

**ECONOMIC DEVELOPMENT INCENTIVES:
USE OF SPECIAL ASSESSMENTS,
SPECIAL SERVICE AREAS, BUSINESS DISTRICTS
AND SALES TAX REBATE AGREEMENTS**

- Prepared by -

THOMAS P. BAYER

of the Law Firm of

KLEIN, THORPE AND JENKINS, LTD.

20 North Wacker Drive

Suite 1660

Chicago, Illinois 60606-2903

Phone (312) 984-6400

Fax (312) 984-6444

tpbayer@ktjlaw.com

**CHICAGO METROPOLITAN AGENCY FOR PLANNING
SEMINAR**

Monday, March 31, 2008

Oak Brook, Illinois

TABLE OF CONTENTS

	<u>Page</u>
I. SPECIAL ASSESSMENTS	
A. Background	1
B. Special Assessment Supplemental Bond and Procedures Act	2
C. Special Assessment Process	3
D. Special Assessment Timetable	6
E. Specific Projects	7
F. Summary	12
II. SPECIAL SERVICE AREAS	
A. Background	14
B. Special Benefit Tax/Land Value Only Tax	14
C. Special Service Area Process	15
D. Special Service Area Timetable	17
E. Specific Projects	17
III. COMPARISON OF SPECIAL SERVICE AREA FINANCING AND SPECIAL ASSESSMENT FINANCING	
A. Advantages of Special Service Area Financing	18
B. Advantages of Special Assessment Financing	18
IV. BUSINESS DISTRICTS	
A. Background	20
B. Business District Process	22
C. Specific Project – Lombard, Illinois	23
V. SALES TAX REBATE AGREEMENTS	
A. The Initial Case Law for Non-Home Rule Municipalities	24
B. The Statutory Basis for Non-Home Rule Municipalities	25

I. SPECIAL ASSESSMENTS

A. Background

During the late 1980's, many municipal officials and attorneys thought special assessment financing was dead as a development or redevelopment tool other than for the alley-paving special assessments being done by the City of Chicago. Some municipalities, however, continued to finance road, sanitary sewer, and water main construction with special assessments because of the long tradition within the community of cost sharing relative to said improvements.

During the 1990's, however, the use of special assessment financing as a mainstream development tool began to take off. A number of factors contributed to this resurgence of special assessment financing. First, the Local Improvement Act, 65 ILCS 5/9-2-1, *et seq.*, was amended (by legislation drafted by the author of this handout) to allow more than one local improvement to be constructed under a single special assessment (65 ILCS 5/9-2-9). Prior to this amendment, the construction of street improvements, storm sewers, sanitary sewers, and water mains in a single area had to be done using four separate special assessments, creating a time consuming and cumbersome process. With the amendment to the Local Improvement Act, a single special assessment could be used to construct all four improvements, even if not all the properties being assessed as part of the project would benefit from all of the improvements. If a property would only benefit from some but not all of the improvements (*e.g.*, a property that had already connected to the municipal water supply), the property could still be included in the special assessment so long as it was not assessed for the portion of the project that it did not need.

The second factor that resulted in the resurgence of the use of special assessment financing was the adoption of the Special Assessment Supplemental Bond and Procedures Act, 50 ILCS 460/1, *et seq.* See Subsection B below. This Act, which had been drafted by municipal financing underwriters, was specifically geared towards making special assessment financing more compatible with modern forms of municipal financing. Key to this Act was the provisions that allowed for line items within the engineer's estimate of cost for the project to cover bond reserve, bond discount, capitalized interest, and an increase in the payment schedule from 10 years to up to 31 years, including the use of more flexible payment schedules. Additionally, the Act allowed for the waiver of bids when awarding the project contracts and an option to have the county clerk collect the special assessment installments for the municipality as part of the real estate tax collection process.

The third factor that laid the groundwork for the comeback of special assessment financing was the education of the municipal debt instrument buyer. With the introduction of the tax cap legislation during the 1990s, non-home rule municipalities proceeded with fewer government-owned bond issues. Consequently, municipal debt underwriters and bond buyers began to educate themselves as to other municipal debt options. In so doing, they came to realize that, although not backed by the full faith and credit of the municipality, special assessment bonds were in fact very secure debt in that the assessment was a lien against the real estate that was assessed and which, if not paid, was handled through the county in the same manner as if the real estate taxes had not been paid (*i.e.*, proceed to the tax sale process). As underwriters and

municipal debt buyers took the time to educate themselves about special assessment bonds, they came to realize that the viability of the project to be financed, the reputation of the developer constructing the project, and the value of the real estate being assessed dictated the marketability of the special assessment bonds.

Fourth, special assessment financing has experienced a resurgence based on home rule municipalities taking advantage of their home rule powers to amend the Local Improvement Act and the Special Assessment Supplemental Bond and Procedures Act, by home rule ordinance, to address the unique issues presented by a particular public improvement project.

Finally, developers of vacant land, faced with paying the cost of installing the public improvements necessary to allow for their developments, came to realize that if the public improvements (including the cost of the land on which they were located) were financed by special assessment, a cost savings would result because of the lower tax exempt interest rate on the special assessment bonds as compared to the interest rate that would be charged by a financial institution for a mortgage on the land or a construction loan. Additionally, special assessment financing gave developers the opportunity to delay repaying the principal amount of the assessments until funds began to come in from the sale of the housing or commercial units that were to be constructed on the property assessed or to pass on the assessment to the end user of the housing or commercial units being constructed (thereby reducing the advertised sale price for the housing or commercial unit).

In regard to passing on the assessment to the end user of the housing or commercial unit, it should be noted that the developer most often must work with one or more preferred lenders who have been educated relative to special assessment financing. Because the special assessment is a lien against the real estate, a mortgage lender often requests that the special assessment be paid off, or subordinated to the mortgage, prior to the issuance of the mortgage so that there is no lien that is first in priority to the mortgage. As special assessments are handled in the same manner as real estate taxes if unpaid, even if first in time for recording purposes, a mortgage lender is not necessarily in a better position if the special assessment goes unpaid. As such, it behooves a developer to educate several lenders in regard to escrowing additional funds as part of the monthly mortgage payment, in the same manner as is done with real estate taxes, so as to give the mortgage lender the security of knowing that sufficient funds will be available to make the special assessment payments when they are due. This will allow the developer to pass on the assessment payments to the buyer as part of a smooth transaction.

B. Special Assessment Supplemental Bond and Procedures Act

The purpose of the Special Assessment Supplemental Bond and Procedures Act is to update certain provisions of the laws applicable to special assessments so as to “accommodate current and anticipated financial markets and practices and the provisions of current federal income tax law.” 50 ILCS 460/5. The Act also streamlines the special assessment procedures in certain cases, with the consent of all the owners of the properties being assessed. In order to rely on the Act, the municipality must make a specific election referring to the Act in the special

assessment documents. In addition to the costs otherwise permitted by law, the following additional costs may now be added as additional line items in the engineer's estimate of cost:

1. an additional reserve in an amount not to exceed ten percent of the amount of any bonds issued pursuant to the Act to ensure that there are sufficient funds on hand to make principal and interest payments in relation to the bonds;
2. capitalized interest to cover a period not to exceed the greater of two years or six months from the estimated completion of the improvement; and
3. bond discount in an amount not to exceed four percent of the total cost of the improvement.

Upon a two-thirds vote of the corporate authorities then in office, a municipality can waive bidding relative to the awarding of the special assessment construction contract. 50 ILCS 460/40.

Provided that all the owners of record of the property subject to the special assessment proceeding consent, the board of local improvements can conduct all the proceedings and perform all of the acts otherwise performed by the court in a traditional special assessment proceeding. 50 ILCS 460/50.

Also, the municipality can enter into an intergovernmental agreement with the clerk of the county in which the municipality is located whereby the county clerk agrees to mail the special assessment bills for the municipality along with the county's regular tax bill mailing. 50 ILCS 460/55.

C. Special Assessment Process

STEP 1: The Board of Local Improvements (BOLI) determines to move forward with a project and authorizes the preparation of an Engineer's Estimate of Cost. The Estimate of Cost sets forth the cost elements of the project:

- a. Construction Cost
- b. Engineering Cost
- c. Cost of Making, Levying and Collecting the Assessment
- d. Accrued Interest Reserve
- e. Capitalized Interest
- f. Bond Discount

g. Debt Service Reserve

STEP 2: Once the Estimate of Cost is prepared, BOLI adopts a First Resolution calling for a public hearing relative to the project. The public hearing cannot be held less than ten (10) days after the adoption of the First Resolution.

STEP 3: Notice of the public hearing must be mailed out to the person who paid the taxes, during the preceding year, relative to each parcel that will be assessed in regard to the improvement, at least five (5) days prior to the public hearing.

STEP 4: Hold a public hearing to explain project, legal process and assessments, and take comments from the residents.

STEP 5: After the public hearing, BOLI will adopt a Second Resolution that either:

- a. calls for moving forward with the project as presented;
- b. calls for moving forward with the project with some changes; or
- c. calls for abandoning the project.

STEP 6: If the Second Resolution calls for other than abandoning the project, BOLI will approve a Recommendation that the project move forward, and will send the Recommendation, along with a form Ordinance to the Village Board/City Council.

STEP 7: If the project will cost in excess of \$200,000, the Ordinance must be published in pamphlet form for at least the (10) days prior to the Village Board/City Council taking action on it.

STEP 8: Village Board/City Council adopts the Ordinance, which authorizes the filing in Court.

STEP 9: President of BOLI appoints a Commissioner to spread the assessment. In reality, this person is Commissioner in name only in that a financial advisor, (in conjunction with the developer if it is a developer requested special assessment), will be preparing the Assessment Roll.

STEP 10: The Petition, Assessment Roll and various other documents are filed with the Court.

STEP 11: The Court confirms the appointment of the Commissioner and sets a date for a hearing on the Assessment Roll.

STEP 12: Notice of the Court hearing must be given in the following manner:

- a. The taxpayer of record for each parcel must be mailed a notice not less than fifteen (15) days prior to the hearing date.
- b. Notice of the hearing must be published in a local newspaper twice, not more than thirty (30) days nor less than fifteen (15) days prior to the hearing date.

STEP 13: At the Court hearing, if there are no objectors, the Court will enter an order confirming the assessments. If there are objectors, the Court will confirm the assessments against the non-objecting parcels and set a hearing date on the objections.

STEP 14: After all objections have been resolved, either by agreement of the parties or after a Court hearing, the Court enters an order confirming all the assessments. This order must be recorded within sixty (60) days after its entry to perfect the liens against the properties.

STEP 15: The Village/City goes to bid on the project, if it has not already done so. The notice to bidders must at a minimum be published in a local newspaper twice, not more than thirty (30) days nor less than fifteen (15) days prior to the date scheduled for the bid opening, unless bidding is waived.

STEP 16: BOLI awards contract for construction.

STEP 17: Publish a notice of the contract award.

STEP 18: BOLI approves first payout and Certificate as to Issuance of First Voucher. Note that interest on the individual assessments, at the rate stated in the Ordinance, begins to run sixty (60) days after the approval of the Certificate as to Issuance of First Voucher, unless a greater length of time is designated in the Certificate as to Issuance of First Voucher.

STEP 19: Certificate as to Issuance of First Voucher is filed with the Court. Court Clerk issues a Warrant to Collect to the Village, and the Village, upon receipt of the Warrant to Collect, sends out the billing notices to the assessees, as well as publishes a billing notice in a local newspaper twice, with the first publication being within ten (10) days after the date on the Warrant to Collect and the second notice being within seven (7) days after the first.

STEP 20: During the sixty (60) day (or longer) interest free period, bids/proposals can be obtained relative to the sale of the bonds, unless capitalized interest has been included so as to allow the bonds to be issued immediately.

STEP 21: When the project is complete, a Certificate of Final Cost and Completion, setting forth the actual costs associated with project, is prepared, approved by BOLI and filed with the Court.

STEP 22: If the Certificate of Final Cost and Completion indicates that the project was constructed for less than anticipated in the Engineer's Estimate of Cost, the Certificate will provide for an abatement of a portion of each assessment.

STEP 23: The Court holds a hearing on the Certificate of Final Cost and Completion, with notice of said hearing being published in a local newspaper twice, not less than thirty (30) days nor more than fifteen (15) days prior to the hearing.

STEP 24: As each assessment is paid in full, the Village must record a Release of Lien document with the County Recorder's Office, and mail a copy of the recorded Release to the taxpayer of record/owner.

STEP 25: At the end of the assessment period, if, after all bills, vouchers and bonds are paid, there is money left in the assessment account, BOLI will authorize a rebate. The rebate first goes to reimburse the Village/City for the public benefit assessment, and then to the property owners of record on the date the rebate is declared, pro rata.

D. Special Assessment Timetable (Best Case Scenario)

- Day 1 – Adopt First Resolution.
- Day 11 – Hold Public Hearing, adopt Second Resolution and Recommendation.
- Day 12 – Publish Ordinance in pamphlet form.
- Day 22 – Adopt Ordinance and sign Court documents.
- Day 24
and
Day 25 – Send out Court hearing notices and publish Court hearing notice.
- Day 40 – Court hearing and entry of confirmation order.
- Day 40 – Assuming the bidding process has taken place while Court proceedings were moving forward, or bidding is being waived, award construction contract.
- Day 40 – Approve Certificate as to Issuance of First Voucher.
- Day 41 – Begin bond issuance process, if not already begun.
- Day 100 – Issue bonds (Note: If capitalized interest is included in the project, there is no need to wait sixty (60) days to issue the bonds).

E. Specific Projects

Special assessment financing can be effectively used to assist developers of vacant land relative to the financing of the installation of the public improvements (*e.g.*, curb, gutter, storm sewers, streets, sidewalks, street lights, sanitary sewers, and water mains). Special assessment financing allows the developer the ability to pay for the cost of these improvements over a ten-year period at an interest rate that is most likely less than the rate that could be obtained in regard to a commercial loan. As properties within the developed area are sold over the ten-year period, the developer can use a portion of the proceeds of the sales to pay the assessment relative to the parcel sold. This method of financing the vacant land infrastructure improvements has been made more advantageous with the creation of the Special Assessment Supplemental Bond and Procedures Act. Special service area financing would not be recommended in this scenario as the first vacant parcel built on would receive most of the revised assessed valuation of the area, thereby being responsible for the majority of the special service area debt service payment through the real estate tax bill. Such an occurrence can result in the owner of the developed parcel being unable to pay the real estate tax bill, the vacant parcels remaining undeveloped for fear of seeing a large jump in the real estate tax bill should they be developed, and the special service area bonds going unpaid as a result of the default in the payment of real estate taxes on the developed parcel. Such a scenario would not occur with a special assessment, as fluctuations in the equalized assessed valuation of the parcels assessed would not cause the assessment amounts to change.

While the authors have worked on numerous special assessment projects, several are of note because of their unique characteristics or because they are good examples of the options available when using special assessment financing to finance the cost of the public improvements (including the cost of the land on which the public improvements are located). In each case, it was the developer who sought out the use of special assessment financing for the public improvements.

1. Lombard, Illinois

The public improvements for the Fountain Square development (northwest corner of Butterfield Road and Westmore-Meyers Road) in Lombard (a non-home rule municipality) were financed with a 19-year special assessment. The development was a 7-lot commercial/residential condominium development, with 2 of the 7 lots covering the private roadway system and the retention pond. The 5 remaining lots were each given an initial assessment based on the anticipated developed use of each lot.

As the lots were eventually subdivided (for condominiums or for smaller commercial users such as restaurants), the assessment against each subdivided lot was further allocated among the various subdivided parcels, as directed by the developer, through the use of the division order process. Through this process, the assessment roll and report filed as part of the special assessment court proceeding was amended, by agreement of the municipality and the property owner (the developer), so as to provide each newly created parcel with an assessment of its own. In this manner, the new parcel's assessment can be either paid in full or passed on to the

new owner at the closing on the new parcel. The division order process allows for changes in a development that were not, or could not accurately have been, anticipated at the time of the initial special assessment.

2. South Beloit, Illinois

This project (located just off Exit 1 on Interstate 90, just South of the Wisconsin border) was similar in nature to the Lombard project, except the majority of the property in question was unsubdivided at the time of the initial assessment. As subdivided property is often assessed at a higher fair market value than vacant unsubdivided property, the developer did not want to record plats of subdivision for each phase of the project until absolutely necessary. As such, the division order process allowed for the use of special assessment financing without the need to immediately record a plat of subdivision for the entire property that was being assessed.

This project also presented a challenging financing situation for South Beloit (a non-home rule municipality). As the developer did not have a proven track record of development success and because of the history of development within the area, the issuance of special assessment bonds was not a viable option. Believing in the viability of the project, however, the village issued general obligation debt certificates to finance the cost of the public improvements, with the special assessment payments to be received from the developer being the village's primary source for payment of the debt service on the general obligation debt certificates.

3. Tinley Park, Illinois

The public improvements for the Town Pointe and Millennium Lakes projects, both of which were mixed-use residential developments within the Village of Tinley Park, were financed using special assessment financing. Both special assessments included a line item for reimbursement to the developer for land acquisition costs for that portion of the property on which public improvements (primarily roads) were to be located. By doing this, the developer was allowed to receive reimbursement for its initial cash outlay for the purchase of said "public improvement" land and then repay said amount by way of the special assessment process, thereby paying for the property in the same manner as a mortgage but at a lower interest rate (a refinancing of a portion of the initial mortgage on the property).

Additionally, both special assessments were set up with a seven-year repayment period, with interest only due in years one through six and with the entire principal amount of the special assessment being due in the seventh year. The developer anticipated that the residential units would all be sold within said seven-year period. As such, as the developer paid off (pre-paid) the assessment for each residential unit out of the proceeds of the sale of each unit so as to obtain a release of the special assessment lien for each closing, the special assessment "balloon" principal payment in the seventh year was reduced. In this manner, said "balloon" principal payment would not have to be made if the developer's sales projections were accurate.

4. Chicago, Illinois

This special assessment involved the redevelopment of a nine-hole golf course facility in downtown Chicago, generally bounded by Wacker Drive on the north, Lakeshore Drive on the east, Randolph Street on the south, and Columbus Drive on the west, with a combination residential/commercial office-retail development known as the Lakeshore East Project. This special assessment project was extremely unique in that the property interests relative to the location of the public improvements involved fee title, easements, dedications, and air rights (for double and triple-deck roadways). In addition, the special assessment included the construction of a five-acre park that would, after a period of time, be owned by the Chicago Park District and not the City of Chicago. Finally, the special assessment included recreation areas, bike paths, vehicular parking improvements, signage improvements, and landscaping improvements. Chicago relied on its home rule powers to enact an amendment to Chapter 2-102 of the Chicago Municipal Code on July 25, 2001, to facilitate the special assessment. Said amendment provided as follows:

2-102-075 Exercise of home rule powers in relation to special assessment proceedings.

Pursuant to the City's home rule powers, as provided by Article VII, Section 6 of the 1970 Illinois Constitution, any proceeding under the provisions of the Local Improvement Act, 65 ILCS 5/9-2-1, et seq., and the Special Assessment Supplemental Bond and Procedures Act, 50 ILCS 460/1, et seq., may be initiated and may proceed in accordance with the following:

(a) Notwithstanding 65 ILCS 5/9-2-9, as amended, the following provisions shall apply to the proceeding:

“The proposed local improvement may consist of the acquisition of the necessary interests in real property and the construction of any public improvement or any combination of public improvements, including, but not limited to, streets, storm sewers, watermains, sanitary sewers, sidewalks, walkways, bike paths, parks, landscaping, recreation areas, lighting improvements, signage improvements, vehicular parking improvements, any additional improvements necessary to provide access to the public improvements and all necessary appurtenances, in a local area pursuant to a single special assessment project, provided that in assessing each lot, block, tract and parcel of property, the commissioner so assessing shall take into consideration whether each lot, block, tract or parcel is benefited by all or only some of the improvements combined into the single special assessment project. For purposes hereof, a local area shall be defined as an area in which all of the lots, blocks, tracts or parcels located within the boundaries thereof will be benefited by one or more of the proposed improvements. The fact that more than one improvement is being constructed as part of a single special assessment project shall not be grounds for an objection by an assessee to the special assessment proceeding in court.”

(b) Notwithstanding 65 ILCS 5/9-2-62, as amended, the following provisions shall apply:

“No special assessment or special tax shall be levied for any local improvement until the City, or another unit of local government pursuant to an intergovernmental agreement between the City and said other unit of local government, has obtained, or has entered into a binding contractual agreement to obtain, an appropriate permanent interest in the land necessary therefor, as determined by the City. An appropriate permanent interest in the land necessary for a local improvement shall include, but shall not be limited to, fee title, a permanent easement, an easement which converts to fee title after the passage of a specific period of time, a dedication, a limited dedication of air rights at a specific height above ground level, or any combination thereof.”

(c) Notwithstanding 50 ILCS 460/55, as amended, the following provisions shall apply:

“In the event that the county clerk does not agree to mail such bills, or in the event that the City declines to request the county clerk to mail said bills, the City still may bill the annual amount due as of January 2nd in two even installments to become due on or about the due dates for the real estate tax bills issued by the county clerk during the year in which such January 2nd date occurs, thus deferring to later dates in said year the obligation to pay the assessment installment.”

(d) In addition, the City Council may on a case by case basis, provide for further amendments to the application of other provisions of the Local Improvement Act, 65 ILCS 5/9-2-1, et seq. and the Special Assessment Supplemental Bond and Procedures Act, 50 ILCS 460/1, et seq. to City proceedings that are necessary in order to facilitate a specific special assessment project. Any such further amendments shall be specifically set forth in the ordinance authorizing the specific special assessment project.

In the event of a conflict between the language of the Local Improvement Act, 65 ILCS 5/9-2-1, et seq. and/or the Special Assessment Supplemental Bond and Procedures Act, 50 ILCS 460/1, et seq. with the foregoing, the foregoing provisions shall prevail.

With the Chicago Municipal Code amendment in place, all but the Chicago Park District's eventual ownership of the park, the construction of which was to be financed by the special assessment, had been addressed. In order to address this last issue, an intergovernmental agreement between the Chicago Park District and the City of Chicago was required.

Pursuant to Article VII, Section 6(l) of the 1970 Illinois Constitution:

[t]he General Assembly may not deny or limit the power of home rule units (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government. [Emphasis added.]

As such, if the Chicago Park District had the power to levy a special assessment on the effective date of the 1970 Illinois Constitution, the City of Chicago and the Chicago Park District could enter into an intergovernmental agreement to exercise that power jointly, with the City of Chicago taking the lead in processing the special assessment. A review of the state statutes revealed that 70 ILCS 1505/16 did give special assessment authority to the Chicago Park District. Consequently, the ordinance that was adopted by the City of Chicago on June 19, 2002, which authorized the Lakeshore East special assessment project, provided as follows in §6:

Pursuant to Article VII, Sections 6(1) and 10 of the 1970 Illinois Constitution, 70 ILCS 1205/7-1 through 70 ILCS 1205/7-5, 70 ILCS 1505/16 and 5 ILCS 220/1 through 220/9, the Chicago Park District, pursuant to an Intergovernmental Agreement with the City, has authorized the City to move forward with a special assessment on behalf of the Chicago Park District, in accordance with the provisions of 65 ILCS 5/9-2-1, et seq., 50 ILCS 460/1, et seq. and Section 2-102-075 of the Chicago Municipal Code, for the purpose of acquiring real property and thereafter creating parks and constructing park improvements thereon, as part of the special assessment provided for by this ordinance.

Additionally, the City of Chicago and the Chicago Park District entered into an intergovernmental agreement that provided in pertinent parts as follows:

Pursuant to Article VII, Sections 6(1) and 10 of the 1970 Illinois Constitution, 70 ILCS 1205/7-1 through 70 ILCS 1205/7-5, 70 ILCS 1505/16 and 5 ILCS 220/1 through 220/9, the Park District hereby authorizes the City to move forward with the Assessment on behalf of the Park District, in accordance with the provisions of 65 ILCS 5/9-2-1 et seq. and 50 ILCS 460/1 et seq., for the purpose of acquiring the Park Property and thereafter creating and constructing the Park on the Park Property (including all necessary street vacations), as part of the City's Lakeshore East Special Assessment Project (to be known as Docket No. 58763 and Warrant No. 62456), at those locations as more fully identified on Exhibit A; provided that no liability shall be incurred by the Park District with respect to the Assessment.

It should be noted that because of the positive impact that the City of Chicago's home rule ordinance had on the ability to proceed with the Lakeshore East Project special assessment, legislation was introduced during 2003 to expand the types of public improvements that could be financed as part of a single special assessment project (H.B. No. 2317 signed into law on July 14,

2003, as P.A. 93-0196 (eff. July 14, 2003)) and to allow for a municipality to proceed with billing special assessments with two installment payments each year regardless of whether the county clerk agrees to process said billing for the municipality (S.B. No. 1546 signed into law on July 18, 2003, as P.A. 93-0222 (eff. Jan. 1, 2004) and H.B. No. 2317 signed into law on July 14, 2003, as P.A. 93-0196 (eff. July 14, 2003)).

F. Summary

Because of the creative use of home rule powers, the passage of the Special Assessment Supplemental Bond and Procedures Act and the updating of the Local Improvement Act, the use of special assessments to finance the cost of the public improvements in new developments is becoming a more accepted practice. It is anticipated that as the state statutes are further amended to address the modern public improvements construction process, special assessment financing will become a universally used tool in facilitating development.

II. SPECIAL SERVICE AREAS

A. Background

In simple terms, the Illinois Constitution allows a municipality to levy an additional real estate tax and other taxes in an area within its boundaries for the purpose of providing special services to that area that are not available to the entire municipality.

Whenever an improvement is to be constructed that will affect only a specific locality, the municipal government must decide whether to finance it by special assessment or by the creation of a special service area.

1. Authority for Special Service Area Financing

In 1973, the General Assembly adopted the Special Service Area Tax Law, 35 ILCS 200/27-5, *et seq.*, setting forth the procedures by which special service areas may be established, bonds issued, and taxes levied.

2. Constitutional and Statutory Provisions

The term “special services” means “all forms of services pertaining to the government and affairs of the municipality or county, including but not limited to . . . improvements permissible under Article 9 of the Illinois Municipal Code, and contracts for the supply of water.” 35 ILCS 200/27-5. Article 9 of the Municipal Code pertains to local improvements and provides for making a wide variety of improvements by special assessments, including, but not limited to, streets, storm drain sewers, water mains, sanitary sewer improvements, sidewalks, walkways, bicycle paths, landscaping, lighting improvements, signage improvements, vehicular parking improvements, any additional improvements necessary to provide access to the public improvements, and all necessary appurtenances.

It would appear from the court decision in *Elgin National Bank v. Rowcliff*, 109 Ill.App.3d 719, 441 N.E.2d 112, 65 Ill.Dec. 320 (2d Dist. 1982), that all property is deemed to be taxable unless the special service area ordinance provides otherwise. In *Briarcliffe Lakeside Townhouse Owners Ass'n v. City of Wheaton*, 170 Ill.App.3d 244, 524 N.E.2d 230, 120 Ill.Dec. 465 (2d Dist. 1988), it was held that the creation of a special service district is discretionary and cannot be compelled by mandamus.

3. Boundaries

One of the practical difficulties in special service area financing is the establishment of the boundaries of the special service area. The enabling legislation provides that a “special service area” means a contiguous area within a municipality. 35 ILCS 200/27-5. A court has held that a special service shopping area boundary was valid even though the legal description omitted all residential and industrial properties from the special service area and even though some of those properties omitted were surrounded by the special service area, thus leaving a “hole in the donut.” *Hiken Furniture co. V. City of Belleville*, 53 Ill. App. 3d 306, 368 N.E.2d 961, 11 Ill.Dec. 353 (5th Dist. 1977) (decision now part of 35 ILCS 200/27-5).

The special service area statute allows creation of special service areas that transcend municipal boundaries. 35 ILCS 200/27-5.

4. Permissible Taxes, Rates, and Debt Limits

Taxes may be levied or imposed in the special service area at a rate or amount sufficient to produce revenues required to provide the special service. 35 ILCS 200/27-25. Taxes are not limited to property taxes but may include other taxes as the Illinois Constitution and the statute both provide that taxes may be levied or imposed. 35 ILCS 200/27-45 provides that special service area bonds shall not be regarded as indebtedness of the municipality or county for the purpose of any limitation provided by law.

5. General Procedures and Ordinance Calling for Hearing on Proposed Service Area

A special service tax or bond issue must be for a public purpose. After determining that a proposed project is for a public purpose, the next step is to ascertain a reasonable boundary for the special service area. This boundary could be based on existing uses, existing zoning classifications, or simply the extent of the benefits received from the special service.

Next, a determination must be made that the services to be rendered are “special,” which means that the services to be rendered are different in quality or quantity from services generally rendered in the municipality.

6. Public Hearing

If the proposition is vetoed by the property owners and electors (the signatures of at least 51% of both on a petition is required to veto the proposal), then the subject matter may not be re-proposed by the municipality for two years. 35 ILCS 200/27-55. The 60 days within which the

petition to veto the proposition can be filed does not commence until final adjournment of the public hearing. *Id.*

The issue of whether the property owners and electors can waive the 60-day objection period has not been addressed by Illinois courts. The benefit of obtaining a waiver from the property owners and electors is that it would allow the bidding and construction of the project to move forward at a quicker pace, which may be advantageous to the municipality and the property owners and electors for a number of reasons, such as securing a competitive construction bid and a favorable construction schedule. When one person, such as a developer, owns the land, the waiver may be a viable option. There are, however, several drawbacks with this waiver concept. First, it may not be feasible to secure waivers from all of the property owners and electors. Second, there is an open question as to whether a court would allow a person to revoke the waiver after it is signed and submitted to the municipality. Support for the argument that such a waiver is irrevocable can be found in *Beghr Willowbrook Venture v. Village of Willowbrook*, 217 Ill.App.3d 614, 576 N.E.2d 853, 159 Ill.Dec. 930 (2d Dist. 1991). In *Beghr*, it was held that the signer of a petition objecting to the creation of a special service area could not withdraw the signature after the petition had been filed with the village. If there are bonds being issued as part of the special service area project, the prospect that a court might allow a person to revoke a waiver may impact the ability of bond counsel to issue an unqualified opinion, which may have a negative effect on the marketability of the bonds.

7. Supplemental Ordinances

Although there is no specific statutory requirement, it is suggested that an appropriation ordinance be adopted for those items to be financed out of the annual tax levy. It is necessary to adopt a separate tax levy ordinance for the special service area if a tax levy has been authorized. If bonds are to be issued, then it is necessary to adopt a bond ordinance. This ordinance must be filed by December 31st. 35 ILCS 200/27-75.

B. Special Benefit Tax/Land Value Only Tax (35 ILCS 200/27-75)

There is some doubt as to the constitutionality of the special benefit tax and land value only tax:

1. As a “tax”, a special benefit tax or a land value only tax lacks uniformity. Section 4 of Article IX of the 1970 Illinois Constitution provides that taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law. Under subsection (1) of Section 6 of Article VII of the 1970 Illinois Constitution, the power to make local improvements by special assessment is an exception to the uniformity requirement. However, under subsection (1) the power to levy taxes, as contrasted to special assessments, does not contain any exception to the uniformity rule. This casts doubts on the constitutionality of the special benefit tax.

2. As an “assessment”, the special benefit tax and land value only tax lack a method for an individual taxpayer to challenge the amount of the assessment. Unless a taxpayer can persuade 51% of the electors and 51% of the owners of property in the special benefit tax area to file an objection petition, an individual property owner is stuck with the assessment. Such a scenario arguably violates the due process rights of the individual property owner.

It should be noted that bond counsel from several major law firms have taken the position that absent at least an appellate court case upholding the constitutionality of the special benefit tax provisions, they would not issue a bond opinion relative to special benefit tax bonds. In addition, at least one Court has upheld a county's refusal to collect a special benefit tax special service area on the real estate tax bill. *County of Will v. Village of Rockdale*, 226 Ill.App.3d 634,589 N.E. 2d 1017, 168 Ill. Dec. 617 (3rd Dist. 1992).

C. Special Service Area Process

STEP 1: Determine the nature of the special services needed/requested, the area that will be benefited and the cost, for providing the special services. The costs should include:

- a. Construction costs;
- b. Engineering costs;
- c. Legal fees;
- d. Bond issuance costs;
- e. In-house services;
- f. Capitalized interest; and
- g. Other costs uniquely attributable to the special services being provided.

STEP 2: Adopt Ordinance calling for a public hearing on the establishment of the special service area. The Ordinance must set forth:

- a. The boundaries by legal description and, when possible, street location;
- b. The permanent tax index number of each parcel located within the area;
- c. The proposed tax rate limits, if any;
- d. The proposed limit on the amount of bonds to be issued, if any;
- e. The maximum number of years for the special service area;
- f. The form of the notice to the property owners;
- g. The nature of the proposed special services to be provided within the special service area;
- h. A statement as to whether the proposed special services are for new construction, maintenance, or other purposes;

- i. The hearing time, date and location; and
- j. If the special services are to be maintained other than by the municipality or county after the life of the bonds, then a statement indicating who will be responsible for the maintenance of the special services after the life of the bonds.

STEP 3: Notice of the public hearing must be given in the following manner:

- a. Notice of the hearing must be published in a local newspaper once, not less than fifteen (15) days prior to the hearing date; and
- b. The taxpayer of record for each parcel must be mailed a notice not less than ten (10) days prior to the hearing date.

The notice must set forth items a through e, and g through j, in Step 2 above.

STEP 4: Hold public hearing to discuss the formation of the special service area, the levy or imposition of taxes and the issuance of bonds.

STEP 5: Finalize boundaries. The original boundaries may be amended at the public hearing or at the first meeting of the Village Board/City Council following the public hearing.

STEP 6: After the final adjournment of the public hearing, there is a sixty (60) day window for the filing of objections. A valid objection petition must be:

- a. Filed within the sixty (60) day period;
- b. Signed by at least 51% of the owners of record within the proposed boundaries; and
- c. Signed by at least 51% of the electors (registered voters) within the proposed boundaries.

If a valid objection petition is filed, the subject matter of the special service area cannot be re-proposed for a two (2) year period.

STEP 7: Adopt an Ordinance establishing the special service area. This Ordinance can be adopted at the end of the sixty (60) day objection period, or immediately after the public hearing, but with an effective date after the running of the sixty (60) day objection period. This Ordinance should include all the information set forth in Step 2 above, plus an accurate map of the territory that makes up the special service area.

STEP 8: File a certified copy of the Ordinance establishing the special service area with the County Clerk and record a certified copy with the Recorder of Deeds. The Ordinance must be recorded within sixty (60) days after its adoption or it will be deemed invalid.

STEP 9A: If the special service area provides for a tax levy other than in relation to a bond issue, adopt an appropriation Ordinance and tax levy Ordinance (e.g. an annual levy for the

maintenance or street cleaning services). The tax levy Ordinance must be filed with the County Clerk on or before the last Tuesday of December.

STEP 9B: If the special service area provides for a bond issue, adopt a bond Ordinance (e.g. construction of a street scape improvement in a downtown shopping district). This Ordinance must be filed with the County Clerk by December 31st.

D. Special Service Area Timetable (Best Case Scenario)

- DAY 1: – Adopt Ordinance calling for public hearing.
- DAY 2: – Publish public hearing notice and mail out public hearing notices.
- DAY 17: – Hold Public Hearing and finally adjourn same.
- DAY 18: – Begin bond issuance process
- DAY 77: – Adopt Ordinance establishing special service area and bond Ordinance.
- DAY 78: – File Ordinances with the County Clerk/Recorder.
- DAY 79: – Issue bonds.

Note: If the property owners and electors waive their right to object during the sixty (60) day objection period, the timetable can be shortened.

E. Special Projects

Special service area financing can effectively be used to assist developers with the redevelopment of property, including the financing of such items as land acquisition and environmental remediation costs. Likewise, special service area financing can effectively be used to assist developers or property owners relative to the financing of the installation of the localized private improvements (e.g., storm sewers and drainage facilities). Special service area financing allows the property owner or developer the ability to pay for the cost of these improvements over a multi-year period at a competitive interest rate.

1. Oak Lawn, Illinois

The redevelopment of a commercial retail site, which now includes a national, large box home improvement store, a grocery store, a pharmacy, a restaurant, and expanded parking facilities as a consequence of the creation of a municipal parking lot adjacent to the private parking lots that serve the site, was facilitated by the implementation of a special service area for the entire site and the imposition of a special service area sales tax for the site.

Under a redevelopment agreement, the Village of Oak Lawn, Illinois, formed the special service area, issued special service area bonds, acquired a portion of a former automobile dealership that was located within the commercial retail site, arranged for the environmental

remediation of the automobile dealership parcel, and then improved the parcel for use as a public parking lot. The developer and other property owners within the newly created special service area agreed to reimburse the Village for the acquisition costs and the environmental remediation costs relative to the public parking lot parcel, as well as the maintenance costs of the parking lot, through the imposition of the special service area sales tax. In the event that the special service area sales tax was not sufficient to pay the debt service relative to the Village's special service area bonds, the Village would allow the tax levy associated with the service area bonds to go forward. To the extent that the special service area sales tax revenues were available, the Village would annually abate all or a portion of the real estate tax levy.

2. Western Springs, Illinois

The Village of Western Springs, Illinois, has created several special service areas to address localized rear yard flooding within certain residential blocks. The special service area financing allowed for the installation of private storm sewers and related drainage facilities within the rear yard areas on each of the residential blocks.

III. COMPARISON OF SPECIAL SERVICE AREA FINANCING AND SPECIAL ASSESSMENT FINANCING

A. Advantages of Special Service Area Financing

When making a choice between whether to finance an improvement by special assessment or by special service area financing, the following are some of the factors to be considered as advantages of special service area financing:

- 1.** The legal procedures involved in special service area financing may be quicker than those in special assessment financing.
- 2.** Ad valorem bonds issued for a special service area may be marketable at a lower interest cost than special assessment bonds.
- 3.** The procedures involved with a special service area are less costly than special assessment procedures.
- 4.** Although the question has not been finally determined, taxes paid in special service area financing are thought by some to be deductible for federal income tax purposes. However, if audited by the IRS, such taxes probably will not be found to be deductible.
- 5.** Spreading costs on the basis of assessed value is quick and inexpensive. However, this type of a spread does not work well if the area to be specially assessed has vacant lots or, if they are all improved, have a wide disparity among assessed values.
- 6.** There is flexibility in the type of tax that can be levied to finance special service areas. The tax is not necessarily limited to the traditional property tax but may be a sales tax or any of the other taxes available to home rule units.

B. Advantages of Special Assessment Financing

Special assessment financing is still a valuable tool for financing local improvements. It has the following advantages over special service area financing:

1. Special assessment financing may be more equitable than spreading the cost on an ad valorem basis within an area.

2. Because special service area financing may be vetoed by a petition signed by at least 51 percent of the electors and at least 51 percent of the property owners, when an improvement is required but at least 51 percent of the property owners and electors are opposed, a municipality may be forced to use special assessment financing.

3. Special assessment financing can be supplemented by a public benefit assessment against the municipality as a whole. Under special service area financing, a non-home rule municipality would have difficulty financing its share of the cost.

4. Special assessment financing can effectively be used to assist a developer of vacant land relative to the financing of the installation of a public improvement. Special assessment financing allows the developer the ability to pay for the cost of the public improvements over up to a thirty-year period at an interest rate that is most likely less than the developer could obtain in regard to a commercial loan. This method of financing the vacant land infrastructure improvements has been made more advantageous with the creation of the Special Assessment Supplemental Bond and Procedures Act. Special service area financing would not be recommended in this scenario, as the first vacant parcel built on would receive most of the revised assessed valuation of the area, thereby being responsible for the majority of the special service area debt service payment through the real estate tax bill. Such an occurrence can result in the owner of the developed parcel being unable to pay the real estate tax bill, the vacant parcels remaining undeveloped for fear of seeing a large jump in the real estate tax bill should they be developed, and the special service area bonds going unpaid as a result of the default in the payment of real estate taxes on the developed parcel. Such a scenario would not occur with a special assessment, as fluctuations in the equalized assessed valuation of the parcels assessed would not cause the assessment amounts to change.

IV. BUSINESS DISTRICTS

A. Background

Business District development and redevelopment is specifically provided for in 65 ILCS § 5/11-74.3-1 *et seq.* Recent amendments to the State statutes have made Business Districts a useful tool in financing municipal improvements.

Pursuant to 65 ILCS § 5/11-74.3-1(2), a municipality may approve a Business District and a specific plan for development and/or redevelopment within the Business District after holding at least two public hearings. In carrying out said specific development and/or redevelopment plan, a municipality has, pursuant to 65 ILCS 5/11-74.3-3, the following powers:

1. To approve all development and redevelopment proposals for a business district;
2. To exercise the use of eminent domain for the acquisition of real and personal property for the purpose of a development or redevelopment project;
3. To acquire, manage, convey or otherwise dispose of real and personal property acquired pursuant to the provisions of a development or redevelopment plan;
4. To apply for and accept capital grants and loans from the United States or the State, for business district development and redevelopment;
5. To borrow funds as it may be deemed necessary for the purpose of business district development and redevelopment, and in this connection issue such obligation or revenue bonds as it shall be deemed necessary, subject to applicable statutory limitations;
6. To enter into contracts with any public or private agency or person;
7. To sell, lease, trade or improve such real property as may be acquired in connection with business district development and redevelopment plans;
8. To employ all such persons as may be necessary for the planning, administration and implementation of business district plans;
9. To expend such public funds as may be necessary for the planning, execution and implementation of the business district plans;
10. To establish by ordinance or resolution procedures for the planning, execution and implementation of business district plans; and
11. To create a Business District Development and Redevelopment Commission to act as agent for the municipality for the purposes of business district development and redevelopment.
12. To impose a retailers' occupation tax and a service occupation tax in the business district for the planning, execution, and implementation of business district plans and to pay for business district project costs as set forth in the business district plan approved by the municipality.
13. To impose a hotel operators' occupation tax in the business district for the planning, execution, and implementation of business district plans and to pay for the business district project costs as set forth in the business district plan approved by the municipality.
14. To issue obligations in one or more series bearing interest at rates determined by the corporate authorities of the municipality by ordinance and secured by the

business district tax allocation fund set forth in 65 ILCS 5/11-74.3-6 for the business district project costs.

Pursuant to 65 ILCS 5/11-74.3-2 and 5/11-74.3-5, a municipality may designate a specific area of the municipality as a Business District, with the authority to levy an additional sales tax or hotel/motel tax therein, but only after the holding of at least two public hearings, at least one week prior to establishing the Business District, and the making of a formal finding as to the following:

- (i) the business district is a blighted area that, by reason of the predominance of defective or inadequate street layout, unsanitary or unsafe conditions, deterioration of site improvements, improper subdivision or obsolete platting, or the existence of conditions which endanger life or property by fire or other causes, or any combination of those factors, retards the provision of housing accommodations or constitutes an economic or social liability or a menace to the public health, safety, morals, or welfare in its present condition and use; and
- (ii) the business district on the whole has not been subject to growth and development through investment by private enterprises or would not reasonably be anticipated to be developed or redeveloped without the adoption of the business district development or redevelopment plan.

65 ILCS 5/11-74.3-5.

Please note that a review of the legislative debates, relative to Public Act 93-1053 (the Public Act that added the above-quoted language to the statute), reveals no further clarification relative to what must be found to exist to establish a “blighted area” designation for the proposed Business District . A review of the Missouri statutes (upon which the amendments made by Public Act 93-1053 were purportedly based), reveals the following definition of “blighted area” within Section 353.020 of Missouri’s Urban Redevelopment Corporations Law (Missouri Statutes, Title XXIII, Chapter 353):

“Blighted area”, that portion of the city within which the legislative authority of such city determines that by reason of age, obsolescence, inadequate or outmoded design or physical deterioration have become economic and social liabilities, and that such conditions are conducive to ill health, transmission of disease, crime or inability to pay reasonable taxes.

If there is any doubt as to whether the area is “blighted,” Missouri cases which address the definition of “blighted area” should be reviewed until there is Illinois case law on point.

The service occupation and retailers’ occupation taxes may be imposed at a rate of not exceeding one percent (1%), must be imposed in quarter percent (0.25%) increments, may not be imposed on “prescription and nonprescription medicines, drugs, medical appliances, modifications to a motor vehicle for the purpose of rendering it usable by a disabled person, and insulin, urine testing materials, syringes, and needles used by diabetics, for human use,” or “food for human consumption that is to be consumed off the premises where it is sold (other than

alcoholic beverages, soft drinks, and food that has been prepared for immediate consumption)” and may only be imposed for no more than twenty-three years. *See* 65 ILCS 5/11-74.3-6. These taxes, if imposed, are automatically collected by the Illinois Department of Revenue and then disbursed to the municipality. The hotel operators’ occupation tax may be imposed at a rate of not to exceed one percent (1%), must be imposed in quarter percent (0.25%) increments, may only be imposed for no more than twenty-three years and, if imposed, must be collected by the municipality.

B. Business District Process

Based on the foregoing, if a municipality decides to move forward with one or more Business Districts that will impose an additional business district sales tax and/or hotel/motel tax, the following steps should be followed relative to each Business District:

STEP 1: Identify the boundaries of the Business District and prepare a legal description. The area proposed to be designated as a Business District must be contiguous and must include only parcels of real property directly and substantially benefited by the proposed Business District development and/or redevelopment plan. *See* 65 ILCS 5/11-74.3-5(1).

STEP 2: Develop a specific plan for development and/or redevelopment of the area in question. Said plan should reference the Village’s ability to use the powers set forth in 65 ILCS 5/11-74.3-3 to accomplish the goals of the plan. Pursuant to 65 ILCS 5/11-74.3-5(4) this plan for development and/or redevelopment must set forth the following in writing:

- A. a specific description of the proposed boundaries of the district, including a map illustrating the boundaries;
- B. a general description of each project proposed to be undertaken within the business district, including a description of the approximate location of each project;
- C. the name of the proposed business district;
- D. the estimated business district project costs;
- E. the anticipated source of funds to pay business district project costs;
- F. the anticipated type and terms of any obligations to be issued; and
- G. the rate of any service occupation, retailers’ occupation or hotel operators’ occupation tax to be imposed and the period of time for which the tax shall be imposed.

STEP 3: Public hearings (at least two) in regard to the proposed Business District designation, and the proposed development and/or redevelopment plan for the area, must be held by the corporate authorities of the municipality. The public hearings must be held at least one week prior to the designation of the Business District and approval of the development and/or

redevelopment plan. *See* 65 ILCS 5/11-74.3-5(1). Although the statute is silent as to the notice requirements relative to the public hearings, the following is recommended:

- A. A newspaper notice at least fifteen days prior to the public hearings.
- B. Notices (by first class mail) to the taxpayers of record for all parcels located within the proposed Business District at least fifteen days prior to the public hearings.

STEP 4: The corporate authorities of the municipality must make the formal findings, as referenced above, in regard to blight and lack of development.

STEP 5: The adoption of an ordinance or ordinances by the corporate authorities of the municipality, after the public hearings, setting forth the findings referenced in STEP 4, designating the area in question as a Business District, officially approving the development and/or redevelopment plan for the Business District and imposing the service occupation and retailers' occupation taxes and/or the hotel operators' occupation tax.

STEP 6: Creation of a special fund, entitled the "Business District Tax Allocation Fund," to receive business district service occupation and retailers' occupation tax revenues from the Illinois Department of Revenue. Pursuant to State statute, all funds received from these business district taxes must be deposited into this special fund. *See* 65 ILCS 5/11-74.3-6.

STEP 7: Move forward with action in furtherance of the Business District development and/or redevelopment plan as outlined in 65 ILCS 5/11-74.3-3.

Finally, it should be noted that if the Business District will not include a sales tax or hotel/motel component, the foregoing process would be somewhat abbreviated, in that STEP 4 and STEP 6 would be eliminated, and the public hearings could be held less than one week prior to the designation of the Business District.

C. Specific Project – Lombard, Illinois

The designation of a Business District can be most effectively used to assist developers with the redevelopment of property, including financial assistance in all aspects of the redevelopment, when a "blighted area" designation can be made and the redevelopment involves sales tax producing businesses. In this regard, the Village of Lombard has recently completed the establishment of a Business District in relation to a portion of the Yorktown Shopping Center, a major regional shopping mall located within the Village. The area so designated consisted of a vacant 218,000 square foot anchor tenant space, and the immediately surrounding area, including a portion of the adjacent mall wing which had been negatively impacted by the vacant space, and outlots which had remained undeveloped. The area designated as a Business District also needed watermain replacement, access improvements (because of access limitations resulting from a State highway improvement) and aesthetic improvements (because the shopping mall had been originally developed over 30 years ago). Based on the foregoing, the Business District was formed with a "blighted area" designation, and a one percent (1%) business district sales tax was imposed within the Business District. The Village then entered into a redevelopment agreement with the property owner, pursuant to which the property owner agreed

to develop restaurants on the outlots, and a 225,000 square foot lifestyle center upon demolition of the anchor tenant space. In exchange for the property owner's redevelopment commitment, the Village agreed to reimburse the property owner, solely from the Business District sales taxes generated within the Business District, if and when generated (with no bond issue to provide up front dollars), for a portion of the cost of said redevelopment. It is estimated that when complete, the redevelopment within the Business District will generate approximately \$1.5 million in new sales taxes and property taxes.

V. SALES TAX REBATE AGREEMENTS

A. The Initial Case Law for Non-Home Rule Municipalities

On May 12, 1992, the City of Loves Park (City) entered into an agreement with Riverside Partners II (developers) for the purpose of developing land within the City and constructing a car dealership and other businesses on that land. The land in question was 11 acres and had been vacant and unimproved for a lengthy period of time. Pursuant to the agreement, the developers were to construct the car dealership and the City would lend financial assistance to the project by rebating a portion of the Retailer's Occupation Tax revenues generated by automobile sales at the dealership.

Pursuant to a request from the State's Attorney of Winnebago County, the Office of the Illinois Attorney General issued an informal opinion wherein the agreement entered into between the developer and the City was found to be beyond the authority of a non-home rule municipality. The informal opinion found that, because the City was not statutorily granted any specific authority to rebate sales taxes, and because the City did not conform with statutes granting municipalities the ability to promote economic development such as the Economic Development Area Tax Increment Allocation Act (20 ILCS 620/1 *et seq.*), the Tax Increment Allocation Redevelopment Act (65 ILCS 5/11-74.4-1 *et seq.*) and the Illinois Enterprise Zone Act (20 ILCS 655/1 *et seq.*), the rebate of taxes was an unauthorized gift of city taxes and therefore invalid. The informal opinion further advised the State's Attorney that under Article 13 of the Code of Civil Procedure, the State's Attorney could bring a *quo warranto* action against the City to prevent it from carrying out its agreement with the developer.

In September of 1993, the Illinois Municipal League Home Rule Attorneys Committee, in a letter authored by its Chairman, Patrick A. Lucansky of Klein, Thorpe and Jenkins, Ltd., responded to the Attorney General's informal opinion. The letter referenced the Intergovernmental Cooperation provisions of the Illinois Constitution of 1970 and the Illinois Municipal Code (the Business District Development and Redevelopment Act (65 ILCS 5/11-74.3-1 *et seq.*) and the Industrial Project Revenue Bond Act (65 ILCS 5/11-74-1 *et seq.*)) in coming to the conclusion that agreements such as the one at issue in Loves Park were valid.

The State's Attorney then brought suit against the City. On May 3, 1994, in an opinion written by Associate Judge Gerald F. Grubb, the agreement entered into by the City was found to be a valid exercise of power by a non-home rule municipality. (*People of the State of Illinois v. City of Loves Park*, 93 MR 133). The City Attorney for Loves Park argued that the agreement was valid, relying on many of the same statutory and constitutional provisions contained in the letter authored by the Illinois Municipal League Home Rule Attorneys Committee. The State's Attorney sought to uphold the reasoning of the Attorney General's informal opinion.

Judge Grubb dismissed the Industrial Revenue Bond Act and the Local Government Tax Fund Act as inapplicable, but found that the broad grant of authority contained in Article 7, Section 10(a) of the Illinois Constitution of 1970 (the Intergovernmental Cooperation provision) provided sufficient authority for an agreement to rebate sales taxes as it “reverses Dillon’s Rule under certain conditions for non-home rule municipalities.” Article 7, Section 10(a) of the Illinois Constitution of 1970 provides: “Units of local government and school districts may contract and otherwise associate with individuals, associations, and corporations in any manner not prohibited by law or by ordinance.” (Ill. Const. 1970, art. VII § 10(a)). Judge Grubb saw the intent of the drafters of the Constitution as desiring to “encourage new arrangements between municipalities and private enterprise.” Further, because sales tax rebate agreements were not prohibited by law and the City had not exceeded its debt limitation, the Judge upheld the agreement. No appeal was filed by the State’s Attorney.

(From the Illinois Municipal League’s Legal Bulletin 94-3, dated 5/17/94.)

B. The Statutory Basis for Non-Home Rule Municipalities

1. (65 ILCS 5/8-11-20)

Sec. 8-11-20. Economic incentive agreements. The corporate authorities of a municipality may enter into an economic incentive agreement relating to the development or redevelopment of land within the corporate limits of the municipality. Under this agreement, the municipality may agree to share or rebate a portion of any retailers' occupation taxes received by the municipality that were generated by the development or redevelopment over a finite period of time. Before entering into the agreement authorized by this Section, the corporate authorities shall make the following findings:

- (1) If the property subject to the agreement is vacant:
 - (a) that the property has remained vacant for at least one year, or
 - (b) that any building located on the property was demolished within the last year and that the building would have qualified under finding (2) of this Section;
- (2) If the property subject to the agreement is currently developed:
 - (a) that the buildings on the property no longer comply with current building codes, or
 - (b) that the buildings on the property have remained less than significantly unoccupied or underutilized for a period of at least one year;
- (3) That the project is expected to create or retain job opportunities within the municipality;
- (4) That the project will serve to further the development of adjacent areas;
- (5) That without the agreement, the project would not be possible;
- (6) That the developer meets high standards of creditworthiness and financial strength as demonstrated by one or more of the following:
 - (a) corporate debenture ratings of BBB or higher by Standard & Poor's Corporation or Baa or higher by Moody's Investors Service, Inc.;
 - (b) a letter from a financial institution with assets of \$10,000,000 or more attesting to the financial strength of the developer; or

(c) specific evidence of equity financing for not less than 10% of the total project costs;

(7) That the project will strengthen the commercial sector of the municipality;

(8) That the project will enhance the tax base of the municipality; and

(9) That the agreement is made in the best interest of the municipality.

(Added by Public Act 89-63, effective 6/30/95, as amended by Public Act 92-263, effective 8/7/01))

2. (65 ILCS 5/8-11-21)

Sec. 8-11-21. Agreements to share or rebate occupation taxes.

(1) On and after June 1, 2004, the corporate authorities of a municipality shall not enter into any agreement to share or rebate any portion of retailers' occupation taxes generated by retail sales of tangible personal property if: (a) the tax on those retail sales, absent the agreement, would have been paid to another unit of local government; and (b) the retailer maintains, within that other unit of local government, a retail location from which the tangible personal property is delivered to purchasers, or a warehouse from which the tangible personal property is delivered to purchasers. Any unit of local government denied retailers' occupation tax revenue because of an agreement that violates this Section may file an action in circuit court against only the municipality. Any agreement entered into prior to June 1, 2004 is not affected by this amendatory Act of the 93rd General Assembly. Any unit of local government that prevails in the circuit court action is entitled to damages in the amount of the tax revenue it was denied as a result of the agreement, statutory interest, costs, reasonable attorney's fees, and an amount equal to 50% of the tax.

(2) On and after the effective date of this amendatory Act of the 93rd General Assembly, a home rule unit shall not enter into any agreement prohibited by this Section. This Section is a denial and limitation of home rule powers and functions under subsection (g) of Section 6 of Article VII of the Illinois Constitution.

(Added by Public Act 93-920, effective 8/12/04.)

#210777