



OFFICE OF ATTORNEY GENERAL
STATE OF OKLAHOMA

ATTORNEY GENERAL OPINION
2019-7

The Honorable Jason Smalley
Oklahoma Senator, District 28
2300 N. Lincoln Blvd., Room 416
Oklahoma City, OK 73105

September 26, 2019

Dear Senator Smalley:

This office has received your request for an official Attorney General Opinion in which you ask, in effect, the following questions:

1. **Under the Oklahoma Local Development Act, 62 O.S.2011 & Supp.2018, §§ 850–869 (the “Act”), may a municipality adopt an apportionment area without also having approved a project plan?**
2. **How detailed must a project plan’s description of proposed improvements be to comply with the Act?**
3. **How is a municipality’s compliance with the Act’s guidelines set forth in 62 O.S.2011, § 852(1) & (2) measured?**
4. **May a tax increment financing district include a project currently under construction and/or known prior to the district’s creation, such that tax revenue relating to that project may be captured to pay project costs that have not yet been incurred?**

I.
BACKGROUND

The Oklahoma Local Development Act, 62 O.S.2011 & Supp.2018, §§ 850–869 (the “Act”) was enacted in 1992 as a statutory method by which cities, towns, and counties (“localities”) may undertake development projects contemplated by Article X, Section 6C of the Oklahoma Constitution (“Section 6C”).¹ *See* 1992 Okla. Sess. Laws ch. 342, §§ 1–20. The purpose of both

¹ Article X, Section 6C authorizes the Legislature to, among other things, “grant incorporated cities, towns, or counties the ability to provide incentives, exemptions and other forms of relief from taxation for historic preservation, reinvestment, or enterprise areas that are exhibiting economic stagnation or decline.” OKLA. CONST. art.

Section 6C and the Act is to promote the planning, financing, and development or redevelopment of “areas determined . . . to be unproductive, undeveloped, underdeveloped or blighted.” OKLA. CONST. art. X, § 6C(C); 62 O.S.2011, § 851; *see also In re Okla. Dev. Fin. Auth.*, 2004 OK 51, ¶¶ 13-14, 94 P.3d 87, 92-93. The Legislature declared in the Act that “historic preservation, reinvestment and enterprise areas as defined [therein] are unproductive, undeveloped, underdeveloped or blighted areas.” 62 O.S.2011, § 851. Thus, any projects proposed in those areas, as they are defined by the Act, are automatically eligible for sponsored development under the Act. *Harvey v. City of Oklahoma City*, 2005 OK 20, ¶¶ 7-8, 111 P.3d 239, 242.

Under the authority granted by Section 6C, the Act permits a locality’s governing body to (i) grant incentives and exemptions from taxation to persons improving and developing property in a particular area, and (ii) provide for apportionment of a tax increment for planning, financing, development, and redevelopment. *See* 62 O.S.2011, § 851. The Act provides a framework whereby a locality designates an apportionment area, also known as an increment district, incentivizes the development or redevelopment of properties in the area to meet the area’s economic development needs, and finances improvements through the resulting increase in ad valorem and/or sales tax revenue in the revitalized area. *See id.* § 854. This financing method is commonly referred to as “tax increment financing” and the related districts are referred to as “TIF districts.” *See Harvey*, 2005 OK 20, ¶ 3, 111 P.3d at 241; *see also Oklahoma City Urban Renewal Auth. v. Med. Tech. & Research Auth. of Oklahoma*, 2000 OK 23, ¶ 10, 4 P.3d 677, 682-83 (“The amount of ad valorem taxes in excess of the base assessed valued is the ‘increment’ paid into an apportionment fund established for the payment of the project costs[.]”).²

A locality seeking to create a TIF district must “cause to be prepared a project plan” which is then reviewed by the locality’s planning commission.³ 62 O.S.2011, § 858(A). Based on that plan, the planning commission then makes a recommendation to the locality’s governing body. *Id.*; *see also* 62 O.S.Supp.2018, § 855 (requiring the governing body to also appoint a “review committee to review and make a recommendation concerning the proposed district, plan or project”). A project plan generally must (i) identify a potential project area, (ii) describe proposed improvements, (iii) estimate project costs and financing methods (*i.e.*, local tax and fee revenue or ad valorem tax revenue), and (iv) include a map of the district’s existing uses and proposed improvements, along with any necessary changes in the locality’s zoning ordinances and master plan. 62 O.S.2011, § 858(A). Before any plan may be adopted, the locality’s governing body must hold public hearings to answer questions and receive comments regarding the proposed plan. 62 O.S.Supp.2018, § 859. If, after the public hearings, the locality’s governing body opts to pursue the plan, an ordinance or resolution is enacted creating an increment district as of a date provided or deferred by up to 10 years after the date of approval of the project plan. 62 O.S.2011, § 856(B).

X, § 6C(A). It was adopted on November 6, 1990 pursuant to the citizens’ approval of State Question 641. *See* <https://www.sos.ok.gov/gov/questions.aspx> (last visited September 25, 2019).

² For a more in-depth explanation of tax increment financing and the mechanics of the Act, *see* Attorney General Opinions 2011-5, 2009-39, and 2009-13.

³ The planning commission is “an organization established for local planning by local government or governments in accordance with the laws of this state.” 62 O.S.2011, § 853(11).

As noted above, a project plan may contemplate the use of ad valorem tax revenues to finance the project's costs. If ad valorem tax increment financing is to be used, the county assessor(s) for the district must determine the total assessed base valuation of taxable real and personal property within the boundaries of the increment district and certify it to the locality within 90 days of project plan approval. 62 O.S.2011, § 862(A). After all approvals, the work of development and/or redevelopment according to the plan begins. When property values and resulting revenue in the district increase during or after development, revenue that derives from the difference between the base value and the new increased value is used by the locality to pay some portion of project costs and incentives. *Id.* § 861. The increment realized from ad valorem taxes or apportionment from local taxes and/or fees may then be apportioned for a period not to exceed 25 fiscal years subsequent to approval of the project plan to complete payment of the project costs. *Id.* § 861(A).

II. DISCUSSION

A. A locality may not adopt an apportionment area or increment district pursuant to the Act without also having approved a project plan.

You first ask whether a municipality may designate an apportionment area, or increment district,⁴ without first having approved a project plan. In short, the answer is no. “The justification for all TIF districts is found in the project plan.” 2009 OK AG 13, ¶ 14 (citing 62 O.S.Supp.2008, § 858(A)); *see also In re Okla. Dev. Finance Auth.*, 2004 OK 51, ¶ 15, 94 P.3d 87, 93 (“The plan is intended to create economically productive property where none presently exists by providing inducements for private commercial development.” (citing *Okla. City Urban Renewal*, 2000 OK 23, ¶¶ 10-12, 4 P.3d at 682-83)). As such, the project plan is a prerequisite to establishing a TIF district. *See* 62 O.S.2011, § 858(A) (“The governing body *shall* cause to be prepared a project plan.” (emphasis added)). It is a first and necessary step in the process. *See id.* § 856(B). And by statute, the plan must include, among other things, “[a] description of the proposed boundaries of the district and the proposed boundaries of the project area[.]” *Id.* § 858(A)(1). While apportionment pursuant to a TIF may be prospective, *see id.* § 854(4), without an adopted (or proposed) project plan, there would be no method by which to determine how much funding is needed, making the appropriate TIF size and area from which to generate such funds indeterminable. The identification of the apportionment area, or increment district, and the development of the project plan go hand-in-hand.

⁴ The Act defines “apportionment area” to mean “the same as an increment district as defined under this act.” 62 O.S.2011, § 853(2). The term “increment district” is not specifically defined, but the Act defines “district” as “either an incentive district as authorized by Section 860 of [the Act] or an *increment district as authorized by Section 861* of [the Act].” *Id.* § 853(4) (emphasis added). Further, “[a] district may consist of all or a portion of a project area.” *Id.* Finally, “project area” is defined as “the geographic boundaries within which development activities will occur.” *Id.* § 853(13). “The project area may be coextensive or larger than the increment district.” *Id.*

B. A project plan must include a general description of the public works or proposed improvements in the increment district.

While there is nothing in the Act that requires a certain level of specificity in a project plan, the Act does require the plan to include certain items, “if applicable, according to the type of district being formed.” 62 O.S.2011, § 858(A). Among the listed items is “a *general description* of the proposed public works or improvements, anticipated private investments, and estimated public revenues which should accrue.” *Id.* § 858(A)(4).⁵ A “general” description is commonly understood to mean one that is “marked by broad overall character without being limited, modified, or checked by narrow precise considerations.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 944 (3d ed. 2002); *see also* 25 O.S.2011, § 1 (“Words used in any statute are to be understood in their ordinary sense, except where a contrary intention plainly appears[.]”). Thus, so long as the project plan is sufficient to identify the broad overall character of the public works or improvements that are being proposed, the plan satisfies the requirements of the Act.⁶

C. The question of whether an increment district is consistent with the Act’s guidelines is factual in nature and therefore committed to the discretion of a trial court, except that districts in “historic preservation, reinvestment or enterprise areas” are *per se* consistent with such guidelines.

Section 6C empowered the Legislature to “authorize any city, town, or county to plan, finance and carry out the development or redevelopment of areas determined by the governing body of such city, town, or county to be unproductive, undeveloped, underdeveloped or blighted.” OKLA. CONST. art. X, § 6C(D). The Legislature so authorized in the Act, *see* 62 O.S.2011, § 851(3), and included guidelines for localities that utilize the Act’s tools. *See id.* § 852. Two of those guidelines are relevant to your request: the Act’s tools may be used (i) only “in those cases where investment, development and economic growth is difficult, but is possible if the provisions of [the Act] are available,” *but not* (ii) “in areas where investment, development and economic growth would have occurred anyway[.]” *Id.* § 852(1)-(2). Finally, as noted above, the Legislature determined that for the purposes of satisfying Section 6C, “historic preservation, reinvestment or enterprise areas as defined under [the Act] *are* unproductive, undeveloped, underdeveloped or blighted areas[.]” *Id.* § 851 (emphasis added).

You have asked how it is to be determined whether a locality has complied with the guidelines set forth in Section 852(1) & (2). This question was addressed in part by the Oklahoma Supreme Court

⁵ In addition, a project plan must include “a map showing proposed improvements to and proposed uses of” real property in the district. 62 O.S.2011, § 858(A)(5).

⁶ It is also worth noting that some parcels in the district ultimately may be used for a purpose not initially contemplated by the project plan. While the plan must generally describe the proposed public works or improvements for various parcels, *see* 62 O.S.2011, § 858(A)(4), (5), the plan may be later modified based on what property owners propose and what the locality ultimately approves, subject to public hearings if proposed developments require plan amendment. *See id.* § 858(A)(2), (C)-(E); *Oklahoma City Urban Renewal*, 2000 OK 23, ¶¶ 10-12, 4 P.3d at 682-83.

in *Harvey v. City of Oklahoma City*, wherein the plaintiff argued that the Skirvin Hotel redevelopment in Oklahoma City would have occurred without the benefit of the Act. The Court disagreed, finding as follows:

Paragraph C of § 6C requires that the development or redevelopment areas be determined by the governing body to be “unproductive, undeveloped, underdeveloped or blighted.” Similarly, Sections 852(1) and (2) of [the Act] express the intent of the Legislature that the Act be used in cases “where investment, development and economic growth is difficult, but is possible if the provisions of this act are available” and that the Act not be used in areas “where investment, development and economic growth would have occurred anyway.”

However, [the Act] specifically declares that “historic preservation, reinvestment or enterprise areas as defined under this act are unproductive, undeveloped, underdeveloped or blighted pursuant to Article 10, § 6C.” 62 O.S.2001 § 851 (emphasis added). The Act defines “enterprise area” as “any area within a designated state or federal enterprise zone.” 62 O.S.2001 § 853(5). Since the area involved in this case is undeniably within a state-designated enterprise zone, it is by definition “unproductive, undeveloped, underdeveloped or blighted” for the purpose of TIF financing and therefore automatically qualifies under [the Act]. Thus, the Skirvin Hotel Project does not violate Article 10, § 6C of the Oklahoma Constitution or § 852(1) and (2) of [the Act] as alleged by plaintiff.

2005 OK 20, ¶¶ 7-8, 111 P.3d at 242 (emphasis in original). Thus, per the Court’s ruling in *Harvey*, a locality complies with the guidelines of Section 852(1) & (2) if its project area is located in an enterprise area, a preservation area, or a reinvestment area, as those terms are defined in the Act. The Court did not, however, reach the question of how projects *not* in those areas should be judged as consistent (or inconsistent) with those guidelines.

Under the Act, the governing body of a locality wishing to create an increment district must adopt an ordinance or resolution containing the body’s findings that the guidelines of Section 852(1) & (2) “shall be followed.” 62 O.S.2011, § 856(B)(4)(c). Thus, the Legislature left the initial determination of the project’s compliance with statutory guidelines to the locality.⁷ So long as the locality’s action is not unreasonable, arbitrary, or capricious, it generally will be upheld.⁸ See *Garrett v. City of Oklahoma City*, 1979 OK 60, ¶ 5, 594 P.2d 764, 766; *Harper v. City of Oklahoma City*, 1953 OK 107, ¶ 20, 255 P.2d 933, 937 (“An ordinance will be presumed to be in conformity with a statute from which it derives its vitality, unless the contrary is made expressly to appear.” (citations omitted)); see also *City of Midwest City v. House of Realty, Inc.*, 2008 OK 28, ¶ 4, 198

⁷ “Notwithstanding any provision contained in an ordinance, resolution or project plan, an ordinance or resolution establishing an increment district shall constitute a legislative act[.]” 62 O.S.2011, § 856(C).

⁸ It is also worth noting that the locality’s determination to establish an increment district is subject to referendum by the locality’s voters. 62 O.S.2011, § 868.

P.3d 886, 891 (“[W]e may overturn the City’s blight determinations only if, in making the findings, it acted arbitrarily or capriciously.”).

In *City of Guymon v. Butler*, the only case apart from *Harvey* to have addressed this issue, the Court deemed the project’s compliance with the guidelines set forth in Section 852(1) & (2) to be a question of fact to be determined by the trial court. 2004 OK 37, ¶¶ 25-26, 92 P.3d 80, 86-87 (explaining that the trial court “specifically found that the economic growth and investment experienced by Guymon and Texas County since 1993 would not have occurred without the measures taken” by the locality pursuant to the Act). Accordingly, whether any particular project is consistent with the Act’s guidelines will depend on facts specific to that project.

D. An increment district may include a project that was planned or in progress before the district was created, thereby permitting the capture of tax revenue relating to the project to pay project costs not yet incurred.

Section 862 of the Act indicates that upon approval of a project plan, the county assessor shall within 90 days determine the total assessed value of all taxable real and personal property within the boundaries of the increment district. This value is certified as the base assessed value. 62 O.S.2011, § 862(A). Each year thereafter the assessor revalues all taxable real and personal property in the district. 68 O.S.Supp.2018, § 2817. The difference between the base assessed value and the new yearly assessed value is the maximum permissible increment value, which is multiplied by the property millage assessment rate, the total of which is provided to the district for payment of project costs. *See* 62 O.S.2011, §§ 853(9), 862(C).

When development of real property within an increment district is planned or in progress on the date of the formation of the project plan, and is completed and assessed thereafter, the property will likely generate an increase in assessed value for ad valorem tax based on the improvements in some subsequent year. The Act is designed to capture this increased ad valorem tax and make it available to finance project costs. *See, e.g., Okla. City Urban Renewal Auth. v. Med. Tech. & Research Auth.*, 2000 OK 23, ¶ 12; 4 P.3d 677, 683 (“Tax increment financing places the cost of urban renewal on the property benefitting from the expenditure of the funds collected.”). The only restriction on that capture is that incentives or exemptions may only be granted on new property investments versus existing improvements.⁹ 62 O.S.2011, § 860(B).

The increment collected from and after the effective date of the approval of the project plan may then be apportioned for a period not to exceed 25 years. 62 O.S.2011, § 862(A). Incentives and exemptions to property owners are generally limited to five years, or six years if the property is located in an enterprise zone. *Id.* § 860(B).

⁹ Projects with construction already in progress at plan adoption will not have been assessed on the improvements in progress. Improvements made after January 1 of any year are generally assessed and added to property valuation for the ensuing year. *See* 68 O.S.Supp.2018, § 2817(J). Improvements in progress at project plan adoption also must comply with the adopted project plan or the plan must be properly modified subject to public hearing. 62 O.S.2011, § 858.

It is, therefore, the Official Opinion of the Attorney General that:

1. A locality may not adopt an apportionment area or increment district pursuant to the Local Development Act without also having approved a project plan. *See* 62 O.S.2011, §§ 856(B), 858(A).
2. A project plan must include a general description of the public works or proposed improvements in the increment district. *See* 62 O.S.2011, § 858(A)(4).
3. Projects undertaken pursuant to the Local Development Act that are located in “historic preservation, reinvestment or enterprise areas” as defined in the Act are consistent with the Act’s guidelines set forth in 62 O.S.2011, § 852(1) & (2). *Harvey v. City of Oklahoma City*, 2005 OK 20, 111 P.3d 239. Outside of those areas, the question of whether the project is consistent with 62 O.S.2011, § 852(1) & (2) is to be determined by a locality’s governing body, and that determination will generally be upheld so long as it is not deemed unreasonable, arbitrary, or capricious. *See Garrett v. City of Oklahoma City*, 1979 OK 60, ¶ 5, 594 P.2d 764, 766; *Harper v. City of Oklahoma City*, 1953 OK 107, ¶ 20, 255 P.2d 933, 937; *see also City of Midwest City v. House of Realty, Inc.*, 2008 OK 28, ¶ 4, 198 P.3d 886, 891.
4. An increment district may include both development that is under construction or planned prior to the district’s creation to permit the capture of tax revenue relating to the project to pay project costs not yet incurred.

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