

MEMORANDUM

DATE June 3, 2019

TO Simon Galperin

FROM Dechert LLP

SUBJ Legal Analysis of Special Improvement District Legislation

INTRODUCTION

The following represents our analysis of the application New Jersey's Special Improvement District ("SID") legislation to a potential Community Information District ("CID"). We believe that 1) the creation of a SID for the sole purpose of establishing a CID may be viewed as arguably beyond the scope of the statute and would therefore be vulnerable to a legal challenge, but that 2) the inclusion of a CID in an existing SID would be less vulnerable to such a challenge.

LEGAL ANALYSIS

1. *Background*

New Jersey law empowers a municipality to establish a SID and to impose special assessments on the property within such district "for the purposes of promoting the economic and general welfare of the district and the municipality."¹ A SID is defined as "an area within a municipality" so designated by municipal ordinance for such purposes.² Any funds collected through special assessments within the SID would be administered by a district management corporation.³ In the view of the New Jersey's Department of Community Affairs, SIDs "enabl[e] a collective, organized response to problems as well as opportunities, leveraging the district's assets to mitigate its issues" by "allowing the businesses of a municipality to operate more like the businesses in a mall, managed by a single group rather than by each individual merchant on his or her own."⁴

¹ N.J. Stat. § 40:56-66(b)

² *Id.*

³ N.J. Stat. § 40:56-66(c)

⁴ State of New Jersey, Dep't of Community Affairs, *Frequently Asked Questions about Improvement District (ID) Programs* ("FAQs"), available at https://www.state.nj.us/dca/divisions/dhcr/faq/idp_faq.html

SIDs are the product of amendments made by New Jersey legislature in 1984 to statutes governing the creation of pedestrian malls. New Jersey's SID legislation relevantly declares that it is New Jersey public policy to "to permit the governing body of any municipality...to preserve and enhance the function and appearance of the business districts of such municipalities" by adoption of ordinances establishing special improvement districts.⁵ The legislation further reflects the following determination by the New Jersey legislature:

(1) that district management corporations may assist municipalities in promoting economic growth and employment within business districts; (2) that municipalities should be encouraged to create self-financing special improvement districts and designated district management corporations to execute self-help programs to enhance their local business climates; and (3) that municipalities should be given the broadest possible discretion in establishing by local ordinance the self-help programs most consistent with their local needs, goals and objectives.⁶

In order to create a SID, a municipality's governing body must first make certain findings.⁷ The governing body must make a finding that "an area within the municipality, as described by lot and block numbers and by street addresses in the enabling ordinance, would benefit from being designated as a special improvement district" and that "it is in the best interests of the municipality and the public to create a special improvement district and to designate a district management corporation."⁸

The SID legislation places emphasis on physical space in defining the parameters for a special improvement district. For example, a SID refers to "*an area...*in which a special assessment on property *within the district* shall be imposed."⁹ Likewise, the predicate findings necessary for adoption of an ordinance creating a SID are tied to a specific area,¹⁰ and the range of permissible

⁵ N.J. Stat. § 40:56-65(c).

⁶ N.J. Stat. § 40:56-65(b).

⁷ N.J. Stat. § 40:56-68.

⁸ *Id.* The legislature must also make findings relating to the administrative and other services provided by the district management corporation and the manner in which special assessment shall be imposed and collected by the municipality.

⁹ § 40:56-66(b)(Emphasis added)

¹⁰ § 40:56-68.

uses of a SID is defined in reference to physical space.¹¹ Further, New Jersey's Department of Community Affairs characterizes a SID as a "defined area, generally in the central business district of a downtown or a mixed-use corridor in a larger city."¹²

Notwithstanding this emphasis on physical space, the SID legislation does not limit a municipality solely to making improvements to physical space. The legislation evinces a broader purpose of enhancing the local business climate.¹³ In this regard, municipalities are to be "given the broadest possible discretion in establishing by local ordinance the self-help programs most consistent with their local needs, goals and objectives."¹⁴

The New Jersey Supreme Court has recognized that improvements made pursuant to the SID legislation are "not necessarily physical, concrete, or permanent, nor are they directly adherent to the specific commercial properties that are assessed" and that benefits provided by such improvements are "generalized and relatively intangible."¹⁵ However, any special assessments imposed in connection with SIDs must be "'as nearly as may be in proportion' to the benefit received" and not in "'substantial excess' of the special benefits to the land."¹⁶

The SID legislation does not provide a specific guidance explaining what is meant by an "enhanced" local business climate. Case law speaks in general terms about "the creation of a commercial climate that encourages stores to open and remain in business."¹⁷ Likewise, the New Jersey Department of Community Affairs describes the SID concept as "a mechanism to improve the economic, physical, social, and civic value of the commercial district in question." Given the

¹¹ See e.g., N.J. Stat. § 40:56-77 ("[A]ny property of a special improvement district may be used...for any purpose or activity which will enhance the movement, safety, convenience or enjoyment of pedestrians, including seating, display and sale of merchandise, exhibiting, advertising, public events, and any other use or activity which in the judgment of the governing body will enhance the movement, safety, convenience or enjoyment of pedestrians and any other use or activity permitted by any applicable pedestrian mall ordinance, a special improvement district or other applicable law, ordinance or power.")

¹² See FAQs.

¹³ See Office of the Governor, *News Release on Senate Bill No. 1680* (Sept. 10, 1984) ("The legislation extends the currently-held authority of municipalities to create pedestrian malls as a local business improvement project. The creation of special improvement districts would be an *additional* method of revitalizing older downtown shopping districts." (emphasis added)).

¹⁴ N.J. Stat. § 40:56-65(b).

¹⁵ *2nd Roc-Jersey Assocs. v. Town of Morristown*, 158 N.J. 581, 594 (1999)

¹⁶ *Id.* at 596.

¹⁷ *Fanelli v. City of Trenton*, 135 N.J. 582, 591 (1994)

vague statutory language and deference afforded municipalities under the SID legislation, however, what likely matters most is that the municipality makes the necessary predicate findings. In this respect, any evidence supporting any nexus between the proposed SID and an enhanced business climate would be helpful.¹⁸

2. *Viability of SID Created Solely to Establish CID*

Given the statutory purposes underlying the SID legislation and the broad discretion it affords municipalities, a CID arguably falls within the scope of the SID legislation and could potentially form the basis of a standalone SID. However, such an approach could leave the municipality vulnerable to challenge.

Municipal ordinances are presumptively valid and will be upheld “[u]nless the challenger meets the heavy burden of showing the municipal ordinance is arbitrary, capricious or unreasonable.”¹⁹ Moreover, a court’s interpretation of such an ordinance would be guided by “the plain meaning of the language used by the municipality.”²⁰ Most significantly, a court considering the validity of a SID does not “pass on the wisdom” of a given plan, but rather decides “only whether the ordinance represents a reasonable exercise of the Legislature’s delegation of authority to municipalities.”²¹

A CID is established with the specific purpose of supporting a community’s local news and information needs and would operate in a manner similar to a SID.²² A CID is “funded by fees assessed on residents and business owners” in a given community and “overseen by a nonprofit, community-managed organization” the purpose of which is to “oversee and approve the funding of local news and information projects.”²³ Such a district may possibly fund projects could include

¹⁸ Potentially relevant indicia of an enhanced local business climate may include increased employment, reduced borrowing costs, increased numbers of independently-owned local businesses, or local market penetration for brands.

¹⁹ *Friends of Rahway Bus., L.L.C. v. Rahway Mun. Council & Rahway*, 2017 N.J. Super. Unpub. LEXIS 1613 at *13-14. See also, *Fanelli*, 135 N.J. at 589 (“municipal ordinances enjoy a presumption of validity.”) (citing *Brown v. City of Newark*, 113 N.J. 565, 571 (1989)).

²⁰ *Bergen Comm'l Bank v. Sisler*, 157 N.J. 188, 202 (1999).

²¹ See *Fanelli*, 135 N.J. 582 at 592.

²² See generally Community Info Coop, *About Community Information Districts*.

²³ *Id.*

“launching or supporting print or online newspapers” and “building public wifi networks,” among other informational services.²⁴

Although municipalities are afforded broad latitude under the SID legislation and courts will interpret municipal ordinances in a favorable manner, a SID established for the sole purpose of creating a CID may be still be vulnerable to legal challenge. Special assessments are not strictly taxes,²⁵ but they invite similar scrutiny over how and for what purposes they are used, and there have been numerous challenges to various SID ordinances through the years. Any SID special assessments imposed must be “‘as nearly as may be in proportion’ to the benefit received” and not in “‘substantial excess’ of the special benefits to the land,”²⁶ and the validity of a SID established for the sole purpose of creating a CID thus will depend on whether the activities and benefits associated with a CID can, on their own, satisfy this standard.

A CID can indeed represent a defined area for purposes of the SID legislation. While a SID generally occurs in a central business district, district lines need not be drawn in such a manner. The statute only requires that the SID span an area within the municipality, that the ordinance describe this area in terms of lot and block numbers and street addresses, and that special assessments be imposed upon and collected on property within the district. A municipality otherwise enjoys great latitude in terms of how it draws district lines. It may exempt or include residential properties from special assessments.²⁷ A New Jersey Court has also upheld a citywide SID on grounds that the relevant statutory provisions did not “specifically prohibit” such a district, but rather “merely suggest[ed]” that a special improvement district “*could* be a small designated area within a municipality.”²⁸ Against this backdrop, a CID could be tailored to be as compact or expansive as a municipality can justify, although such a determination is ultimately a question of political will rather than legal requirement.²⁹

²⁴ *Id.*

²⁵ *2nd Roc-Jersey Associates*, 158 N.J. at 595-596 (observing that the core defining feature distinguishing special assessments from a general tax is that “the special assessment is used to provide a combination of services and improvements that are intended and designed to benefit particular properties and demonstrably enhance the value and/or the use or function of the properties that are subject to the special assessment.”)

²⁶ *Id.* at 596.

²⁷ § 40:56-66(b).

²⁸ *Friends of Rahway Bus., L.L.C. v. Rahway Mun. Council & Rahway*, 2017 N.J. Super. Unpub. LEXIS 1613 (emphasis added).

²⁹ For example, a municipality may encounter more political resistance to a citywide CID or SID if residential properties are subject to special assessments that are being used to fund projects primarily benefiting the downtown business district. Such a dynamic may affect the amount of popular support for the

The more difficult question is whether a municipality can establish the factual predicate necessary to support a SID creating a CID. A municipality must make findings that the area designated for improvement would benefit from being a SID and that, in turn, such a designation would be in the best interest of the municipality. Although the benefits derived under a SID may be generalized and intangible, there nevertheless must be a colorable argument, rooted in factual support, justifying the improvements being funded through the SID.

Although CIDs are not directly concerned with enhancing a local business climate, one can plausibly argue that the benefits of establishment of a such a district is facilitative of that objective by driving civic engagement. This argument would depend establishing a sufficient nexus between this civic engagement and enhancing the local business climate consistent with local needs and objectives.³⁰ However, a court may also conclude that the connection between a municipality's information needs and local business climate is too attenuated to, by itself, justify creation of such a SID. The court may further conclude that a district only indirectly addressing the policy concern of enhancing the local business climate – and which also does not include any of the physical features conventionally associated with an SID – cannot be reasonably construed as consistent with the plain language of the statute and the expressed legislative intent.

3. *Viability of CID In Existing SID*

By contrast, an alternative path towards successful implementation of a CID under New Jersey's SID legislation would be to establish the CID within an existing SID. Under this approach, the municipality would thread the CID through the SIDs existing activities and plans, placing projects funded through an existing CID alongside the types of physical improvements that fit more explicitly within the scope of the SID legislation.

By presenting the CID within the broader context of an existing SID, a municipality faces less of burden in demonstrating how a CID falls within the scope of the legislation. A CID in isolation presents the challenge of showing the link between a municipality's information needs and its local business climate; a CID that is part of a larger project and existing process can highlight the complementary, facilitative role a CID can play in vindicating statutory purposes. Establishing a connection between a CID's objectives and any indicia of enhanced local business climate could

resulting SID ordinance, and it is up to the municipality to determine how it would like to balance these considerations.

³⁰ See Community Info Coop, *About Community Information Districts* ("Stimulating civic engagement in this way is how the Community Information Cooperative will fulfill its mission and help communities cultivate healthier local economies and democracies.").

help persuade a municipality to make its necessary predicate findings. For example, a municipality could more easily link civic engagement and enhancing the local business climate consistent with local needs and objectives.³¹ The municipality could show how benefits associated with CID objectives can support the municipality's other efforts to improve its local business climate pursuant to its SID's mandate, through projects such as issuing an annual print issue featuring local, independent business owners and or workers in the community.

This approach would strengthen the argument that the benefits of a CID are reasonable in relation to the special assessments such a project would impose, as well as make it easier for a municipality to justify its creation of the CID under the SID framework as a reasonable exercise of delegated authority. It allows a municipality to make more compelling arguments as to why a CID is within the scope of municipal authority delegated under the SID legislation and how a CID can further a SID's statutory purpose of enhancing local business climate. For example, a municipality would be able to more credibly make the argument that improved civic engagement derived from a CID can in turn enhance the local business climate consistent with the SID legislation's policy objectives, as it would be able to demonstrate how the CID operates in conjunction with other improvements funded through the SID instead of arguing that such other improvements are not necessary to justify the CID.

4. Conclusion

New Jersey's SID legislation affords municipalities broad discretion with respect to how they structure their SIDs. That discretion, however, is not without limitation, and a SID is susceptible to legal challenge to the extent that it goes beyond the core focus of enhancing the local business climate, that it imposes special assessments substantially in excess of the benefits those special assessments fund, or that it does not include the types of physical improvements conventionally associated with a SID. The creation of a SID for the sole purpose of establishing a CID would be more vulnerable to a legal challenge than a CID implemented through an existing SID, as it would rely on the argument that the benefits of a CID are sufficiently related to the policy purposes of a SID that a CID alone can justify the special assessments authorized under the SID legislation. A CID implemented through an existing SID is more likely to be viewed as a reasonable exercise of delegated authority, as it would present the CID in the context of a broader SID plan that more squarely vindicates statutory purposes.

³¹ See, e.g., Gao, Lee and Murphy, *Financing Dies in Darkness? The Impact of Newspaper Closures on Public Finance* (2018) (establishing a causal link between newspaper closures and increased municipal borrowing costs).