Alphabet Soup
2019 Edition

A Selection of Legal Tools for Financing Development in New Mexico

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(All appendices are available on the accompanying CD Rom)

INTRODUCTION

New Mexico law provides a number of different opportunities and challenges in regard to raising money for the capital and operational needs of development and infrastructure projects. Practitioners often refer to the tools by their acronyms, thus creating a mysterious alphabet soup that can be disconcerting to out-of-state development teams and even local land use practitioners.

This presentation is designed to lift some of the fog covering the area by identifying the most significant legal opportunities and summarizing their primary features.

NEW MEXICO LEGAL TOOLS

1. Special Assessment Districts ("SADs")

Section 3-33-1 through 3-33-43 NMSA 1978 governs the creation of special assessment districts ("SADs") in municipalities. See APPENDIX A — the "SAD Act" and APPENDIX B — the "Model SAD Timetable." A similar act (Section 4-55A-1 through 4-55A-43 NMSA 1978) governs the formation of SADs by counties. SADs are a traditional way to finance infrastructure improvements, though given other current options in New Mexico, they are often viewed as time consuming and confusing. Although SADs can be difficult to establish, their formation process does offer flexibility to cities and counties in that they can be created by a resolution, without the need for an election.

A special assessment district is often initiated by property owners requesting that a district be created for installation of particular street, storm drainage, water and/or sanitary sewer improvements. Applications are evaluated and if it is determined that a special assessment district is feasible, a city may select a consulting engineer to design the improvements and to allocate the benefits and costs of the improvements to each of the properties to be included within the special assessment district.

The consulting engineer prepares an assessment plat showing the properties to be included within the district, preliminary engineering plans and designs, a cost estimate, and an estimated maximum benefit roll stating the estimated maximum benefits and assessments to accrue to each property to be included within the district. Properties may not be assessed for general benefits accruing to the city and its residents as a whole. Often, because most special assessment districts include some general benefit to the city and its residents as a whole, the city may pay some portion of the cost of the improvements associated with a special assessment district.

After notice is given to all affected property owners, a protest hearing is held to determine the need for the improvements and to allow property owners to protest the amount of estimated maximum benefit and estimated assessments to accrue to their property as a result of the installation of the improvements. Upon completion of the protest hearing and disposition of the protests by the city, the city directs the consulting engineer to modify and prepare final plans and designs for the improvements and to advertise for construction bids.

The consulting engineer then prepares a tentative assessment roll allocating the costs of the improvements to each of the individual properties included in the special assessment district. Another notice is then given to property owners and the protest hearing is held by the city to hear objections to the assessments. After objections are settled, the city adopts a resolution which confirms the assessment roll.

An ordinance of the city council assesses the cost of the improvements to the properties within the district and sets the terms of the special assessment liens. Property owners are given a cash pay period in which to pay the assessment lien in advance and avoid having a claim of lien filed against their properties. After the cash pay period expires, the city proceeds with the sale and delivery of bonds in order to provide funds to construct the improvements.

The special assessment method described above has been used almost exclusively in SADs, although the SAD Act also permits a governing body to provide for the financing of public infrastructure through the imposition of an improvement district property tax and the issuance of improvement district general obligation bonds, which would be the subject of a ballot question. In the 2019 legislative session, the SAD Act was updated to eliminate city and county local election procedures and provide that a SAD election must be conducted pursuant to the Local Election Act and pursuant to the requirements of the property tax division of the taxation and revenue department.

The City Council of the City of Albuquerque adopted the Albuquerque Special Assessment District Policy Ordinance on October 21, 1996. See APPENDIX C — the "City of Albuquerque SAD Policy Ordinance." The SAD Policy Ordinance consolidates policies and procedures and repeals a number of council resolutions dealing with SAD policies and procedures dating back to 1984. In addition, the SAD Policy Ordinance provides for preliminary review of proposed SADs by a committee made up of staff of various city departments and a financial review by the Department of Finance and Administrative Services and the Office of Management and Budget. The SAD Policy Ordinance provides that the city may pledge certain supplemental revenues to bonds for SADs where (i) the city owns the improvements, (ii) the SAD is contiguous to existing urban facilities or services, and (iii) the SAD is for the benefit of the Central Urban or Established Urban areas of the City and certain Developing Urban areas. A minimum property value/lien ratio of 3:1 is required if an owner of property within a SAD will be responsible for 20 percent or more of the total proposed special assessment liens in the SAD. In 2013, the City of Albuquerque completed the financing of SAD 228. As of June, 2016, no new SADs are pending in the City of Albuquerque.

Other jurisdictions, including Bernalillo County, Dona Ana County, and the cities of Rio Rancho, Santa Fe and Las Cruces have similar procedures in connection with the development of SADs.

2. Public Improvement Districts ("PIDs")

A modernized and streamlined version of the SAD process was introduced to New Mexico in 2001 with the enactment of the Public Improvement District Act (Section 5-11-1 to 5-11-27 NMSA 1978). See APPENDIX D — the "PID Act." Numerous PIDs have been formed in New Mexico, with multiple PIDs existing in Albuquerque and Rio Rancho. During the Great Recession, several PIDs experienced economic difficulties. This led to legislative initiatives to reform the PID process, including legislation adopted in 2013.

The PID Act provides streamlined procedures for local governments to create districts for public improvements through a petition and hearing process, followed by a unanimous consent procedure or approval through a determination of property owners and election among resident electors. See APPENDIX E — the "Model PID Timetable." If a property has resident electors, then it is necessary to have a determination and election. PIDs are authorized to finance various kinds of infrastructure and improvements, including water and sewer systems, streets and trails, parks, electrical systems, gas and telecommunications systems, public buildings, libraries and cultural facilities, school facilities, equipment and related costs of operation and administration.

The PID Act provides for financing based on (i) levying property taxes on land within a PID, (ii) imposing special levies based on benefit to property, front footage, acreage, cost of improvements (or other factors apart from assessed valuation), or (iii) by providing for use charges for improvements or revenue-producing projects or facilities. PID taxes, levies and charges may be pledged to pay debt service on bonds or other indebtedness issued by a PID. Under the PID Act, PID bonds and other PID indebtedness are not obligations of the State of New Mexico or the local government jurisdiction in which the PID is located, but are obligations solely of the PID issuing the debt.

Following the 2009 legislative session, city and the county governing bodies could no longer resume governance of the district board following the term of the initial appointed board members. Rather the new board would be elected by a majority vote of the qualified electors and owners (this changes again in 2013 and 2019). In addition, in the case of bonds that are the general obligation of the PID, the election for the general obligation bond issuance must contain an authorization for a property tax levy to pay debt service on the bonds as well as a limitation on the amount of that levy.

As examples of municipalities and counties adopting PID ordinances, attached at APPENDIX F are the PID ordinances for the City of Albuquerque and the County of Dona Ana, and the City of Rio Rancho PID guidelines and application procedures, which establish policies and procedures for processing and approving applications for approval of PIDs within their respective boundaries. Las Cruces, Santa Fe, Farmington, Belen, Santa Fe County, and Bernalillo County have also adopted PID policy ordinances. Other jurisdictions may also be considering or adopting PID policy ordinances. PID policies typically require, among other things, petitions for PID formation. PID policies also typically impose certain requirements for equity contributions by developers, corporate governance and the debt financing.

In 2012, controversy arose relating to the lack of anticipated development of the Mariposa PID in Rio Rancho. The lack of development, coupled with the use of a general obligation bond structure (unique in New Mexico PID financing) and the financial difficulty of the project developer, created the possibility of unanticipated and significant increases in the financial responsibilities of homeowners. The homeowners sued the City of Rio Rancho, the

PID, and the developer High Desert Investment Corp., which was owned by Albuquerque Academy. They later settled with the city and PID for a restructuring of the bond debt that lowered their PID payments, and for $5 million from High Desert Investment. The controversy resulted in legislative action. In the 2013 legislative session, several pieces of legislation (House Bills 355 and 371, now Chapter 45, Laws 2013) were introduced to make changes to the PID Act.

The 2013 enactment contained numerous changes to the Public Improvement District Act. It was the product of cooperation between Rep. Mimi Stewart (D. Bernalillo), Rep. Jason Harper (R. Sandoval), the State Department of Finance and Administration and the Attorney General's Office.

Among the changes, the 2013 enactment:

- Limits the amount of general obligation bonds that may be issued by PIDs;

- Provides that a detailed application, modeled on existing requirements contained in the City of Albuquerque PID ordinance, be filed in connection with proposed PID formations;

- Requires that notices be given to purchasers of property within a PID, and contains remedies in connection with such notice requirements, effective July 1, 2013; and

- Allows for the governing body forming a PID to resume governance of the PID after the end of the terms of appointed PID members either directly or through the governing body's designees.

The provisions relating to formation of new PIDs were effective January 1, 2014.

In 2017, Senate Bill 356 was passed to provide that the treasurer of a county in which a new PID is formed be notified of the PID's formation. The measure was ensnared in a budget dispute between the legislature and the governor, with the governor vetoing the bill to emphasize to the legislature that they should focus on passing a budget. The New Mexico Supreme Court ruled that Governor Martinez had failed to send a message with her objections along with the veto, as required by New Mexico's Constitution. Therefore, her veto was ineffective, and SB 356 became law.

In 2019, the legislature undertook a 50-tear tune-up to the state election laws. House Bill 407 revises and repeals numerous existing provisions of New Mexico's election code and adds new sections to other existing laws. These additions included making PIDs subject to the Local Election Act, which was enacted in 2018 and consolidated the conduct of local elections to be held on a single day in November of each odd-numbered year; eliminated authority for local governments, such as PIDs, to run an election; provided that the county in which a PID is situated would administer a PID election; and provided a process for mail ballot elections to be held administered by a county for PIDs for ballot questions.

The 50-tear tune-up also, importantly, provides significant changes to the process of presenting ballot questions concerning PIDs, which must now be answered affirmatively by both the property owners and resident electors (if any), in separate processes. Ballot questions may relate to the formation of a PID, a change PID boundaries, approval of the issuance of PID property tax bonds, and the imposition of a property tax for PID operational and maintenance purposes. Owners vote in an owner's determination, which is (i) not a local election, (ii) conducted in accordance with special procedures established by the local governing body or the PID, and (iii) may be waived in connection with the formation of a PID, if a petition for formation is signed by all the owners of the land in the proposed PID. Resident electors, if any, would vote in an election subject to the Local Election Act.

The 50-tear tune-up makes updates to the composition of the PID governing board and the manner in which board members are elected. The governing body forming a PID may still resume governance of the PID following the terms of appointed PID members. Otherwise, the 50-tear tune-up now requires that only persons residing and registered to vote within the boundaries of a PID may serve on the PID board. Unlike ballot questions, only registered voters participating in a local election may vote for the new PID board members. However, if no person is registered to vote in a PID, then an owner's determination conducted by ballot shall decide the new PID board members.

3. Tax Increment Development ("TIDDs")

A Tax Increment Development District, or TIDD, is a tool which couples the growth of the tax base in a designated development area with the financing of infrastructure improvements in that area. Historically, New Mexico offered tax increment financing only through the Metropolitan Redevelopment Act, Section 3-60A-1 through 3-60A-48 NMSA 1978 (the "MRD Act"), which authorized the issuance of property tax increment bonds to finance metropolitan redevelopment projects. Tax increment financing is a method of financing public improvements through the reimbursement of tax receipts that are received over and above the receipts stream that existed prior to the new development—i.e., the taxes generated by a new project are used to finance infrastructure. Historically, tax increment financing was limited to cities and two counties, Bernalillo and Los Alamos. In 2018, the Metropolitan Redevelopment Act was amended to permit all counties to use tax increment financing as well.

Unfortunately, for the reasons outlined below, and given a cautionary letter from the Attorney General, most bond lawyers are unable to conclude with the degree of certainty necessary to issue a bond opinion that this MRD Act is constitutional under New Mexico law.

Chapter 103, Laws of 2000, enacted several changes to the MRD Act, including a new section now codified at Section 3-60A-23.1 NMSA 1978. This section authorizes a municipality to issue tax increment bonds or tax increment anticipation notes "that are payable from and secured by real property taxes . . . which are collected and deposited in a Metropolitan Redevelopment Fund" pursuant to Sections 6-60A-21 through 6-60A-23 NMSA 1978.

Section 3-60A-21 through 3-60-23 NMSA 1978 set out the procedures for the tax increment evaluation of properties in a metropolitan redevelopment district. Simply stated, certain properties within a metropolitan redevelopment district are identified to the county assessor and the net taxable value of the property at the time of the notification is established as the base value for the distribution of property tax revenues. Thereafter, upon completion of improvements, the assessor is so advised and a new taxable value is established. Section 3-60A-21(D) NMSA 1978 states:

> [C]urrent tax rates are then applied. The amount by which the revenue received exceeds that which would have been received by application of the same rates to the base value before inclusion in the metropolitan redevelopment project shall be credited to the municipality and deposited in the metropolitan redevelopment fund.

Amounts in this fund, which is established by Section 3-60A-22 NMSA 1978, are available to be pledged to tax increment bonds authorized by Section 3-60A-23.1 NMSA 1978.

The question arises whether the monies in the Metropolitan Redevelopment Fund constitute a "special fund" and thus are exempt from the dictates of the debt clauses in our constitution, or, because those monies are real property taxes, the debt which they are to satisfy must first be approved by the voters. The Attorney General's Office has issued an unpublished opinion to the effect that such bonds would be unconstitutional debt.

In that opinion, the Attorney General expressed concern that merely "siphoning off' a certain amount of property tax into a "special fund" would not be enough to allow a New Mexico court to find this debt to be a special fund obligation.

In response to these concerns, the New Mexico legislature considered tax increment financing legislation again in the 2006 session. As a result, the legislature enacted the Tax Increment for Development Act, Section 5-15-1 through 5-15-29 NMSA 1978 (the "TIDD Act"), making sweeping additions to tax increment financing opportunities in New Mexico. A copy of the Tax Increment for Development Act and a Model TIDD Timetable are included as APPENDIX G. The TIDD Act provides for many of the same requirements for the formation of a TIDD as the MRD and PID Acts. However, it also permits increments of gross receipts and *ad valorem* real property taxes to be used. State, county and municipal increments can be used, but different mechanisms exist for seeking the relevant governmental approval.

Attached as APPENDIX H are TIDD ordinances that have been adopted by the City of Albuquerque, the City of Rio Rancho and the County of Dona Ana. Other jurisdictions, including the County of Bernalillo, have adopted similar policies. APPENDIX H also contains the provisions in the New Mexico Administrative Code that have been adopted in relation to the state increment dedication and TIDDs, NMAC 2.61.3.1 et seq. and an article by this author further examining tax increment finance in New Mexico.

The City of Albuquerque has formed five TIDD districts for the benefit of the Mesa del Sol project south of the Albuquerque International Sunport. Three TIDD districts were also created for the Winrock/Quorum Town Center development. Other TIDDs have been formed by Bernalillo County (DevCo Districts 1 to 9), Taos Ski Valley, the City of Rio Rancho (Stonegate) and the City of Las Cruces. In July 2015, the Winrock Town Center Tax Increment Development District completed the first long-term placement of TIDD bonds, in the amount of $43,325,000.

Two other major TIDDs have been approved for the West Side of Albuquerque in the last few years. In 2016, Bernalillo County approved twenty TIDDs for Santolina, a significant development proposal projected to include at buildout 38,000 dwelling units, high density residential development, large-scale industrial and business parks, and approximately 3,000 acres of open space. In 2017, the Lower Petroglyphs TIDD was approved by the Albuquerque City Council, greenlighting a major project slated to include the first hospital on the West Side. In 2018, the New Mexico Board of Finance agreed to dedicate a portion of the state's gross receipts tax increment to the Lower Petroglyphs TIDD.

In 2009, the legislature revised reporting requirements for TIDDs and also increased state-level review of TIDD projects. This increase in state oversight of TIDDs applies to both state and local (city or county) government TIDD projects. Notice of the hearing to form a TIDD and of the formation of a TIDD must be given to the Secretary of the Department of Taxation and Revenue, the Secretary of the Department of Finance and Administration, and the Director of the Legislative Finance Committee. All resolution materials (including fiscal and economic studies) need to be available electronically to the public. In addition, the amendment to the TIDD Act expanded the document set that must accompany a notice to electors and the public entities regarding the formation hearing. One of the board members on the 5-person board that governs a TIDD is required to be the Secretary of the Department Finance and Administration or the secretary's designee. Finally, the maximum amount of bonds to be issued against state gross receipts taxes must be authorized by law, and after retirement of all bonds pursuant to the TIDD plan, any balance in a debt service reserve account must be returned to the taxing authority.

The TIDD Act has been modified three times since 2009. In 2014, the legislature created a process for TIDDs to revise the base year used to determine their gross receipts tax increment. To revise their base year, TIDDs are to adopt a resolution and solicit comments from the Taxation and Revenue Department, the Department of Finance and Administration, and developers and local governments that have dedicated an increment to the TIDD. The TIDD is then to submit the resolution and comments to the New Mexico State Board of Finance. The State Board of Finance is empowered to approve a base year revision once during the lifetime of a TIDD, provided conditions—like there being no unresolved objection to the revision by a developer or local government that has dedicated an increment—are met.

In 2017, Senate Bill 67 was passed to provide that the treasurer of a county in which a new TIDD is formed be notified of the TIDD's formation. As was the case with Senate Bill 356 in the context of PIDs, Governor Martinez vetoed the bill to underscore her concerns about the state budget, and the Supreme Court ruled that her veto was ineffective. Senate Bill 67 was subsequently duly chaptered into law by the Secretary of State.

In 2019, the legislature made sweeping changes to the TIDD Act in three series of bills, which were as follows.

- House Bill 407, Chapter 212, Laws of 2019 made TIDDs subject to the Local Election Act. See the description above regarding the impact of the 50-tear tune-up to the state election laws on PIDs for the impact on TIDDs.

- House Bill 479, Chapter 274, Laws of 2019 relates to the De-Earmarking of Local Option Gross Receipts impacted TIDDs. This bill removed the restricted uses of a number of municipal and county local option gross receipts taxes. In doing so, a number of restricted local option rates were repealed in favor of unrestricted municipal and county local option rates. As such, municipalities and counties must now dedicate increment revenues from the eligible increments of municipal option gross receipts tax or the county option gross receipts tax, as well as certain distributions received by the municipality or county, as authorized by the TIDD Act. This bill also requires municipalities and counties to amend the ordinance imposing local option to provide that such tax may be dedicated to tax increment development projects.

- Senate Bill 566, Chapter 275, Laws of 2019 substantively revised provisions relating to the dedication of state gross receipts tax to a TIDD. This bill was a

> response to developers who read the TIDD Act to permit dedication of a portion of the state gross receipts tax increment to be used to secure obligations other than gross receipts tax increment bonds, as well as calls to reduce the level of state participation in financing public infrastructure through the TIDD program. The bill provided the state's dedication of an increment of gross receipts tax must only be used to secure bonds, which must be authorized by the Legislature; while leaving municipalities and counties the authority to dedicate local tax increment to fund other types of TIDD obligations. The bill also provided that the dedication of the state gross receipts tax increment by the State Board of Finance would expire within four years, unless the TIDD bonds (secured by the state gross receipts tax increment) have been issued and that, beginning July 1, 2029, the State Board of Finance may not dedicate an increment of state gross receipts tax more than the average of the municipal and county dedications.

Updated State Board of Finance Rules relating to the Senate Bill 566 are anticipated.

In recent years, the TIDD Act has been criticized for supposedly facilitating handouts to developers and encouraging sprawl. Attempts have been made to disallow the use of TIDDs in undeveloped "greenfield" areas, which would radically narrow the scope of the TIDD Act. Thus far, these attempts have failed. In view of the mounting pressure for legislative action to continue to rein in TIDDs, the future of the TIDD Act is in question.

4. Business Improvement Districts ("BIDs")

Business Improvement Districts ("BIDs") may be formed pursuant to the Business Improvement District Act (Section 3-63-1 to 3-63-16 NMSA 1978). See APPENDIX I - the "BID Act." BIDs may be formed to promote and restore the economic vitality of areas within municipalities by providing for the administration and financing of additional services to business within the district. Similarly to PIDs, BIDs may be formed by petition and the development of a plan to implement the creation of the BID. After a hearing, the governing body may adopt by ordinance the proposed BID requested by the petition and described by the plan. The BID is governed by a management committee. The committee, in conjunction with the governing body, determines assessments, prepares budgets, and administers the improvements. Under certain circumstances, the issuance and sale of bonds is permitted for raising capital in the construction of public facilities.

5. Industrial Revenue Bonds ("IRBs")

An industrial revenue bond ("IRB") is an obligation of a city or county (the "Issuing Entity") that is payable solely from revenues received from an underlying lease or installment sale arrangement with a company that uses the facility financed by the bonds. The bonds are issued by a city as the "Issuing Entity" pursuant to authority under Section 3-32-1 through 3-32-16 NMSA 1978. See APPENDIX J - the "IRB Act." The bonds are authorized by action of the issuing entity's governing body, sometimes following preliminary review by a development commission or similar entity. Counties have similar authority pursuant to Section 4-59-1 through 4-59-16 NMSA 1978. In recent years, there have been unsuccessful attempts to consolidate the municipal and county IRB statutes. See, for example, Senate Bill 511 in the 2019 legislative session.

Originally, industrial revenue bonds enabled local governments to provide a mechanism for low-cost financing for private parties to create industrial facilities that would enhance employment in the locality. The mechanism would take advantage of the local government's federal income tax exemption with respect to interest on its bonds. Industrial revenue bonds are authorized by the vast majority of states and have been used extensively in recent years to encourage relocations or expansions of many types of commercial facilities. Their extensive use led, in the view of Congress, to some abuses. Because the availability of the federal tax exemption for interest on industrial revenue bonds is subject to Congressional control, Congress acted to curb perceived abuses by severely limiting the types of projects that can be financed with tax-exempt industrial revenue bonds, and imposed other kinds of restrictions as well.

Historically, the authority to issue tax-free industrial revenue bonds for a manufacturing facility is limited to a manufacturing facility with a measurable capital investment over a six-year period of $10 million or less. This amount was increased to $20 million for bonds issued after January 1, 2007, although the size of the issuance still cannot not exceed $10 million. In some cases the value can be exceeded if the project has the benefit of an Urban Development Action Grant. In addition, certain other facilities known as "exempt facilities," traditionally used by the private sector, can be financed with tax-exempt industrial revenue bonds. These include airport facilities and multi-family housing.

The use of industrial revenue bonds makes certain state tax incentives available, and it is not necessary for the issuing entity to structure industrial revenue bonds as tax exempt under the federal income tax laws. Indeed, many of the recent transactions authorized by various cities and counties in the state as industrial revenue bonds have been "taxable" bonds. The primary purpose of issuing taxable bonds is to provide a property tax exemption to the company using the facility for up to thirty years and a gross receipts tax exemption for the equipment purchased for the facility. An industrial revenue bond provides a property tax exemption and a gross receipts tax exemption on equipment because of the way the transaction is structured. The form of the transaction puts legal title to the project in the name of the issuing entity. The issuing entity then typically leases the project to the actual user, and it is the lease payments or purchase price payments that are used to pay off the interest and principal on the bonds. Because title to the property is in the issuing entity, the project is removed from the tax rolls. The lessee's interest in the industrial revenue bond lease is exempt from taxation by statute. The issuing entity can use its authority to issue nontaxable transaction certificates to purchase equipment and other personal property for the project. The nontaxable transaction certificates cannot be used for construction services or for materials incorporated into the structure. Similarly, the compensating tax on equipment purchased out of state is abated.

Because the form of the industrial revenue bond structure is essentially different from its substance, much confusion has arisen in this area. Attached is a chart which summarizes the form of a typical taxable industrial revenue bond project in which the project is acquired by a local government and leased to the company, with the company's rental assigned to a trustee for the bondholders who pays the bondholders on a timely basis. See APPENDIX K — the "IRB Structure." See APPENDIX L – the "Model IRB Timetable."

6. Local Economic Development ("LEDA")

Article IX, Section 14 of the New Mexico Constitution, the "Anti-donation Clause," provides that no government entity shall "directly or indirectly lend or pledge its credit, or make any donation to or in aid of any person, association or public or private corporation .... " In 1994, New Mexico voters elected to amend the Anti-donation Clause to allow local or regional governments to create new job opportunities by providing land, buildings or infrastructure for facilities to support new or expanding businesses. The Local Economic Development Act, Section 5-10-1 through 5-10-13 NMSA, is the implementing legislation required by this exemption. See APPENDIX M — the "LEDA Act" and APPENDIX N — the City of Albuquerque and the City of Rio Rancho's LEDA ordinances and APPENDIX O — the "Anti-donation Clause." The purpose of the LEDA Act is to implement the constitutional amendment.

Prior to providing public support for economic development projects pursuant to the Anti-donation Clause exception, the LEDA Act requires each local government entity to adopt an economic development plan by ordinance outlining its economic development goals and strategies. After the adoption of such a plan by the local government, a qualifying business entity may submit a project application for consideration by the local government. The local government reviews the application based on the provisions of the economic development plan, the financial and management stability of the qualifying entity, the demonstrated commitment of the qualifying entity to the community, a cost-benefit analysis of the project and any other necessary information. The local government then may elect to approve the project by ordinance. After the project has been approved, the local government and the qualifying entity enter into a project participation agreement. The participation agreement must set out the contributions to be made by each party, the security provided to the local government by the qualifying entity, a schedule for project development and completion, provisions for performance review and actions to be taken upon a determination that project performance is unsatisfactory.

The LEDA Act limits the amount of public money expended and credit pledged by a local government for economic development projects under the LEDA Act (with certain exceptions) to 10 percent of the local government's annual general fund expenditures in that fiscal year. This percentage limit was increased from 5 percent in 2009. However, the 10 percent limit does not apply to land or buildings that may be contributed to any project pursuant to a project participation agreement; revenue generated through the municipal or county infrastructure gross receipts tax for furthering or implementing economic development plans and projects under the LEDA Act; the proceeds of a revenue bond issue to which municipal or county infrastructure gross receipts tax revenue is pledged; or funds donated by private entities to be used for defraying the cost of a project. An increasing number of jurisdictions are relying on LEDA as part of their arsenal of economic development tools. Over the last several years, the state government has participated in LEDA transactions by providing appropriations from capital outlay and similar sources. The legislature appropriated $75,000,000 for LEDA in the 2020 fiscal year.

The LEDA program differs from TIDDs in that LEDA is a program that governs the contribution of public money to projects that might otherwise be considered private development. TIDDs, which use tax increment financing, are a mechanism to provide for the growth of a particular tax base to be used as a basis for funding public infrastructure. Establishment of TIDD projects can be expensive and time consuming and is generally considered for long term mixed use projects. However, tax increment financing has been used in conjunction with LEDA projects. In recent transactions for a multi-billion dollar data center and for a sports entertainment facility, local financial and legal experts devised, with the cooperation of the state and local governments, a "local LEDA" component. The incentive was structured so that a certain amount of gross receipts taxes measured by incremental growth related to the project and not otherwise abated was contributed for land, building and infrastructure costs.

7. Infrastructure Development Zones ("IDZs")

During the 2009 legislative session, New Mexico passed the Infrastructure Development Zone Act, Chapter 136, Laws of 2009, Section 5-17-1 through 5-17-36 1978 NMSA. See APPENDIX P — the "Infrastructure Development Zone Act." IDZs are similar in many ways to Public Improvement Districts.

IDZs are quasi-municipal political subdivisions created to provide and finance "services," which are infrastructure and facilities. As to differences between an IDZ and a PID, see APPENDIX R — the "IDZ/PID Comparison Chart." The scope of permissible services under an IDZ is almost identical to the services a PID can provide: water and sewer systems, drainage systems, public safety and fire protection facilities, and roads and parks, among other services. An IDZ must adopt a "service plan," which governs the scope of its activities.

Unlike PIDs, IDZs may cover property across multiple municipalities and counties. Furthermore, noncontiguous tracts may be included so long as they are within 3 miles of each other. Generally, IDZs may not overlap with other IDZs or special districts providing the same services.

To date, no IDZ's have been proposed in New Mexico, perhaps due to the similarity of provisions in the PID Act and the lack of flexibility in procurement matters.

In order to create an IDZ, there must be an initial petition signed by the lesser of 30 percent or 400 of the taxpaying electors in an area. Each municipality and county that has property included in the IDZ must hold a hearing pursuant to statutorily required notice within 90 days of receiving a petition, and approve, disapprove or hold further hearings on the IDZ within 60 days after the hearing. Once all required governing bodies have approved the formation of the IDZ, an organizing election to approve the IDZ must be held unless all eligible electors were petitioners and no competing candidates for the director positions exist.

IDZs have an extensive list of specifically enumerated general powers, including a broad grant of all necessary or incidental rights and powers. A few specific powers have been granted as to parks and recreational services as well as water and sanitary sewer services. For example, an IDZ has the right, with the consent of the approving authority, to compel owners of premises within an IDZ to connect to sewer and/or water lines of the IDZ when necessary for public health reasons.

There are certain restrictions on IDZs. For example, a maximum mill levy must be established in the service plan, which is the maximum mill levy for all IDZ assessments, including operating expenses and debt service. An IDZ must comply with the Procurement Code. Furthermore, IDZs are subject to certain governmental administrative statutes. All IDZ records are public records subject to the Inspection of Public Records Act, Section 14-2-1 NMSA 1978. The Audit Act, Section 12-6-1 NMSA 1978, applies to all financial affairs of an IDZ. All IDZ meetings must comply with the Open Meetings Act, Section 10-15-1 NMSA 1978. IDZs have not been made subject to the Local Election Act.

An IDZ's primary financing tool is the issuance of bonds. Bonds must mature within thirty years. Bonds may either be the general obligation of the IDZ, special assessment bonds, revenue bonds or refunding bonds. General obligation bonds must be authorized in an election. Revenue bonds may come from federal and local government contributions, property taxes, special assessments, private contributions, user or owner fees and charges, or other sources. IDZs are prohibited from requesting or receiving state funding for a capital outlay project.

IDZs are governed by a five director board. When elected, the directors must be eligible electors of the IDZ. A president, secretary and treasurer must be appointed. Once initial terms are served, directors hold their positions for staggered terms of four years. Separate subdistricts may be established. These subdistricts are separate political subdivisions, and the debt of each subdistrict is segregated from the debt of the IDZ. An IDZ may divide itself into areas according to different water and sewer services, may allocate charges within the different areas, and may acquire water rights and construct lines and facilities within and without an IDZ. The "approving authority," which is the governing body that contains a majority or all of the IDZ, has certain approval powers regarding ongoing IDZ affairs. In order to make changes of "a basic or essential nature" in IDZ services, all governing bodies that approved the original plan must also approve the change. Territory may be added to or removed from an IDZ pursuant to the IDZ Act.

8. Affordable Housing Act ("AHA")

In 2002 and again in 2006, voters adopted amendments to the New Mexico Constitution's Anti-donation Clause (Article IX, Section 14 E and F) to provide for government to participate in affordable housing transactions. In 2004, the legislature, in response to the 2002 constitutional amendment, adopted the Affordable Housing Act (AHA) Section 6-27-1 through 6-27-8 1978 NMSA. See APPENDIX Q– the "Affordable Housing Act."

Consistent with the requirements of the affordable housing exception to the Anti-donation Clause, the AHA carefully addresses each element of Article IX, Section 14F. The AHA defines "affordable housing" and carefully takes a broad approach to defining infrastructure. The law specifies two types of eligible grantees —non-individuals and individuals. In order to ensure the successful completion of housing projects, eligibility requirements for non-individual grantees are set out in the AHA, and the eligibility requirements of individual grantees are delegated to the Mortgage Finance Authority (the "MFA"). The AHA allows the state, a county or a municipality to donate land for the construction of affordable housing or to donate an existing building for conversion or renovation into affordable housing. These governments may also provide or pay the costs of infrastructure necessary to support affordable housing projects.

The 2006 amendment required "prior approval by law of an affordable housing assistance grant by the state." Using the same language, Section 6 of the AHA declared itself to be the prior approval of a specific housing assistance grant by the state.

Section 7 of the AHA requires a county's or municipality's governing body to enact an ordinance that authorizes grants and states the requirements and purposes of the grants. The ordinance must also comply with rules promulgated by the MFA.

The AHA contains further provisions addressing the successful completion of affordable housing projects. The MFA is mandated to adopt comprehensive rules covering application contents and procedures, award timetables, the evaluation of applications, procedures for compliance with the act by qualifying grantees, and other requirements for projects and grantees.

The AHA provided that funding should be appropriated to the Department of Finance and Administration for disbursement by the MFA to a qualifying grantee in accordance with rules promulgated by the MFA. It did not address what the source of that funding would be. In 2005, the legislature adopted and the Governor signed into law the New Mexico Housing Trust Fund Act, Section 58-18C-1 through 58-18C-9 1978 NMSA. In a separate piece of legislation, the Housing Trust Fund was capitalized with a $10,000,000 one-time appropriation.

The Housing Trust Fund was established for the purpose of funding loans or grant projects that will provide affordable housing for low and moderate income people or households. The fund consists of state appropriations and transfers as well as private contributions. The MFA is trustee of the fund, and the State Investment Council is the investment agent.

The New Mexico Housing Trust Fund Advisory Committee, representing geographically diverse affordable housing interests, was also established. The committee is subject to oversight by the Mortgage Finance Authority Act Oversight Committee and is charged with reviewing project applications and making funding recommendations, but does not make the fund’s investment decisions.

Trust funds are awarded on a competitive basis, and the MFA is responsible for insuring that the total funds awarded attract at least three times as much funding from other sources. Money from the fund may be used to match federal, local or private money. The act provides that if any provisions of the Housing Trust Fund Act conflict with federal funding requirements, they are inoperable, and requires that all rules adopted by the act meet requirements for federal funding.

The MFA is given authority to carry out the purposes of the Housing Trust Fund Act, including acting as a grantee or intermediary pursuant to the AHA.

9. Renewable Energy Financing District Act

During the 2009 legislative session, the New Mexico legislature passed the Renewable Energy Financing District Act, Section 5-18-1 through 5-18-13 1978 NMSA. See APPENDIX S — the “Renewable Energy Financing District Act.” The law permits a municipality or county to form a district to finance renewable energy improvements. A district may include contiguous and noncontiguous property within the municipality or county.

A “renewable energy improvement” is defined as a photovoltaic, solar thermal, geothermal or wind energy system permanently installed on real property. These improvements can be financed by the issuance of special assessment bonds with maturities not to exceed twenty years. The district may also impose special assessments to pay for renewable energy improvements.

To form a renewable energy financing district, a governing body must adopt an intent resolution describing the specific types of renewable energy improvements that will be eligible for financing. In 2009, Santa Fe County and the City of Albuquerque began the process of adopting resolutions, and other jurisdictions have expressed interest in the possibility. While Santa Fe County created a renewable energy financing district, the City of Albuquerque has not proceeded in formation of a district. Due to concerns expressed by mortgage providers regarding the enforceability of priority special assessment liens over mortgage indebtedness, these programs have stalled nationwide.

In any event, the resolution must provide that property will be included in the district on an owner's agreement to opt in, and that inclusion will cause the property to be subject to a special assessment. The method to calculate and impose assessments must be described as well as the required standards for the improvements. A public hearing is required before a governing body is permitted to pass a resolution forming a district. The special assessments are property liens, with priority other than as to *ad valorem* property taxes.

10. City of Rio Rancho Gross Receipts Investment Policy ("GRIP")

Unique in New Mexico, in 2001 the City of Rio Rancho adopted a Gross Receipts Investment Policy ("GRIP"), Rio Rancho Code of Ordinances Section 36.75 et seq., Ord. 02-031; Am. Ord. 04-003. See APPENDIX T — the "Gross Receipts Investment Policy." The Attorney General reviewed GRIP and opined that the City could properly enter into development agreements with property developers under GRIP. NM Att'y Gen. Op. 02-02 (2002). Following this decision, Bernalillo County and the Cities of Gallup and Alamogordo have also adopted GRIP policies and the City of Carlsbad has implemented an infrastructure reimbursement program for eligible economic development projects.

GRIP provides that in the case of new, large-scale retail and certain, targeted commercial businesses within the City, the City can repay a developer for the cost of reasonable and necessary public infrastructure related to the development. The City may also reimburse impact fees where the reimbursement thereof is instrumental in bringing the development to the City. A written agreement is required and must be submitted to the City's governing body for approval. While the policy focuses on large-scale retail and certain, targeted commercial businesses, small scale retail or targeted commercial businesses or developments can be approved for a GRIP project if the governing body determines that the project qualifies under one or more established criteria and is in the public interest.

For a business to qualify under the GRIP, it must demonstrate one or more of the following: (i) the retail or professional services will generate or draw regional customers or customers who reside beyond 20 miles from the municipal boundaries of the City, (ii) the sales volume is projected to meet or exceed $5,000,000 per year after three years of operation, (iii) the business is a food service or restaurant with a seating capacity of not less than 200 persons, (iv) the business is a full service hotel of not less than 200 rooms; (v) the business will provide employment for at least 50 employees, (vi) the business is a car dealership with an estimated minimum annual volume of sales of 600 units, or (vii) the business represents a substantial expansion of an existing business operation within Rio Rancho, at least doubling existing square footage or increasing retail space by 50,000 square feet, whichever is less.

To designate a GRIP project, a public hearing must be held where the developer presents a reasonable estimate of projected gross receipts tax revenues due the City from the planned development. The estimated tax revenues must be supported by an independent economic analysis. Any development agreement entered into pursuant to the GRIP Ordinance must contain certain specified provisions set forth in the GRIP Ordinance.

The amount of gross receipts tax payable to the developer can be up to one-half of the City's share of total gross receipts taxes directly attributable to sales from the new business, less any amount dedicated to other special purposes, received by the City each year for a specified number of years. Such payments shall not exceed the actual cost expended for the development of the public infrastructure. The collection and pledge of allocated gross receipts tax revenues from the new business constitutes a special fund and is the sole and only source pledged or otherwise available for the repayment of the GRIP project. If the GRIP project involves reimbursement for infrastructure, the developer must build and then dedicate the infrastructure to the City, and the construction must comply with certain GRIP Ordinance requirements.

11. Job Training Incentive Program ("JTIP"), High Wage Jobs Tax Credit, Film Production Tax Credit

JTIP was created pursuant to Section 21-19-7 1978 NMSA. See APPENDIX U— "Development Training." The program subsidizes the creation of economic base jobs in New Mexico by reimbursing companies for part of the cost of training workers to fill new jobs. It is administered by the Industrial Training Board, or JTIP Board. The board makes funding decisions and policy, provides guidelines, and oversees the program to ensure that it is increasing economic activity.

To qualify as creating economic base jobs, companies must either be creating jobs involving the manufacture of goods or providing non-retail services. In the latter case, at least 50% of the company's customer base must be from outside New Mexico. The company must also be financially strong enough to ensure the long-term employment of JTIP trainees. The jobs created must be full-time and year-round, and trainees must be guaranteed full-time employment at the company after completion of training. To be eligible, jobs must also involve helping provide the product or service that is central to the company's business. Additionally, the jobs need to meet certain wage level requirements, which vary depending on whether the job is being created in a rural or urban area. Lastly, trainees must have been New Mexico residents for at least one year prior to employment.

Reimbursable costs include training on the job and/or customized training at a public educational institution. 75% of wages are reimbursable for up to six months of training, and the same is the case of the costs of providing customized training. Additional 5% reimbursements may be available for certain trainees, including recent graduates of post-secondary educational institutions in New Mexico and those who qualify for the High Wage Jobs Credit. See the Job Training Incentive Program Policy/Procedures Manual: Fiscal Year 2018 for more information.

The High Wage Jobs Tax credit, created in 2004, is available for qualified employers who create jobs meeting certain wage thresholds. Section 7-9G-1 1978 NMSA. See Appendix V— the "High-Wage Jobs Tax Credit." In urban areas, defined as areas with a population greater than 60,000, jobs must pay at least $60,000 a year. In rural areas, the threshold is $40,000. The credit is for 8.5% of the job's wages and benefits.

To qualify, employers need to be able to meet the qualifying requirements for JTIP as well. They also must have increased their number of employees within the previous year and made more than 50% of their sales to persons outside New Mexico. The credit can be taken for four years, and cannot exceed $12,750 per year for a single job. See the New Mexico Economic Development Department's explanation of the High Wage Jobs Tax Credit for more information.

The Film Production Tax Credit is another popular incentive program. New Mexico allows film producers to claim an aggregate of $110 million in tax credits each fiscal year. Excluded from the cap are payments to companies that purchase or lease for ten years a film production facility in New Mexico. Individual producers may claim 25-35% of their expenditures for their credit. Requirements include that the filing entity be a film production company, the project be a film, and the production be intended for exhibition and commercial exploitation. See the New Mexico State Film Office's website for more information.

12. New Markets Tax Credits ("NMTCs")

The Federal Government created the New Markets Tax Credit (NMTC) program in 2000. The program is jointly administered by the Community Development Financial Institutions Fund ("CDFI") and the IRS. NMTCs provide a tax credit for qualifying investments in Community Development Entities ("CDEs"). CDEs then use the investment proceeds to make Qualified Low-Income Community Investments (QLICIs), such as business loans, in low-income communities. The program thus encourages investment in low income-communities.

For each dollar of qualified private investment, the NMTC program provides investors with a 39% tax credit based on the original investment. The credit is taken at 5% for the first three years after the original investment is made and then 6% for the next four years. The value of the tax credits depends on a taxpayer's ability to use them to offset tax liability. The NMTC program does not encourage investors to make investments in low-income communities if these investors are unable to use their credits to offset tax liability. Taxpayers who are subject to the alternative minimum tax (AMT) are unable to use NMTC to offset their AMT tax liability.

In 2006, the New Mexico Finance Authority ("NMFA") formed Finance New Mexico to serve as the state's CDE. Administered by the NMFA, Finance New Mexico garners capital that it then lends directly to qualified businesses in low-income areas. Since 2006, the federal government has awarded Finance New Mexico $246 million in NMTCs.

13. Opportunity Zones

Opportunity Zones were created by the Tax Cuts and Jobs Act of 2017 to facilitate capital investment in economically deprived areas. The Department of the Treasury has designated 63 Opportunity Zones in New Mexico. There are three tax incentives available to those who invest in opportunity zones through qualified Opportunity Funds. Investors can receive a temporary deferral of inclusion in taxable income for capital gains, a step-up in basis for capital gains, or permanent exclusion of capital gains from taxable income if the investment is held for at least 10 years. See Appendix W—"Opportunity Zones" for more information. Maps providing the locations of New Mexico's Opportunity Zones can be found on the New Mexico Economic Development Department's website.

In August 2019, the State Economic Development Department announced a program intended to further incentive investment in New Mexico opportunity zones. The program guarantees an additional $1 million in Local Economic Development Act funding to projects that fit into a number of criteria from the Economic Development Department. The criteria includes the project being in one of nine key industry sectors (aerospace, biosciences, cybersecurity, film and television, global trade, intelligent manufacturing, outdoor recreation, sustainable and green energy, and sustainable value-added agriculture), meeting payroll and average salary requirements, commit to the state for at least 10 years, and having capital investment of $15 million or higher.

ADDITIONAL INFORMATION

See APPENDIX X — Rodey, Dickason, Sloan, Akin & Robb P.A., Attorney Biographies and Resumes.