

**QUESTIONS AND ANSWERS REGARDING
CREATION OR AMENDMENT OF DOWNTOWN DEVELOPMENT AUTHORITIES
UNDER SECTION 3(1) OF ACT 197 OF 1975, AS AMENDED**

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Michigan cities, villages, and townships are authorized to create one downtown development authority within their jurisdictions pursuant to the provisions of the Downtown Development Authority Act, Act 197 of the Public Acts of 1975, as amended ("Act 197"). The following is an overview of the substantive prerequisites and the procedures necessary to create a downtown development authority or to amend the district of an existing downtown development authority,¹ as well as frequently asked questions regarding the creation of an authority.

Downtown Development Authority Creation: Substantive Requirements

Sec. 3(1) of Act 197 sets out the substantive requirements which must be present prior to creating an authority:

When the governing body of a municipality determines that it is necessary for the best interests of the public to halt property value deterioration and increase property tax valuation where possible in its business district, to eliminate the causes of that deterioration, and to promote economic growth, the governing body may, by resolution, declare its intention to create and provide for the operation of an authority.

There are four principal elements contained in section 3(1) which must be established or occur in order to provide a legally sufficient basis for creating an authority:

- (1) The proposed authority district must be a "business district."
- (2) There must be "property value deterioration" within the proposed district.
- (3) Creation of the authority must be for the purposes of increasing property tax valuation, promoting economic growth, and eliminating the causes of property value deterioration in the district.
- (4) The governing body of the municipality must determine, in light of each of the foregoing conditions precedent, that creation of the authority is necessary for the best interests of the public.

The section's requirements have been the subject of several Attorney General opinions (referred to as "OAG") over the years. There are in addition a small number of unreported circuit court opinions on various aspects of the foregoing. These authorities have interpreted section 3(1) to require the

¹ Section 3(5) of Act 197 provides that the municipality's governing body "may alter or amend the boundaries of the downtown district to include or exclude lands from the downtown district pursuant to the same requirements for adopting the ordinance creating the authority." The balance of this memorandum will speak in terms of creating an authority, but the discussion is equally applicable to circumstances in which boundary alterations or amendments are contemplated.

following:

Business District. Act 197 defines "business district" as "an area in the downtown of a municipality zoned and used principally for business" (sec. 1(d)). "Downtown" is not defined in Act 197, although "downtown district" is defined as "an area in a *business district* that is specifically designated by ordinance of the governing body of the municipality pursuant to this act" (sec. 1(j); emphasis supplied). The circularity of the definitions thus leaves unresolved a fundamental issue. The Attorney General has concluded that Act 197's focus "for the accomplishment of its stated purposes is upon a business district *zoned and used* as such." OAG, 1983-84, No. 6212 (March 29, 1984) (emphasis supplied).² Thus, both the zoning and the actual use of properties within any proposed district must be principally for business activities.

Property Value "Deterioration." This requirement has been among the more problematic requirements of Act 197. The sole interpretive guidance about its meaning has again come from the Attorney General: In OAG 1989-90, No. 6558 (January 18, 1989) ("OAG No. 6558"), the Attorney General opined that a municipality had no power to establish a downtown development authority based on deterioration of "one or two" parcels of property within the downtown district. In so concluding, the Attorney General relied on an earlier opinion, OAG 1985-86, No. 6335 (January 16, 1986) ("OAG No. 6335"), which dealt with analogous issues under the Tax Increment Finance Authority Act ("Act 450"). That opinion reviewed the purposes and powers of tax increment finance authorities (which are similar in some respects to the purposes and powers of downtown development authorities) and concluded that:

the legislative intent is manifest that a significant number of parcels of property in the area of the municipality must be found to be falling off in value in order to warrant the establishment of an authority possessed of wide powers to accomplish the beneficial purposes intended. One or two parcels of property suffering declining property values would not suffice to set in motion the establishment of [an authority] in a municipality. (Emphasis supplied)

What constitutes a "significant number" is an open question on which there is virtually no authority. The common meaning of "significant" is "of a noticeably or measurably large amount." The expression contemplates a subjective determination in light of the facts and circumstances and does not lend itself to a precise rule. Reasonable persons may well differ in their judgments of what is "significant" in a given set of circumstances.³

"Deterioration" similarly is undefined in Act 197. OAG No. 6558 states that "'property value deterioration' means a *decline* in property values" (emphasis supplied). The opinion seems

² The Attorney General has inferred that the definition contemplates one contiguous area, and has opined that a unit of government may not attach to a downtown development district a parcel of land which is not contiguous to the "downtown business district." OAG, 1987-88, No. 6466 (September 14, 1987).

³ The Gratiot County Circuit Court, in a challenge to a proposed downtown development authority comprised of 504 parcels, of which 341 were residential, concluded that decline in 7 commercial parcels over the four years prior to creation of the authority was not a sufficient number of parcels to provide the statutory basis to create the authority.

to assume that the decline must be in the value of real property because it describes decline in terms of "parcels." The opinion further assumes that "decline" is measured in nominal rather than real terms, i.e., the valuation number with respect to a particular parcel must be lower than the number reported in a prior year, rather than showing a lower rate of increase than that of some comparative norm. The opinion is silent with respect to declines in the value of building improvements or in personal property. In the absence of Legislative or judicial clarification of these ambiguities, it is not possible to say conclusively that the Attorney General's position is incorrect, and in all likelihood it would be cited as controlling authority by a party challenging creation of a downtown district on the basis of insufficient deterioration.

Satisfaction of Each Condition Precedent. With respect to Act 450, OAG No. 6335 states that "a plain reading of the statute makes it clear that the governing body is to make *each* of these four conditions precedent determinations prior to proceeding with the formation of [an authority]" (emphasis supplied). The same requirement applies by implication to Act 197 because of the similarity of language between section 3(1) of Act 197 and the analogous language of Act 450.

Legislative Body's Discretion As To Section 3(1) Matters. The first clause of section 3(1) empowers the governing body of a municipality with the power (and obligation) to make the determinations respecting each of the foregoing conditions precedent. The determinations must be reasonable and informed based upon a factual record before the governing body; *see* OAG No. 6335. The ambiguity present in section 3(1)'s language makes the existence and careful preparation of the factual record all the more important. Provided that the determinations made by the governing body are supported by a factual record and are reasonable both in light of Act 197's purposes and of the circumstances before the legislative body, the determinations will enjoy a presumption of validity if challenged. *See 1426 Woodward Ave. Corp. v. Wolff*, 312 Mich 352 (1945); *Inch Memorials v. City of Pontiac*, 93 Mich App 532 (1979).

Procedural Requirements; 1994 Amendments

In addition to describing the substantive elements which must be met in order to create an authority, section 3 of Act 197 sets out the procedures which must be followed to create an authority and establish the downtown district's boundaries. In brief those procedures are as follows:

- 1) The municipality's governing body adopts a resolution of intent incorporating the findings required by section 3(1) and calling a public hearing on the adoption of a proposed ordinance creating the authority and establishing the downtown district's boundaries.
- 2) Notice of the public hearing must be published **twice** in a newspaper of general circulation in the municipality not less than 20 and not more than 40 days before the public hearing.
- 3) Notice of the public hearing must be mailed to property taxpayers of record in the proposed district not less than 20 days before the public hearing.
- 4) Notice of the public hearing must be mailed not less than 20 days before the public hearing also to the governing body of each taxing jurisdiction levying taxes that would be subject to capture if the district and a tax increment financing plan is approved.

- 5) Notice of the public hearing must be posted in at least 20 conspicuous and public places in the proposed downtown district not less than 20 days before the public hearing.
- 6) Not more than 60 days after the public hearing, *the governing body of a taxing jurisdiction levying ad valorem property taxes that would otherwise be subject to capture may exempt its taxes from capture by adopting a resolution to that effect and filing a copy with the clerk of the municipality proposing to create the authority or amend the district. The resolution takes effect when filed with that clerk and remains effective until a copy of a resolution rescinding that resolution is filed with that clerk.* This provision, which now appears at section 3(3) of Act 197, represents a major revision to the approval procedures and materially limits a downtown development authority's ability to fund its development plan from TIF revenues. It was enacted in connection with the approval by Michigan voters of Proposal A in 1994.
- 7) Not less than 60 days after the public hearing, the governing body of the municipality may adopt, by majority vote of its members (i.e., not simply a majority of those present and voting), an ordinance establishing the authority and designating the downtown district's boundaries.
- 8) The ordinance must be filed promptly with the Michigan Secretary of State.
- 9) The ordinance must be published **in full** at least once in a newspaper of general circulation in the municipality.

Municipalities also should be aware that Act 197 authorizes the creation of one, and only one, downtown development authority within a municipality. As a result, the municipality should evaluate carefully the long-term policy implications of creating an authority in light of the municipality's overall land use pattern and (if applicable) Master Plan.

Conclusion

The steps required to create a downtown development authority or to amend the district of an existing authority, and the legal issues created by the ambiguity in Act 197's language, are complex. In addition, Act 197 contains requirements pertaining to the preparation and approval of budgets; completion of audits; filing certain reports with the Michigan Department of Treasury; publication of certain reports; financing projects through approved Development and Tax Increment Finance plans; and issuing obligations. Municipalities should bear in mind that financial risk can be created inadvertently if the proper steps and procedures are not carefully followed. For this reason, any municipality considering creating an authority or amending its boundaries, or establishing a development area for the purpose of collecting tax increment revenues, should consult with counsel having broad experience in these matters.

Should you have further questions, please do not hesitate to contact Michael McGee of Miller, Canfield, Paddock and Stone, P.L.C., (313) 496-7599, email mcgee@millercanfield.com, or visit our website at www.millercanfield.com.