those findings, the municipality should conduct a feasibility study, which results in a written report documenting the manner in which the project meets the statutory tests of eligibility.65 ILCS 5/11-74.4-4.1. It is almost always necessary–and is certainly advisable–to have such studies conducted by an independent consultant. In the event of a legal challenge to eligibility, the consultant's report and the testimony of the expert witnesses will be critical to the success of the project. If the project will displace residents from ten or more housing units or if the project area contains 75 or more inhabited residential units, a separate housing study is mandatory.

Redevelopment Plan

The statute requires the municipality to adopt a "redevelopment plan" (this is not the same thing as the "redevelopment agreement" discussed below). 65 ILCS 5/11-74.4-3(n). The plan is typically prepare by the TIF consultant along with the feasibility study. The plan must describe the project and include

1. An itemized list of estimated redevelopment project costs (the "project budget");

2. Evidence indicating that the redevelopment project area on the whole has not been subject to growth and development through investment by private enterprise;

3. An assessment of any financial impact of the redevelopment project area on, or any increased demand for, services from any taxing district affected by the plan, and any program to address such financial impact or increased demand;

4. The sources of funds to pay costs;

5. The nature and term of any debt obligations to be issued;

6. The most recent equalized assessed valuation of the redevelopment project area;

7. An estimate as to the equalized assessed valuation after redevelopment and the general land uses planned in the redevelopment project area;

8. A commitment to fair employment practices and an affirmative action plan; and

9. If the project will result in the displacement of ten (10) or more housing units, or if the project area contains seventy-five (75) or more inhabited residential units, the redevelopment plan must include a Housing Impact Study describing the plan for relocating the residents.

10. Estimated date of completion and retirement of obligations.

Procedures

Once a proposed redevelopment plan is completed, the municipality is able to begin the final process leading to creation of the tax increment finance district. The steps include:

1. Creation of Interested Parties Registry This is a list of persons or organizations which wish to be notified of any formal activities relating to the TIF process. Notice must be published in a newspaper that such a registry is available, and how to get on it.

2. Adopt Ordinance Authorizing Feasibility Study If a feasibility study is required, an ordinance must be adopted authorizing it to be prepared, including a housing impact study.

3. Publish Notice of Plan. Along with notice of the interested parties' registry, notice must be published that the redevelopment plan is available for inspection.

4. Give Notice of Housing Impact Meeting. If necessary (see next paragraph) send certified mail notice to taxing bodies and registered interested parties, and regular mail notice to residences in project area in both English and the predominant language in the area, if other than English, of Housing Impact Meeting date and place, boundaries of project area, purpose of the project, explanation of tax increment financing, and contact person.

5. Hold Housing Impact Meeting. If the project will displace residents from 10 or more housing units or if the project area contains 75 or more occupied housing units, hold a public meeting (not a hearing) at least 15 days after notice. Any interested person may be heard and submit written comments. The meeting is conducted by the corporate authorities or, more typically, by any designated board or official.

6. Adopt Resolution or Ordinance Setting Public Hearing The corporate authorities set a date and time for the required public hearing. Because of notice requirements, the hearing date should be at least sixty (60) days in the future. Typically, the date for the meeting of a Joint Review Board is also set by the corporate authorities at this point.

7. Mail Notice of Plan. Notice of the availability of the plan for inspection must be sent to all names on the registry, and to all residential addresses within 750 feet outside the boundary of the proposed redevelopment area.

8. Notice to Taxing Bodies. Not less than 45 days prior to the public hearing, affected taxing bodies and the Illinois Department of Commerce and Economic Opportunity must receive a copy of the plan, notice of hearing, and notice of a meeting of the Joint Review Board.

9. Convene Joint Review Board The Joint Review Board consists of a representative of each of the major taxing bodies in the project area, including the municipality, and a member of the public designated by majority vote of the other members. Typically, the mayor or village president recommends a person to be designated as the public member. For TIF projects involving housing units, the public member must be a resident of the affected housing. It is not unusual for some taxing bodies to decide not to send a representative to the JRB meetings. Thus, the JRB consists of those representatives who actually show up for meetings and there is no minimum number required for a quorum. The JRB must hold its first meeting not less than fourteen (14) nor more than twenty-eight (28) days after mailing of the notice. The JRB reviews the plan and other related TIF documents and, within thirty (30) days after convening, votes on a recommendation to the corporate authorities whether to approve the TIF project, and issues a written report. If the JRB recommends rejection, the municipality must meet and confer with the JRB. If differences cannot be resolved, the corporate authorities may nonetheless approve the TIF, but only by a 3/5 majority vote of the corporate authorities. The JRB also meets annually to review the TIF audit report.

10. Publish Notice of Public Hearing Notice must be published twice not more than thirty (30) nor less than ten (10) days before the hearing, of the time and location of the hearing, a description of the boundaries, and a description of the plan.

11. Mail Notice of Hearing Send notice by certified mail to each taxpayer of record for each parcel of land in the proposed redevelopment project area not less than ten (10) days before the public hearing. If the redevelopment plan involves a Housing Impact Study, also send notice to each residential address in the area.

12. Hold Public Hearing At the public hearing, the municipality presents the redevelopment plan and explains the proposed financing. All interested persons must be given an opportunity to comment and file objections

13. Introduce Ordinances Not less than fourteen (14) days nor more than ninety (90) days after the public hearing, the corporate authorities must consider

ordinances (1) approving the redevelopment plan and (2) designating the project area. A third ordinance (3) adopting tax increment financing is required. This ordinance is typically introduced along with the other two although it may come later. The ordinances must contain certain language which is critical to their validity and effectiveness.

14. Certify Initial Equalized Assessed Evaluation Immediately upon enactment, the three TIF ordinances must be sent to the County Clerk, who must immediately determine the equalized assessed value of each parcel in the project area. The total EAV of all property in the project area becomes the baseline used to measure incremental property taxes as the redevelopment takes place.

15. Annual Meeting and Reports Each year, as soon as the municipality's audited financial statements are available, the municipality must convene a meeting of the JRB, and thereafter file certain reports with the State Comptroller.

16. Redevelopment Agreement The typical TIF project involves a private developer who will carry out the actual redevelopment work and own or control the private property involved. A written agreement between the municipality and the developer is an essential component of the TIF project. It is a comprehensive contract which spells out in detail what work is to be done, when, where, how and by whom. The redevelopment agreement also sets out the financial plan for the TIF including the list of eligible costs for which the municipality will reimburse the developer with TIF funds. Often, the agreement provides for transferring ownership of the property to the developer at no cost or a below-market price, in exchange for the developer's promise to improve the land in accordance with the approved plan. Sometimes the agreement is not executed until after the developer has secured an anchor tenant for the project.

17. Reimbursement of Eligible Costs As the redevelopment project progresses, the developer will incur development costs and debt. Typically the developer is required by the redevelopment agreement to submit invoices and backup data to the municipality on a defined schedule seeking reimbursement of TIF-eligible costs and debt payments. Some qualified municipal officials, typically the engineer and finance director, are directed to review the developer's requests for payment to ensure that only eligible costs are paid, and then only to the entity legally entitled to receive reimbursement.

Closing a TIF District

A TIF district terminates after 23 years, unless it is closed early by the municipality or extended to 35 years by the State legislature. At the end of the life of the TIF, the municipality must pay off any remaining debt, disburse any surplus funds to the affected taxing districts, and close the books. The TIF Act is vague about the procedures for doing so and, in particular, about determining the exact date that the TIF expires. This is significant because until the municipality takes the necessary steps to close the TIF, tax revenue continues to be collected into the TIF fund. In *Devyn Corporation v. City of Bloomington,* 2015 IL App (4th) 140819 (Sept. 15, 2015), the Appellate Court brought some much-needed clarity to this issue, holding that expiration of the TIF district, and collection of TIF taxes, does not occur at the precise end of 23 years but, rather, only after the municipality has taken the required steps to close the books and notify the affected taxing bodies.

Enterprise Zones

In addition to the economic development tools that a municipality may offer directly, municipalities may consider applying for the creation of an enterprise zone through the State of Illinois.

The Illinois Enterprise Zone Act is designed to stimulate business and industrial growth and retention in depressed areas of the state through tax incentives and relaxed governmental controls. 20 ILCS 55/2. There are specific requirements that a proposed enterprise zone area must meet in order to be eligible for certification as an enterprise zone. 20 ILCS 6555/4. A county or municipality, or a group of municipalities or counties, may apply to the State to establish an enterprise zone. Once established, an enterprise zone can offer a wide array of state incentives for economic development, including sales tax exemptions, utility tax exemptions, investment tax credits, and also local incentives such as property tax abatements and fee waivers. The number of enterprise zones is limited, and there are specific deadlines to apply for the creation of a new enterprise zone, so a municipality should consult with their attorney to determine if an enterprise zone is feasible.

Cook County Tax Incentives

For municipalities in Cook County, there are additional property tax incentives that municipalities play a part in approving.

Cook County offers a tax incentive program that encourages private business investment, employment, and the revitalization and rehabilitation of property within the County. These incentives provide a reduction in property taxes for certain businesses for a specified time period. Importantly, Cook County requires any business applying for a property tax incentive to obtain the approval and support of the municipality where the property is located. These property tax incentives may provide an additional economic development tool to offer to potential developers.

Procedural Incentives

Municipalities may also employ procedural incentives to encourage economic development. These procedural incentives generally take the form of fee waivers or streamlined approval processes.

Municipalities impose fees upon developers for a wide variety of costs, such as professional consulting fees for engineers and attorneys, and permit fees for construction. For large scale developments, these fees can be significant, and offering to waive or reduce these fees can provide a significant incentive to a potential developer.

In addition to fee waivers, a municipality may offer a streamlined review and approval process for development projects. Many development projects require numerous steps before they can be finalized, such as the need to obtain zoning relief or approvals from multiple departments within a municipality. A municipality may agree to work with a developer to streamline the approval process as much as possible as an incentive. These procedural incentives can include the expedited review of plans, fast track permit processing, scheduling special meetings of zoning boards or plan commissions, combining preliminary and final approvals into one process, allowing separate approvals to proceed simultaneously, waiving the findings of fact period, or waiving the first or preliminary reading of an ordinance granting a developer approvals. A municipality should also review their existing application materials and code provisions to determine if there are any areas that can be revised to streamline the overall approval process

Conclusion

These are some of the most useful tools available to municipal officials who want to encourage economic development in their communities. Equipped with an understanding of what jobs these tools are suited for and what each can accomplish, elected and appointed officials will be able to have informed discussions with other officials, consultants and developers about the feasibility of particular projects. However, experienced financial and legal expertise is almost always necessary for the effective use

of these tools. Any municipality thinking about undertaking economic development should seek guidance and assistance from financial consultants, its regular legal counsel, and experienced special counsel.

Ancel Glink Zoning and Land Use Practice Group

The Ancel Glink Zoning and Land Use Practice Group is comprised of several dedicated attorneys representing many years of experience working in all areas of zoning, land use, land banks, and economic development on behalf of both public and private sector clients. We leverage our deep experience working with urban, suburban, exurban, and rural Illinois communities, representing the broadest array of socio-economic characteristics, to efficiently arrive at practical solutions to often complex development and redevelopment matters.

For information about any of our services, contact David Silverman, dsilverman@ancelglink.com or Julie Tappendorf, jtappendorf@ancelglink.com, telephone 312-782-7606, or visit our Web site: **www.ancelglink.com**