Incentives for Downtown Revitalization: Tax Increment Financing Districts, Chapter 380, and Other Tools

Susan Mead
Jenkens & Gilchrist, P.C., Dallas, Texas; J.D., Southern Methodist University, 1977; B.S., Trinity College, 1974.

I. Introduction

The days of massive public financial support for the construction of infrastructure north across the prairie to Oklahoma in support of suburban sprawl appear to be over. This reduction in federal and state government dollars available for expansion of infrastructure, not just in Texas but elsewhere, has sharply focused new attention on our downtowns. We now have the task of rebuilding our center cities not as single-use office centers but as multi-use twenty-four hour centers. This article will explore the statutory tools that are being used as incentives to bring our downtowns back economically and, as a result, socially.

II. Texas Enterprise Zone Act (Texas Government Code § 2303)

A. Background

The Texas legislature enacted the Texas Enterprise Zone Act (the “Enterprise Zone Act”) in 1983 as a means of assisting communities to create the proper economic and social environment to induce the investment of private resources in productive business enterprises located in severely distressed areas. The Enterprise Zone Act is specifically aimed at severely depressed or impoverished areas, whether urban or rural in character, and is intended to assist job intensive business, i.e., not the creation of new housing. Many of our downtowns in Texas qualify for this designation, since many of our downtowns are truly economically distressed. The criteria described under the Enterprise Zone Act are similar to the criteria provided in the Texas Tax Abate-

1. TEX. GOV'T CODE § 2303 et seq.
2. Id. § 2303.002.
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order by the nominating body; and (4) is an area of pervasive poverty, unemployment, and economic distress (which terms are given specific meanings tied to public reports on poverty, urban development action grants under federal law, median income of the residents, and establishment by a nominating government, to the satisfaction of the Texas Department of Commerce, that chronic abandonment or demolition of commercial or residential structures exists in the area, there have been substantial tax arrearages for commercial or residential structures existing in the area, substantial losses of business or jobs in the area, or substantial increases in youths under eighteen years of age arrested due to criminal activity in the area).

2. PROCEDURE

If the proposed area meets the criteria, the local governing body may nominate the potential enterprise zone by ordinance or order. To be valid, the ordinance or order adopted by the local governing body must be passed after a public hearing (although no notice requirements are given), and must include the cooperation of both municipality and county, if the property is located in the extraterritorial jurisdiction of a municipality, or partially located in a municipality and an unincorporated area of a county. The requirements of the ordinance or order are fairly specific. The ordinance or order must set forth: (1) a precise description of the area comprising the zone; (2) a finding that the zone meets the criteria listed in the Enterprise Zone Act; (3) provisions of economic incentives applicable to business enterprises in the zone at the election of the nominating body; and (4) a nomination of the area as an enterprise zone.

Once the ordinance or order has been passed, the staff of the local government must make written application to the Texas Department of Commerce to have the area certified as an enterprise zone. The application must include the items listed in the statute such as a certified copy of the ordinance or order nominating the proposed zone and a statement detailing any tax, grant, and other financial incentives or benefits to be provided by the municipality or county to business enterprises in the zone that are not provided throughout the municipality or county.

Upon determining that the area meets the criteria of the statute, the Texas Department of Commerce "shall negotiate with the nominating body for a designation agreement." Specific time limits apply to the

B. Judicial Treatment

Once again, judicial treatment of the Enterprise Zone Act is nonexistent. However, the cases cited under the Tax Abatement section of this article discussing "blighted" areas should shed some light on the potential treatment of cases under the Enterprise Zone Act. In particular, it can be expected that, given the specific criteria listed in the Enterprise Zone Act, judicial review of the designation of an area as an enterprise zone will require strict adherence to the statutory criteria. In addition, the incentives which make the enterprise zone attractive will not doubt be challenged on constitutional grounds, including equal protection and uniform taxation, not unlike previous challenges to Public Improvement Districts.

C. Statutory Authority

1. CRITERIA

An area of a municipality, county, or combination of these local governments may be designated as an enterprise zone if it: (1) has a continuous boundary; (2) is at least one square mile in size but does not exceed the larger of either: (a) ten square miles (exclusive of lakes, waterways, and transportation arteries); (b) or 5 percent of the area of the municipality, county, or combination of municipalities or counties designating the areas as an enterprise zone, but not more than twenty square miles (exclusive of lakes, waterways, and transportation arteries); (3) has been nominated as an enterprise zone by an ordinance or

5. Id. § 2303.102.
6. Id. § 2303.104.
7. Id. § 2303.105.
negotiation of such an agreement, and if the time limits are not met, the application is considered to be denied.\textsuperscript{8}

3. INCENTIVES

Once an area has been designated an enterprise zone, qualified businesses may seek designation as an enterprise project.\textsuperscript{9} The Texas Department of Commerce determines whether the business should be so designated; however, the qualified business must also make the request to the enterprise zone’s administrative authority. It is not entirely clear whether a business must be a designated enterprise project to qualify for incentives for which provision has been made in the Enterprise Zone Act, although it is implied. Suggested incentives include utilizing the TIF Act and Tax Abatement Act for projects in the zone.

In addition, a municipality may refund local sales and use taxes and may establish a program by which it reduces or eliminates any fees or taxes other than property taxes on a qualified business or qualified employee.\textsuperscript{10} The more salient local incentives include: (1) deferring compliance with subdivision and development ordinances and regulations, other than those governing streets and roads or sewer or water services; (2) giving priority to the zone for the receipt of urban development action grant money, community development block grant money, revenue bonds, or funds received under the Texas Job-Training Partnership Act; (3) adopting and implementing a plan for police protection in the zone; (4) establishing preferences in permit processes for businesses in the zone; (5) amending zoning ordinances to promote economic development in the zone; (6) waiving development fees for projects in the zone; (7) creating a local enterprise fund for funding bonds or other programs or activities to develop or revitalize the zone; (8) reducing utility rates charged by utilities owned by the municipality or county; (9) giving priority to persons or projects in the zone in issuing housing finance bonds; (10) giving priority and providing services to local economic development, educational, job training, or transportation programs that benefit the zone; and (11) selling real property owned by the municipality or county and located in the zone.

In addition to the local regulatory incentives, state agencies may exempt qualified businesses, qualified property, qualified employees, and neighborhood enterprise associations from state regulations, if the exemptions are consistent with the purposes of the Enterprise Zone Act and with the protection and promotion of the general health and welfare.\textsuperscript{12} A governing body of an enterprise zone or qualified business or qualified employee is to be given preference over other eligible applicants for grants or loans that are administered by a state agency under certain conditions, including that 50 percent of the loan be expended for the direct benefit of the enterprise zone and that the purpose of the loan is to promote economic development or to construct, improve, extend, repair, or maintain public facilities within the community.\textsuperscript{13} State and local governments may also sell surplus buildings or vacant lands within the enterprise zone under certain restrictions, but exempt them from the public bidding requirement contained in other statutes governing the sale of public property.\textsuperscript{14}

III. Texas Tax Increment Financing Act (Texas Tax Code Ch. 311)

A. Background

Tax Increment Financing (TIF) is a flexible statutory tool for public/private partnership arrangements. Most downtowns in Texas now have aging infrastructure and updated facilities are mandatory in order to attract new development. The Act is premised on the assumption that a new development or redevelopment project in a particular area (the “TIF District”) will result in both increased real property values and an increased tax base. Basically, the “tax increment” is the difference between the amount of taxes that would be raised from the completed project and the amount of taxes by the property generated prior to establishment of the TIF District and the subsequent development or redevelopment. As the property owner continues to pay the taxes, the portion of the taxes above the base are deposited into a special tax increment fund (a “TIF Fund”) that can be used to pay for public improvements, which may include site acquisition, facade easements, and other innovative redevelopment needs. The use of a specific TIF historic fund is limited by the state statute only to specific uses or specific improvements. Meanwhile, the municipality and all other taxing entities continue to receive tax revenue based on the pre-construction base year in which the district was established. When all of the project costs have been paid, the district dissolves and the taxing districts then directly benefit from the increased property values\textsuperscript{15} and taxes paid.

\textsuperscript{8} Id. § 2303.107(e).  
\textsuperscript{9} TEX. GOV'T CODE § 2303.404.  
\textsuperscript{10} Id. §§ 2303.505, 2303.506.  
\textsuperscript{11} Id. § 2303.511.  
\textsuperscript{12} Id. § 2303.501.  
\textsuperscript{13} Id. § 2303.503(a).  
\textsuperscript{14} TEX. GOV'T CODE § 2303.513.  
\textsuperscript{15} Christina G. Dudley, Comment, Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast, 54 UMKC L. REV. 77 (1985).
TIF originated in California in 1952\(^\text{16}\) as a way for municipalities to: (1) generate their local share of federal matching grants; and (2) recoup the costs of acquiring and clearing a redevelopment site as part of an effort to encourage redevelopment of blighted areas by the private sector.\(^\text{17}\) More recently, TIF has become a vehicle “designed to aid cities and towns in financing public improvements”\(^\text{18}\) in light of diminished federal grants available to municipalities. In this respect, the municipality itself is the recipient of the funds generated by the TIF program. Today, several states have passed legislation that allows the private sector developer to utilize TIF Funds through a redevelopment agency to pay project costs. Because the economy demands more creative methods of funding urban development projects, TIF enabling legislation is being amended to authorize the use of funds in a broader spectrum of situations. For example, the Tax Increment Financing Act of 1981,\(^\text{19}\) as amended (the “TIF Act”), was amended in 1983 and again in 1987 to allow reinvestment zone designation for areas designated as local or state enterprise zones under the Texas Enterprise Zone Act,\(^\text{20}\) thus broadening the scope of application for TIF in Texas. However, the combination of the over-leveraging of the California type of TIF and the crash of real estate values in the late 1980s, which resulted in insufficient increment to repay TIF bonds, has led to a very conservative use of the tool in Texas. Typically, the municipality has asked the developer to loan the improvement cost to the TIF fund with the expectation of repayment with interest when TIF increment funds are available. However, in the last year, several Texas cities, Dallas and Houston, specifically, have begun to use “on the behalf of” corporations, created by the municipality, to facilitate restoration of historic sites and environmental clean-up of sites using TIF increment funds.

B. Judicial Treatment

The validity of TIF legislation and its practical application has been challenged in a number of states.\(^\text{21}\) The claims of invalidity have focused on several constitutional issues including equal protection violations,\(^\text{22}\) due process challenges,\(^\text{23}\) public purpose challenges,\(^\text{24}\) and unlawful delegation of authority.\(^\text{25}\) Notwithstanding these challenges, TIF has consistently been held constitutionally valid.\(^\text{26}\)

The two Texas cases involving the TIF Act\(^\text{27}\) have focused on judicial interpretation of statutory language, rather than constitutional questions. In Lampson v. City of Beaumont,\(^\text{28}\) the city sought judicial determination as to the proper year for determining the tax increment base for a TIF project. In another case, El Paso County Community College District v. City of El Paso,\(^\text{29}\) the court was asked to determine whether an independent school district was a “political subdivision” within the meaning of the constitutional provision\(^\text{30}\) governing TIF in Texas.

In El Paso, the city brought suit for a declaratory judgment to validate its authority to issue tax increment bonds. The ordinance in question designated the city’s central business district as a TIF District. The project plan called for improvements to parking facilities and the rerouting of several existing streets, but no project funds were to be expended for any educational purpose. Other governmental entities were included in the tax increment fund, including the El Paso Independent School District and the El Paso County Community College District.

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22. See Tribe v. Salt Lake City Corp., 540 P.2d 499 (Utah 1975); Richards v. City of Muscatine, 237 N.W. 2d 48 (Iowa 1975). The courts in both cases rejected arguments that taxpayers outside the project area would be paying a disproportionate share of the city’s financial burden during the life of the project.


25. See Metropolitan Development & Housing Agency v. Lecch, 591 S.W. 2d 427 (Tex. 1979); State ex rel. Schneider v. City of Topexa, 605 P.2d 556 (Kan. 1980); City of Sparks v. Best, 605 P.2d 638 (Nev. 1980). Most courts have rejected delegation of authority challenges and upheld delegation by the state legislature of authority to tax. Cf. Miller v. Covington Development Authority, 539 S.W. 2d 1 (Ky. 1976). The Kentucky Supreme Court held that legislative decision-making powers were improperly delegated to the local agency.

26. See cases cited infra note 68.


Representatives of the school district argued that the city ordinance establishing the reinvestment zone was unconstitutional because it allowed the city to pledge and use ad valorem tax revenues of the school district for noneducational purposes. Additionally, the school district argued that it was not a “political subdivision” within the meaning of the provisions of Article 8, § 1-g(b) of the Tax Increment Financing Act. The court of appeals held that

within the terms of tax increment financing as authorized by Art. VIII, § 1-g, and as enunciated by the Supreme Court, an independent school district is not a political subdivision, and tax revenues belonging to such an independent school district cannot be pledged for the repayment of tax increment financing obligations.

The court based its holding on several Texas judicial decisions which have held that public school funds may be expended only for purposes strictly necessary in the public schools and that the legislature is without power to devote the funds to any purpose other than education.

The court’s holding that school district tax revenues may not be captured and funneled into the tax increment fund impaired the revenue generating power of TIF in Texas. In Dallas County, for example, school district and junior college taxes represented nearly 40 percent of the total taxes collected in both 1985 and 1986. With the decision in El Paso, a major source of TIF revenue in Texas was lost. On appeal, the Supreme Court overturned the decision and found that the school district’s revenues are subject to capture.

Due to amendments, the TIF Act provides in section 311.013(b)(1) that local governments can capture school district funds and funds of other political subdivisions. While permitting taxing units which would otherwise be subject to this capture to contract to pay the funds to another political subdivision, the statute provides that:

(b)(1) each taxing unit shall pay into the tax increment fund for the zone an amount equal to the tax increment produced by the unit, less the sum of: (1) property taxes produced from the tax increments that are, by contract executed before the designation of the area as a reinvestment zone, required to be paid by the unit to another political subdivision.

31. El Paso, 698 S.W.2d at 252.
35. However, the case was overruled on appeal. See City of El Paso v. El Paso County Community College District, 729 S.W.2d 296 (Tex. 1986).

Hence, the school districts, and all other taxing entities for that matter, must execute an agreement providing for the level of contribution of their tax dollars to the TIF Fund.

C. Statutory Authority

The Texas legislature enacted the TIF Act of 1987 to aid the financing of private sector development in certain “reinvestment zones.”

1. CRITERIA

Areas designated under the TIF Act as “reinvestment zones” are eligible to benefit from a tax increment fund established to promote the development or redevelopment of the area so designated. The local government must, however, determine “that development or redevelopment [of the area] would not occur solely through private investment in the reasonably foreseeable future.” The area must either:

(1) substantially arrest or impair the sound growth of the municipality creating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of (A) a substantial number of substandard, slum, deteriorated, or deteriorating structures, (B) the predominance of defective or inadequate street, sidewalk, or street layout; (C) faulty lot layout in relation to size, adequacy, accessibility, or usefulness; (D) insanitary or unsafe conditions, (E) the deterioration of site or other improvements, (F) tax or special assessment delinquency exceeding the fair value of the land, (G) defective or unusual conditions of title, or (H) conditions that endanger life or property by fire or other cause; (Typically these conditions are easily found in and around downtown areas.)

(2) be predominately open and, because of obsolete platting, deterioration of structures or site improvements, substantially impair or arrest the sound growth of the municipality; (again these characteristics are found in and around downtowns) or

(3) be in a federally assisted new community, located in the municipality or in an area immediately adjacent to a federally assisted new community; or

(4) be an area described in a petition requesting that the area be designated as a reinvestment zone, if the petition is submitted to the City Council by the owners of property constituting at least 50 percent of the appraised value of the property in the area.

Designation as “a local or state-federal enterprise zone under the Texas Enterprise Zone Act” as a qualifying criterion (former section 311.005(a)(4)) was repealed by the legislature in 1989.

37. Id. § 311.002(a).
38. Id. § 311.002(a)(1).
39. Id. § 311.002(a)(2).
40. Id. § 311.002(a)(3).
41. TEX. TAX CODE § 311.005(a)(5).
42. Id., Historical and Statutory Notes.
2. PROCEDURE

In addition to the above criteria, local governments wishing to designate a given area as a reinvestment zone must give sixty days’ written notice to each taxing entity that levies real property taxes in the proposed zone of its intent to establish the said zone, unless the area has already been designated as an enterprise zone under Government Code ch. 2303. The notice must include proposed boundaries of the zone, tentative plans, and an estimate of the general impact on property values and tax revenues. A formal presentation is to be given to the governing bodies of the county and school taxing units, which are required to appoint representatives to meet with the local governments within fifteen days after the required notice is given. Prior to adopting an ordinance to establish a reinvestment zone, the local government must prepare and distribute to the taxing entities concerned a preliminary reinvestment zone financing plan. It must also hold a public hearing on the adoption of the zone, with a chance for interested parties to speak for or against, and provide a reasonable opportunity for owners of property within the proposed zone to protest the inclusion of their property in the zone. At least seven days before the date of the hearing, notice must be published in a newspaper of general circulation in the municipality.

3. ESTABLISHMENT

The ordinance creating the reinvestment zone must make provision for the creation of a board of directors, boundaries of the zone, that the zone take effect immediately upon passage of the ordinance, a termination date, the TIF District name, establish the TIF fund, and state findings that the improvements will significantly enhance the value of all taxable real property in the zone and that the area meets the criteria for creation of a reinvestment zone under section 311.005. Each taxing entity is required to pay into the TIF Fund an amount equal to the tax increment produced, less any taxes required by prior contract to be paid and less a portion, not to exceed 15 percent, of the tax increment provided by the zone’s financing plan, or a larger portion pursuant to an agreement between the taxing unit and the municipality. Where bonds are not issued, property is not acquired, or construction of improvements has not commenced, pay-over requirements may not exceed three years. The municipality may issue tax increment bonds, to be made payable solely from the proceeds of the TIF Fund.

4. RESTRICTIONS

The TIF funding provided by the TIF Act is unavailable if more than 10 percent of the privately owned property within the zone is used for “residential purposes,” unless the zone was created pursuant to a petition by the property owners. The TIF funding is unavailable in all cases if the total appraised value of taxable real property in the proposed zone and in existing zones exceeds 15 percent of the current total appraised value of taxable real property in the municipality and in the industrial districts created by the municipality.

In addition, if a TIF District is designated pursuant to a petition by property owners and is located in a county with a population of 2.1 million or more, the plans for such district must provide (i) that at least one-third of the surface area of the district be dedicated to residential housing, and (ii) that at least one-third of the tax increment of the TIF District be used to provide affordable housing during the term of the district. This is known as the Houston provision and applies only when the TIF is created by petition in that jurisdiction.

Finally, the TIF District must establish programs to encourage participation of disadvantaged businesses, such as those owned by minorities and women.

D. 1997 and 1999 Amendments

The 1997 and 1999 amendments to the TIF Statute are limited in scope. Basically, the legislature clearly restated that designation of an area as an enterprise zone under Government Code ch. 2303 fulfills the hearing and procedural requirements of designation as a reinvestment zone. Another amendment to section 311.010 provided for the regulation of the use of land by the imposition of restrictions or covenants as well as the use of increment funds to replace housing or places of public

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43. Id. § 311.0031.
44. Id. § 311.003(a).
45. Id. § 311.003(f).
46. Tex. Tax Code § 311.003(g).
47. Id. §§ 311.003(b) and 311.011.
48. Id. § 311.003(c).
49. Id. § 311.003(c).
50. Id. § 311.004.
52. Id. § 311.013(d).
53. Id. § 311.012.
54. Id. § 311.006(d)(1) and § 311.006(e). "Residential purposes" is defined by § 311.006(d) of the Act as being property "occupied by a house having fewer than five living units..."
55. Id. § 311.006(a)(2).
57. Id. § 311.0101.
assembly, in or out of the zone. The more substantive amendments, are indirect and found in the school funding wealth sharing amendments, limiting school districts’ participation in a TIF after September 1, 1999.  

IV. Public Improvement District Assessment Act  
(V.A.C.S. Article 1269j-4.12)

A. Background

Public Improvement Districts in Texas have been utilized since the passage of the state enabling legislation, known as the Public Improvement District Assessment Act (as amended, the “PID Act”), V.A.C.S. art. 1269j-4.12, in 1977, as amended in 1983, 1987, and 1989.  

Similar to the special assessment district, which is widely employed in many states, the Texas equivalent was named a Public Improvement District (PID). As the name reflects, the original statute restricted the use of funds to capital improvements. A 1983 amendment, however, permitted, among other items, the funding of special supplemental services for improvement and promotion of an area (such as advertising, health, safety, and cultural enhancement) through a PID.

The PID performs the same functions as a special assessment district, and for the purpose of this analysis the two terms are synonymous. The PID is a funding mechanism created for the sole purpose of financing improvements and/or services that will benefit a defined, but limited, geographic area of a municipality and/or a municipality’s extraterritorial jurisdiction (ETJ). A special assessment is levied against a piece of property because that property has theoretically reaped a benefit from some public improvement initiated by the local government. Typically, the improvements are financed by the sale of bonds which are secured by the assessments.

The supporting theory behind assessments is that parcels that are similarly benefited should be similarly burdened. The dollar amount of an assessment is therefore apportioned according to the degree of benefit received, which may result in the assessment varying in proportion to the proximity of the assessed parcels to the improvements. An assessment formula may be based on a variety of measures, includ-

64. See Lance de Haven-Smith, Special Districts: A Structural Approach to Infrastructure Finance and Management, in The Changing Structure of Infrastructure Finance 61 (J. Nicholas ed.).
66. Id. 752.
68. Id.
It should be remembered, however, that the PID assessment is an additional tax, so the tool is not viable as an incentive for encouraging development that otherwise would not occur. For example, an additional tax on the land used for housing in or around a downtown would only serve as a disincentive when urban land prices already make housing economically difficult to achieve. There is disagreement as to whether a PID ordinance can exempt a certain type of property or use, housing for example, from the special assessment.

B. Judicial Treatment

The concept of special assessment has long been validated by the judiciary. The foundation for the power to levy special assessments is the special benefit which the object of the assessment confers on the assessed property. Thus, the courts have continually held that without the foundation of a special benefit, the right to levy the assessment must fail.

The distinction between special and general benefits has been the subject of much litigation throughout the years. The general view is represented by the following:

Statutes and case law distinguish between “special” and “general” benefits from public improvements. Although precise definition of these words is difficult, general benefits seem to be those that are so diffused throughout a community that they cannot easily be ascribed to particular parcels. “Special” benefits are those focused on parcels near the improvements.

Ultimately however, whether an improvement confers special or general benefits within the contemplation of the statute has been construed as a question of fact to be determined by looking at the circumstances of each case.

In addition, it is generally conceded that the determination of special benefits is a legislative function. As such, the determination is subject to judicial review only if it is clear that the determination was arbitrary, fraudulent, or a palpable and gross abuse of legislative authority.

69. See, e.g., Craighill v. Lambert, 168 U.S. 611 (1898); Higgins v. Bordages, 31 S.W. 52 (Tex. 1895).
72. Walters v. City of Tampa, 101 So. 227 (Fla. 1924).

Further, even if an assessment is deemed to be a “special” assessment, such assessment will be valid only if the amount of the assessment does not exceed the special benefit to the property. This issue of valuation was addressed by the U.S. Supreme Court in Village of Norwood v. Baker where it stated that “exact equality of taxation is not always attainable; and for that reason the excess of cost over special benefits, unless it be of a material character, ought not to be regarded by a court of equity when its aid is invoked to restrain the enforcement of a special assessment.” Thus, the general rule is that a method of assessment cannot be arbitrary, and must have some relation to the benefit conferred.

C. Statutory Authority

As previously stated, the Texas legislature enacted the PID Act in 1977. As the name suggests, the statute as originally enacted restricted the use of PID funds to expenditures for capital improvements. Subsequent amendments in 1983 and 1987, however, permit the funding of special supplemental services and transit stations, respectively, through a PID, thus increasing the opportunities for utilizing this financing tool.

1. CRITERIA

The PID is intended to permit construction of improvement projects that confer a special benefit on a definable part of the municipality or the municipality’s ETJ. The project may include, among other things, acquisition, improvement, widening, narrowing, closing, or rerouting of streets or sidewalks; landscaping; acquisition of real property for an authorized improvement; special supplemental services to improve and promote the PID; and expenses of establishing, administering, and operating the PID.

2. PROCEDURE

A PID may be created by ordinance by the local government upon receipt of a properly verified petition requesting the same and which

77. Id. at 279.
78. 14 McQUILLAN, MUNICIPAL CORPORATIONS § 38.02.
80. Id.
83. Id.
contains signatures representing (1) either more than 50 percent of the property owners or more than 50 percent of the taxable land area and (2) more than 50 percent of the appraised value of the taxable real property, including the value of structures and other improvements, within the area.  

3. ESTABLISHMENT

a. Determining Ownership

Although a number of informational sources, such as market analysis and research firms, compile the data listed above, the County Appraisal District should not be overlooked when gathering this information. The level of detailed information required is not easily secured through the tax offices because it is not normally compiled in this form for public use. However, much, if not all, of the required information will be collected and stored by the County Appraisal District for use in calculating appraised and assessed values.

Whatever informational sources you choose, you will undoubtedly discover that much of the available data is outdated in terms of actual property owners of record, improvements built or begun within the year, recent changes in use of the property, and recent replats (which may mean slightly reduced land area of the property, due to dedications of right-of-way normally secured through the replat process). To assist you in updating this information, you should consider several alternative methods of acquiring relevant information, including, for example: (i) contacting past owners indicated on the tax rolls to determine chain of title; (ii) contacting realtors to locate new owners; (iii) consulting leasing guides for actual square footage of recent developments; and (iv) checking city tax plats or recorded county plats for the most recent information on replats including the area of newly dedicated private right-of-way or newly abandoned public right-of-way.

b. Drafting the Petition

The statute lists items that should be addressed in the petition; including, for example, the nature of the proposed improvement, the boundaries of the assessment district, the proposed method of assessment and the concurrence of the parties signing the petition.

84. Id. § 372.005.
85. Id.
86. Id. § 372.012.
87. TEX. LOC. GOV'T CODE ANN. § 372.005.

88. Id. § 372.007.
89. Id. §§ 372.009, 372.012.
90. Id. §§ 372.010, 372.011.
91. Id.
92. TEX. LOC. GOV'T CODE ANN. § 372.011.
93. Id. §§ 372.013, 372.015.
94. Id.
e. Calculation of Assessments

The assessments may be calculated equally per front foot or per square foot of property, and may include or exclude the value of structures or improvements existing on the property.95 A proposed assessment roll must be filed with the City Secretary, and must be open for public inspection.96 The City Council may approve the proposed assessment roll after holding a public hearing to consider the same,97 with notice of the hearing required to be published at least 10 days before the public hearing and mailed to individual property owners within the PID as soon as the proposed assessment roll is filed with the City Secretary.98

The maximum interest rate which may be charged on assessments is one-half of one percentage point above the actual interest rate being paid on the public debt which is being used to finance the improvements and services.99 All assessments are considered liens against the property until paid, and the owners of assessed properties are entitled to pay the entire assessment against their property, with accrued interest to date of payment, at any time.100

f. Accounting Procedures

When the PID is established, a separate improvement district fund must be created for it in the City Treasury, with all proceeds from the sale of bonds, warrants or notes, and all other sums appropriated to the fund, to be credited to the fund.101 If any balance is left in the fund at the completion of the improvements, it is to be transferred to a fund established for the retirement of the bonds.102

4. RESTRICTIONS

There are statutory restrictions on the use of special assessments. First, the assessment plan must provide that at least 10 percent of the cost of the improvement be paid by special assessment against the property in the PID.103 Where there is municipality-owned property within the PID, the municipality is responsible, by statute, for payment of assessments.104

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95. Id.
96. Id. § 372.016.
97. TEX. LOC. GOV'T CODE ANN. § 372.016
98. Id.
99. Id. § 372.018.
100. Id.
101. Id. § 372.022.
102. TEX. LOC. GOV'T CODE ANN. § 372.022
103. Id. §§ 372.013, 372.014.
104. Id.
105. Id. § 372.025.
106. Id. § 372.026.
107. TEX. LOC. GOV'T CODE ANN. § 372.026
108. Id.
109. Id. § 312.205.
and desired use, for example, downtown housing or factories in a high unemployment area. In contrast to the TIF, the payment for the specific improvements by the property owner would occur initially, but the property taxes may be abated for a number of years after the improvement is installed. In an abatement program, specific improvements by the property owner are likely to be constructed on private rather than public property. The municipality may, however, find the need to agree to the upgrading of certain public infrastructure as part of the abatement agreement. For example, the City of Dallas' Intown Housing Program (downtown and one mile beyond) includes tax abatement, fee rebates, and infrastructure cost participation.

B. Judicial Treatment

Tax abatement as a tool has been used in several states other than Texas, and more recently has found its way into the Texas statutory scheme. Because tax abatement for redevelopment projects or public land-use projects is relatively new in Texas, judicial treatment of such statutes is nonexistent. However, cases from other jurisdictions are instructive.

Cases dealing with “blighted areas” have upheld the use of tax abatement in redevelopment of those areas. However, cases dealing with blighted areas have also pointed out the need to comply strictly with state and local legislation to accomplish the desired result. In Weehawken Environment Comm., Inc. v. Township of Weehawken, the Superior Court of New Jersey held that the town had failed to adequately review the area subsequently declared to be blighted for the specific factors described in the legislation. A common issue discussed in these cases is the uniformity requirement of the taxing properties. Cases such as Weehawken indicate the heightened scrutiny received by properties given preferential tax treatment.

C. Statutory Authority

The Texas Legislature enacted the Texas Tax Abatement Act of 1961 (as amended, the “Tax Abatement Act”), in the same year that TIF was approved. The Tax Abatement Act was amended in 1987 and entitled the Property Redevelopment and Tax Abatement Act, enabling the governing bodies of municipalities to again aid the private sector by allowing abatement to occur in certain reinvestment zones.

1. CRITERIA

Areas designated under the Tax Abatement Act as “reinvestment zones” are eligible to benefit from tax abatement. However, the local government must determine that the area to be designated must: (1) substantially arrest or impair the sound growth of the municipality creating the zone, retard the provision of housing accommodations, or constitute an economic or social liability and be a menace to the public health, safety, morals, or welfare in its present condition and use because of the presence of specified factors found in the TIF Act (same as TIF criteria); (2) be predominantly open and, because of obsolete platting or deterioration of structures or site improvements, or other factors, substantially impair or arrest the sound growth of the municipality; (3) be in a federally assisted new community located in a home rule municipality or in an area immediately adjacent to the federally assisted new community; (4) be in an area which meets the requirements for federal assistance under Section 119 of the Housing and Community Development Act of 1974 (42 U.S.C. § 5318); (5) be in an area other than the TIF Act, encompass signs, billboards, or other outdoor advertising structures designated by the governing body of the incorporated municipality for relocation, construction, or removal for the purpose of enhancing the physical environment of the municipality; (6) be in an area designated as a special use zone or a primary location for major investment in the area; or (7) be designated an enterprise zone under the Texas Enterprise Zone Act, Government Code ch. 2303 (same as TIF criteria).

2. PROCEDURE

If an area meets the criteria for a reinvestment zone, the governing body must deliver to the presiding officer of the other taxing units in which the property is located written notice that the municipality intends to be a party to a tax abatement agreement, with a copy of the proposed agreement, no later than seven days before the date on which the municipality will enter into an agreement. A public hearing must


114. Id. § 312.202(a)(2).

115. Id. § 312.202(a)(3).

116. Id. § 312.202(a)(4).

117. Id. § 312.202(a)(5).

118. Id. § 312.202(a)(6).

119. Id. § 312.201.

120. TEX. TAX CODE ANN. § 312.201(d). §§ 1, 2 of Acts 1987, 70th Leg., Chap. 423, purport to add subsection (f) to § 2 and amend subsection (b) of § 5, respectively.
also be held on the designation with a finding that “the improvements sought are feasible and practical and would be a benefit to the land to be included in the zone and to the municipality after the expiration of an agreement entered into.” Notice of such hearing must be published in a newspaper of general circulation and delivered in writing to the presiding officer of each taxing unit at least seven days before the hearing.

3. ESTABLISHMENT

A taxing unit, i.e., city, town, county, or school district, may only be eligible to enter into a tax abatement agreement if the governing body of the unit has established guidelines and criteria governing these agreements. The taxing unit must also adopt a resolution stating that the city, town, county, or school district elects to become eligible to participate in tax abatement. After the governing body of a municipality has held the required public hearings an agreement with the property owner shall be executed stating that the real property is exempt from taxation on all or a portion of the value of the property, for a period not to exceed ten years. The agreement shall include provision that the owner of the property make specified improvements or repairs, and if there is more than one owner in the zone, must contain identical terms for the portion of the value of the property that is to be exempt and the duration of the exemption. However, agreements with property owners in an enterprise zone that is also designated as a reinvestment zone do not have to contain identical terms for the portion of the property value that is to be exempt and the duration of the agreement. It should be noted that the Tax Abatement Act also provides for property located within the ETJ to be included if the municipality annexes the property during the period specified in the agreement.

The required specific terms of the agreement are set forth in the statute at section 312.205:

(a) An agreement made under Section 312.204 must: (1) list the kind, number, and location of all proposed improvements of the property; (2) provide access to and authorize inspection of the property by municipal employees to ensure that the improvements or repairs are made according to the specifications and conditions of the agreement; (3) limit the uses of property consistent with the general purpose of encouraging development or redevelopment of the zone during the period that property tax exemptions are in effect; and (4) provide for recapturing property tax revenue lost as a result of the agreement if the owner of the property fails to make the improvements or repairs as provided by the agreement; (5) contain each term agreed to by the owner of the property; (6) require the owner of the property to certify annually to the governing body of each taxing unit that the owner is in compliance with each applicable term of the agreement; and (7) provide that the governing body of the municipality may cancel or modify the agreement if the property owner fails to comply with the agreement.

(b) An agreement made under Section 312.204 may include, at the option of the governing body of the municipality, provisions for: (1) improvements or repairs by the municipality to streets, sidewalks, and utility services or facilities associated with the property, except that the agreement may not provide for lower charges or rates than are made for other services or properties of a similar character; (2) an economic feasibility study, including a detailed list of estimated improvement costs, a description of the methods of financing all estimated costs, and the time when related costs or monetary obligations are to be incurred; (3) a map showing existing uses and conditions of real property in the reinvestment zone; (4) a map showing proposed improvements and uses in the reinvestment zone; and (5) proposed changes of zoning ordinances, the master plan, the map, building code, and city ordinances.

Section 312.206 of the Tax Abatement Act further requires that other taxing units may also execute a tax abatement agreement. However, “the agreement [by the taxing unit] must contain terms identical to those contained in the agreement with the municipality. . . .” Each taxing unit may execute a written agreement with owners of enterprise zone property. The taxing unit has up to 90 days to execute the agreement after the municipal or county agreement is executed, whichever is later. The agreement may contain terms that are identical to those contained in the municipal or county agreements: the only terms that may vary are the portion of the property “that is to be exempt from taxation under the agreement and the duration of the agreement.” Before the agreement can be deemed to be in effect, it must be approved by a majority of the members of the governing body of the municipality or other taxing units. Modifications must be made pursuant to the same procedure as the adoption of the original agreement, and the maximum duration of the abatement of ten years may not be extended by modification.
4. 1997 Amendments

Section 312.002, as amended, restates the requirement for a municipality or county taxing entity to adopt guidelines and criteria for the agreements (rather than policies) and further notes their application to the expansion or modernation of existing facilities. The most substantive amendments appear to be in section 312.210, “Agreement by Taxing Units Relating to Property in Certain School Districts.” This provision requires districts that have a wealth per student that does not exceed the equalized wealth must exempt amounts from taxation as specified in the amendments.

The most interesting development is found in section 312.211, “Agreement by Municipality Relating to Property Subject to Voluntary Cleanup,” under Health and Safety Code § 361.606. The abatement is really an exemption for not more than four years for a declining percent from 100 percent to 25 percent during the term. New construction or existing facility expansion, or, theoretically, cleanup in and of itself increases the properties’ value. A school district may not enter into such an agreement.

VI. Texas Local Government Code Ch. 380

A more recent, yet related law, is designed to provide flexibility to municipalities in funding economic development programs. Chapter 380 of the Local Government Code, “Miscellaneous Provisions Relating to Municipal Planning and Development,” provides that a municipality may administer programs and loan or grant public money to “promote state or local economic development and to stimulate business and commercial activity in the municipality.” Chapter 380 thus implicitly asserts that an overall public purpose exists in promoting private commercial enterprise to spur the economy. Although Chapter 380 does not refer to condemnation powers, it does accord tremendous discretion to a municipality to fund any type of private project that promotes economic development.

A fascinating case proceeding currently in Tarrant County, Texas, involves the application of this statute to condemnation of private homes for the redevelopment and expansion of a shopping mall. Pursuant to Chapter 380, the Town of Hurst, Texas, created an “incremental sales tax sharing agreement” with a shopping mall developer. Like a

TIF structure, the sales tax agreement utilizes tax increments from the increased sales tax revenue generated by new shops to reimburse the mall developer for the expansion project. The Hurst agreement simply employs sales rather than property taxes as its funding source. The agreement provides that the city will split the sales tax revenue from the new shops with the developer. The city will expend its portion on “public improvements” and the developer will take the rest as repayment for its expansion project. Under Chapter 380, such agreement might fall within a “grant of public money” to “promote . . . local economic development.”

The lawsuit arose, however, when Hurst attempted to extend its power under Chapter 380 to justify exercising eminent domain in the name of economic development. The City condemned 127 homes at the behest of the mall developer to make way for the mall expansion. Unlike the TIF Act, Chapter 380 is silent on whether municipalities can exercise eminent domain power to promote economic development.

Hurst argues that Chapter 380 envisions the promotion of economic development as a proper “public purpose” and thereby defends a municipality’s discretionary power to exercise eminent domain. The homeowners counter that Chapter 380 does not sanction eminent domain and that financially supporting a private commercial enterprise does not serve a proper “public purpose” or “use” for condemnation purposes. The court’s acceptance of Hurst’s argument remains to be seen. Yet regardless of the ultimate disposition of the case, the court’s determination will surely help define “public purpose” and “use” and perhaps shed light on how these concepts might be interpreted within the TIF context.

VII. Conclusion

As different communities have begun to utilize the PIDs, TIF Districts, Tax Abatement Agreements, economic development grants, or other
methods of assisting in the funding of public and/or private improvements and services, there will be more amendments and judicial opinions which will guide their statutory application. At present these tools have begun to be utilized to fund public improvements, in particular, which otherwise might either wait for a position in the budgetary line or never happen at all. The unfortunate overuse of the tax abatement and/or rebate of sales tax as part of competitive relocation offers for corporations has caused state legislators to begin reevaluating the criteria for their use. Several bills were introduced during the last legislative session to narrow their application, so any proposed use of the tools should be evaluated after a review of current legislative amendments. It would be unfortunate for these tools to be restricted as applied to urban cores, further since our creative use of them to encourage downtown revitalization is just beginning. Clearly, the legislature has already begun by limiting the school districts’ increment effective after September 1, 1998, which will have a dramatic effect on the use of tax increment financing districts for downtown renovation.