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Evolution of Tax Increment Financing: Indiana, Kentucky, Ohio, and West Virginia - Frost Brown Todd

Tax increment finance (TIF) legislation continues to evolve in many states within the Frost Brown Todd footprint. Below are summaries of recent legislative changes in Indiana, Kentucky, Ohio and West Virginia. These changes may provide additional opportunities for local governments or developers looking to utilize TIF to complete their capital stacks. In addition, the changes may provide additional financing opportunities for existing districts and projects.

Indiana

The General Assembly of the State of Indiana passed limited modifications to the TIF statutes and related provisions during this session. Some of the more relevant amendments to TIF and redevelopment commissions were included in House Bill 1271. The bill was the omnibus legislation for the Department of Local Government Finance (DLGF). It was signed into law by Governor Eric Holcomb on April 8, 2021, and included, among many other things, the following:

Negotiated Bond Sales – The bill extended the sunset provision permitting sales of general obligation, revenue (including tax increment revenue), or special tax bonds at negotiated sales until July 1, 2023.

Allocation Areas – There were several amendments providing that one parcel may not be included in multiple allocation areas. This provision, however, does not apply retroactively to parcels currently located in multiple allocation areas.

Annual Notification to DLGF – The bill shifted responsibility for annual notification to DLGF of the amount of excess tax increment revenue from the redevelopment commission of the local governmental unit to the county auditor.

The above is a short summation of some of the legislation passed by the General Assembly that affects TIF and redevelopment commissions. The 2022 General Assembly session will likely yield more changes to Indiana's TIF statutes and related provisions.

Kentucky

During the 2021 legislative session, the Kentucky legislature passed an amendment to Section 65.7047 of the Kentucky Tax Increment Financing Act. The amendment, effective June 29, 2021, places certain preliminary requirements on cities and counties that are establishing or modifying local development areas over previously undeveloped land. The amendment requires the city or county to engage a "qualified independent outside consultant or financial adviser" to prepare a report that analyzes data related to the project and the proposed development area.

The component parts of the required report include:

1. the estimated approved public infrastructure costs;

2. an assessment of the feasibility of the project;
3. the estimated amount of local tax revenues that will be generated by the project over the term of the local development area;
4. the estimated amount of local tax revenues that will be displaced as a result of the project;
5. the estimated amount of old revenues that would have been generated in the local development area in the absence of the project; and
6. a determination that the project will not occur "but for" the existence of the local development area.

The amendment also addresses improvements to local development areas that will be financed through the issuance and sale of increment revenue bonds or "TIF bonds." Where such bonds will be issued and sold, the required report must also include projected financing costs as well as the relationship of the estimated revenues to the financing needs of the project.

Finally, with respect to the legislative approval of a local development area, the amendment provides that the ordinance approving the development area must include the estimated net positive fiscal impact as set forth in the required report.

Ohio

The Ohio General Assembly recently passed several bills that will impact the implementation and administration of TIF districts in Ohio. Below is a summary of key updates that will be of interest to local governments, developers, and other community stakeholders.

Amendments to Sections 5709.40 and 5709.41 of the Ohio Revised Code – The biennium budget bill, signed into law by Governor Mike DeWine on July 1, 2021, includes amendments to Sections 5709.40 and 5709.41 of the Ohio Revised Code, which are the tax increment provisions that govern the establishment of TIF districts in municipal corporations. The amendments incorporate the following updates:

- ***Off-Street Parking Facilities:*** A Section 5709.40(A)(8) amendment updates the definition of "public infrastructure improvement" to expressly include "off-street parking facilities" as a qualifying expenditure of TIF service payments. This update will give municipalities more certainty with respect to their participation in the financing of projects that incorporate structured parking.
- ***Exemption Period Commencement Flexibility Allowing Designated Tax Year or Value:*** A Section 5709.41(D) amendment gives municipalities greater latitude when designating the commencement date for a TIF exemption under an authorizing ordinance. Under the updated provision, municipalities may elect to have a TIF exemption commence with any tax year specified in the TIF ordinance other than a tax year that precedes the effective date of the ordinance. Alternatively, the amendment permits municipalities to refrain from designating a tax year for the commencement of a TIF exemption and to instead utilize an improvement value as the basis for commencing a TIF exemption. For projects that incorporate multiple parcels, the amendment permits a municipality to establish different commencement dates for each parcel identified in the authorizing ordinance. These updates bring Section 5709.41 in alignment with the parallel provisions under Section 5709.40.

Minimum Service Payment Obligations Under Section 5709.91 – Substitute Senate Bill 57 was signed by Governor DeWine on April 27, 2021 and will be effective on August 3, 2021. This legislation approves several updates to Section 5709.91 of the Ohio Revised Code with respect to the status of "minimum service payment obligations" as they pertain to real property located in TIF districts. "Minimum service payment obligations" are payment obligations that supplement a property owner's obligation to make statutory service payments under Section 5709.42 and related

provisions of the Ohio Revised Code. The updates to Section 5790.91, include the following changes pertaining to minimum service payment obligations:

- ***Covenant Running with the Land:*** Recorded agreements or instruments memorializing a property owner's consent to a minimum service payment obligation shall constitute a covenant running with the land and be binding against subsequent owners of the property;
- ***Insurable Interest****:* Minimum service payment obligations constitute an insurable interest for purposes of issuing title insurance in Ohio;
- ***Collected Like Property Taxes:*** Minimum service payment obligations may be certified to the county auditor and shall be collected in the same manner as real property taxes; and
- ***Security Mechanism for Financing:*** Minimum service payment obligations may be established to ensure sufficient funds to "finance expenditures" authorized under Chapters 725, 1728, and 5709. This update provides for broad authority to utilize "minimum service payment obligations" as compared to the prior provision which limited the use of "minimum service payment obligations" to ensuring sufficient funds to finance expenditures attributable to "public infrastructure improvements" and "housing renovations."

These changes provide greater flexibility and increased opportunity for local governments to incorporate the "minimum service payment obligations" into the financing of projects.

Payment Limitation on TIF District Extensions – Certain TIF districts in Ohio may be eligible for an extension of the exemption period. As a reminder, the ability to extend TIF districts in 2020 is gone, but TIF districts may still be extended in 2021 and beyond. For extensions after January 1, 2021, service payments may not exceed $1,500,000 for all calendar years prior to the calendar year immediately preceding the adoption of the extension amendment.

West Virginia

The West Virginia legislature continued passing amendments to the West Virginia Tax Increment Financing Act during the 2021 legislative session. The Act was previously amended during the 2004, 2014, 2016 and 2018 legislative sessions. The 2021 amendments primarily address:

1. extending the termination date of certain districts;
2. procedures to combine two districts;
3. the maturity date of certain refunding bonds; and
4. agreement for payments in lieu of taxes for properties within districts.

The amendments discussed below were effective on July 9, 2021.

Extension of Termination Date of Certain Districts – County commissions or municipalities may extend the termination date of certain districts for up to five years or to December 31, 2050, whichever is earlier. Only districts for which tax increment financing obligations were issued prior to December 31, 2020 may be extended. The extension of the term of a district may not occur simultaneously with the modification of the boundaries of the district. The local government proposing the extension is required to hold a public hearing, obtain the approval of the director of the West Virginia Department of Economic Development, and, if applicable, obtain the approval of any municipality in which a portion of a district is located.

Combining Districts – The amendments to the Act clarified: (i) the base assessed value of the property of a district resulting from the combination of two prior districts and (ii) the termination date of a combined district. The base assessed value of property in a combined district is the base assessed value of such property in each of the prior separate districts. The termination date of a

combined district is the termination date of the district that had the latest termination date prior to the combination of the districts. This provides the opportunity to create a new district adjacent to an existing district, and following the combination of the two districts, the termination date would be nearly 30 years.

Payments in Lieu of Taxes – Prior to the most recent amendments to the Act, agreements for payments in lieu of taxes with respect to property in a district were required to have any such payments be equal to the property taxes that otherwise would have been due. The amendments permit agreements for payments in lieu of taxes to be negotiated among the public entity owning the property, the lessee of the property, and the applicable local levying bodies. These changes provide flexibility to provide property tax incentives for projects within a district. In addition, these changes provide for a written agreement to address the amount of property taxes to be deposited in the tax increment financing fund for the term of the agreement which eliminates assessment risk for any property covered by such an agreement.

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