

ECONOMIC INCENTIVES AT THE LOCAL LEVEL

A recent amendment to Alabama's Constitution allows cities and counties to have greater flexibility in offering economic incentives to retailers and manufacturers wishing to locate in their communities. .

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The State of Alabama has been a hotbed of economic development for years. Cities and counties throughout Alabama are constantly competing on a national and international level for prospective businesses. Frequently, companies coming into Alabama are manufacturers. These manufacturers often request infrastructure improvements, such as water and sewer lines, as well as statutory incentives, as a condition to locating or expanding in Alabama. Statutory incentives, which are incentives granted by legislator acts of the Legislature, have traditionally been limited to manufacturing and research companies.

As the economy has shifted to the service sector, communities in Alabama have sought other methods of assistance, particularly in the area of financing, to attract new projects. Recently enacted Alabama Constitution Amendment No. 772 should help immensely, by adding flexibility for cities and counties looking to entice a much broader range of businesses, though questions as to its applicability to cities and counties with pre-existing constitutional amendments remain.

TRADITIONAL INCENTIVES FOR MANUFACTURERS

The Alabama Legislature passed the Tax Incentive Reform Act of



The Summit in Birmingham benefitted from a public-private partnership between its developer and the City of Birmingham. Some of the initial infrastructure for the retail development was built through this partnership.

1992 (the 1992 Reform Act) to provide property and sales and use tax abatements to companies locating or expanding certain types of facilities in Alabama. This law does not apply to retailers. The Alabama Legislature also passed a law in 1995 — the Capital Credit Act — providing businesses with an annual credit against Alabama income tax allocable to a qualifying project. As with tax abatements under the 1992 Reform Act, the predominant trade or business at a project must consist of an industrial, warehousing or research activity in order to qualify under the Capital Credit Act.

DIRECT GOVERNMENTAL EXPENDITURES FOR ECONOMIC DEVELOPMENT

Faced with statutory and constitutional constraints, city and county governments have become increasingly more creative in offering

financial packages containing other economic incentives to lure various projects, including retail businesses. The power of local governmental units in Alabama, including cities, counties and public corporations, however, is limited under a principle of Alabama law known as "Dillon's Rule." This rule states that the power of a local government is only that power expressly granted to it by the Legislature together with any powers that are necessarily implied from those expressly granted powers. Section 93 of the Alabama Constitution further limits the ability of the state to participate in economic development projects. A similar provision, Section 94, applies to local governments in Alabama. These constitutional provisions generally provide that the state and local governments do not have the power to lend credit or to grant public money to private businesses. Public funds may, however, be spent for "public purposes" in the economic develop-

The Summit in Birmingham continues to attract new shops to its location on Highway 280.



ment context.

Public infrastructure improvements for private business typically qualify as a “public purpose.” A municipality may issue general obligation warrants, without an election, for any valid municipal purpose under Ala. Code §11-47-2. Valid municipal purposes include development of public infrastructure, such as roads, utilities and streetscapes, which are all within the public domain. In addition, such public improvements, if they are to remain public, can be financed by a municipality on a tax-exempt basis, thus lowering borrowing costs. An example in the federal tax regulations permits the public funding on a tax-exempt basis of a 25-mile long road to a private facility, where the road has no use other than to permit persons to travel to the private facility. In the example, since the road will be available without restriction to all users, and the road will be owned by the city, the mere fact that the private facility is at the end of the road does not constitute “private business use” that could cause the debt to be taxable. Treas. Reg. §1.141-3(f), Ex. 11. This example could be useful in the financing of a retail establishment. If a city wishes to participate in attracting a retail employer, the city can commit to, and finance on a tax-exempt basis, street improvements, streetscape improvements and utility work within the public domain and not on the property to be conveyed, to entice the retail customer to locate in a certain spot. The

“public use” exception, however, provides no benefit inside the territory conveyed to the developer or the ultimate retail customer.

Even if undertaken for a permissible purpose, counties and cities do not have an unlimited ability to issue debt in Alabama. The Alabama Constitution imposes debt limits on cities based upon their population. The debt limit is based upon the net assessed value of real property in the city or county, excluding some short-term debt, debt issued for schools, waterworks and sanitary sewers and debt paid from facility revenues where the property financed solely supports the debt.

ADDITIONAL FINANCING AVAILABLE METHODS

In addition to direct funding by a city or a county, the Code of Alabama provides several other options for financing infrastructure improvements. These options include tax-increment financing districts, improvement districts and cooperative districts. Tax-increment financing districts are districts created by a city or county for the benefit of “blighted or economically distressed areas,” including areas in need of redevelopment or areas needing rehabilitation after a natural disaster. Ala. Code §§11-99-1 et seq. This statute permits a city or county to issue tax-increment obligations payable from the incremental ad valorem tax increase in the project

area. Unless that obligation is secured by a general obligation pledge of the city or county, the obligation of the city or county to repay tax increment debt is not counted against its debt limit.

Improvement districts are formed under Ala. Code §§11-99A-1 et seq., as a separate public corporation to facilitate the financing of public infrastructure improvements. Where a local government does not have the debt capacity, financial resources or desire to finance infra-

structure improvements with its own funds, the developer can ask that an improvement district be established to finance public infrastructure improvements with tax-exempt debt. Bonds issued by a district are payable from assessments on property in the district. Unpaid assessments constitute a lien on the property. The sponsoring local government, if it so desires, can guarantee or pledge revenue to the payment of district bonds, in which case the amount pledged will count against the local government’s debt limit.

Cooperative districts are established by multiple local governmental units under Ala. Code §§11-99B-1 et seq., in order to finance public infrastructure projects. Local governmental units may lend or donate money to a cooperative district and may contract to pay for its debts.

LOCAL ECONOMIC DEVELOPMENT CONSTITUTIONAL AMENDMENTS

Sections 93 and 94 of the Alabama Constitution restrict economic development methods. Many local governments have obtained local amendments to the Constitution from the Alabama Legislature in order to broaden their power to participate in economic development projects. The local amendments will often provide the power to use public funds to acquire land, to develop industrial

sites or create industrial park projects, to convey such land or projects to private businesses and allow the local government to lend its credit to or grant public funds to private businesses in order to promote the economic and industrial development of the county or the municipality. Frequently, the local amendment will specifically state that in carrying out the purposes of the amendment, neither the county nor any municipality covered by the amendment will be subject to Sections 93 or 94 of the Alabama Constitution.

Recently, the Alabama Legislature passed Alabama Act 2004-94, which is now Amendment No. 772 of the Alabama Constitution. Amendment No. 772 is an economic development amendment for the benefit of all counties, and municipalities located therein, for which a local constitutional amendment has not been adopted. The amendment authorizes the use of specified economic development powers. Included in these powers are the power to use public funds to purchase, improve, develop or lease real property in favor of private businesses or to convey such property to private businesses and to lend credit or issue bonds to support economic development projects on behalf of private businesses. To authorize the use of the economic development powers specified in Amendment No. 772 for a particular project, the amendment requires public notification of the project and a subsequent public hearing by the governmental authority explaining the parameters of the project and the economic incentives involved.

It is unclear from the language of Amendment No. 772 if this amendment applies to those counties and/or municipalities for which an economic development amendment already exists. It is unsettled, therefore, if Amendment No. 772 can be used by a county or city if the amendment would have the affect of broadening the powers already authorized by a local economic development amendment.

CONCLUSION

Alabama law provides valuable incentives for cities and counties to offer businesses in connection with the creation or expansion of particular types of industry. In addition, certain financing vehicles are avail-

able under Alabama law in order to provide infrastructure improvements that benefit other private development projects. Traditionally, constitutional limitations have limited the ability of Alabama cities and counties to provide direct financial assistance for private projects. Recently, however, the enactment of Amendment No. 772 has provided local govern-

ments with greater flexibility in the types of incentive packages they may offer in order to entice businesses, regardless of type, to locate or expand in their community. •

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