

February 5 & 6, 2008
Current Status of Michigan Brownfield Redevelopment Incentives
Workshop

Workshop Panel Discussion
Q & A

Panel members included:

Peter Anastor – Brownfield Redevelopment Program Manager, MEDC
John Byl – Warner, Norcross, & Judd
Richard Barr – Honigman, Miller, Schwartz, & Cohn
Darlene Van Dale – Act 381 Specialist, DEQ

Moderator: Lynelle Marolf – Assistant Division Chief, RRD, DEQ

Moderator: Susan Erickson – Chief, Brownfield Grant and Loan Program, DEQ

Q: Regarding a brownfield plan that was approved last year; is there retroactivity for work that has already been done? For example, costs that have already been incurred, that were not in the brownfield plan because they were not previously eligible, but now due to the legislative changes, are eligible. Can the brownfield plan be amended to include these costs now?

A: Byl: If a statutory change such as this one is "remedial" in nature, it usually can be applied retroactively. Therefore, I suggest you consider amending the brownfield plan to include after-the-fact reimbursement of these expenses. Obviously, it will require approval of the local municipality that approved the brownfield plan in the first instance.

Van Dale: Pre-brownfield plan costs are only locally eligible. No. You cannot go back and change what was the deal at the time, or you would be able to go back forever and claim those expenses now.

Q: Is the 35-year timeframe for capturing Tax Increment Financing (TIF) retroactive? Could you amend a brownfield plan to reflect the new 35-year criteria?

A: Anastor: If you are not maximizing the 30-year capture period, it would not make sense.

Byl: If reimbursement has already started you cannot amend, but if it has not yet begun, you should be able to amend.

Q: When a brownfield plan is already approved with a 30-year time frame for tax capture, would you have to amend?

A: Anastor: If no capture has occurred during those periods, maybe this could be amended. If it gets captured, but is not yet reimbursed, you could potentially uncapture the funds so you could then amend your brownfield plan.

Q: The process for Act 381 approval is a burden for smaller communities. Is there anything that can be done to make the process easier?

A: Barr: Abbreviated forms for work plans and credits for small projects could help streamline the process for smaller communities.

Byl: Some sort of automatic approval for smaller projects could be a technique to help streamline the process.

Q: Who makes the determination of a property being “blighted due to the presence of foundations?” What would be considered “substantial?” This could get abused.

A: Anastor: Substantial is not defined in the law. It is being left to the local unit. If it smells bad, it likely is.

Barr: No go-to person regarding local TIF issues.

Q: What if it is a large factory site with subsurface debris? Would this be considered substantial?

A: Anastor: Yes, this would be allowed. It was actually allowed before, but it was not clearly spelled out and did not really fit into any of the previous definitions.

Q: What criteria will be used to determine if you will allow (school taxes for) interest as an eligible expense?

A: Anastor: This is a policy decision that the Michigan Economic Development Corporation (MEDC) and the Michigan Economic Growth Authority (MEGA) Board will need to decide. The MEDC is attempting to coordinate with the Michigan Department of Treasury (Treasury) to develop a revised policy. The criteria for eligibility are unknown at the moment. The MEDC has supported interest in the past for projects that met the current transformational policy. If I had to provide insight on what a policy might include, I would say projects with costs that are “brownfield related” like, demolition and lead and asbestos abatement are the most likely to be supported with interest. Projects that include local financing will also be looked at more favorably for interest approval. Allowing interest for site preparation and public infrastructure costs adds more costs and leads to longer repayment and subtracts from future school costs. Treasury will need to review and determine what is appropriate. I would imagine the policy for site preparation and public infrastructure costs will have a higher threshold of justification to include interest. Brownfield TIF was not designed to fund municipal capital improvements. I am hopeful that a policy regarding this will be going to the MEGA Board soon, maybe as early as March 2008.

Van Dale: Interest will be approved for activities to be conducted in a work plan. Interest costs do not need to be approved, just the activities. The DEQ must confer with MEDC to make sure the interest rate is “reasonable.” If a local

unit of government (LUG) starts activities without approval, interest costs will not be eligible on those activities.

Q: Prior to the board meeting to approve the MEDC interest policy, will there be a draft MEDC policy for public review?

A: Anastor: The MEDC will try to make one available, but cannot commit at this time. The MEDC is receptive and appreciative of public input.

Q: If a developer already has done a Baseline Environmental Assessment (BEA) without work plan approval, can a work plan be submitted after the fact that includes the BEA so that interest can be approved?

A: Van Dale: Our policy will be for work “to be conducted.” Prior approval will be necessary to recoup interest costs.

Q. What is considered a “reasonable” interest rate? T-bill?

A: Anastor: This is the #1 unresolved issue in the program. The MEDC's current policy on interest has been the transformational project. We are looking at this policy. There are basically two main considerations: (1) The added costs to school programs forgoing their money. Some think we do not need to worry about this, but it is a real issue, and (2) There are costs eligible under the brownfield program that are less brownfieldy than other costs. Infrastructure, site prep, etc. are costs on both brownfield and greenfield projects. Items need to be looked at closely. Lead, asbestos, and demolition are TRUE brownfield costs, and these are where we will see the most support. We need to have community involvement. It also impacts the local tax revenue as well. Communities selling bonds, and therefore, showing they are putting something into the project, will see more consideration on the interest issue. As far as an acceptable rate, if the rate is equal to the rate they would get selling bonds, that would be the base. It is difficult to give a specific rate as it depends on what the market is doing. If anyone has suggestions regarding the development of a policy on interest, we would love to hear them.

Barr: Whatever is a reasonable rate to reimburse the cost incurred. Some communities do not approve interest. Think about if you can afford to or not to do it.

Van Dale: If you want interest approved, it needs to be in your work plan. We do not have to approve interest, but we need to have it included in your work plan, including the interest rate to be used. Although the DEQ does not approve interest, we would check with the MEDC to make sure the proposed interest rate is reasonable. Approval must come before work is conducted.

Byl: Some local units are not approving interest because the state is not. It becomes very complicated to split out school and local TIF.

Q: If the interest rate in a work plan is found to be not acceptable, can you change it? If the DEQ gives work plan approval, but is not approving the interest rate, is the interest rate automatically approved if the work plan is approved?

A: Van Dale: We are not required to approve interest, but if it appears to be out of line, we would contact you about that and work with you to revise the work plan. The work plan would not be approved until this issue was resolved. The DEQ and MEDC would work with you to come to an acceptable revised work plan.

Anastor: The MEGA Board will be approving eligible activities and the amount for interest. If the rate is way out of line, prior to taking it to the MEGA Board, we would try to amend the work plan to bring it to a more reasonable rate. Make sure your interest costs are clearly shown and defined because the MEDC will also be running calculations to make sure they are coming up with the same numbers. Ideally, we need to come to an agreement with the local community before we take this to the MEGA Board for approval so we are not trying to fix problems on the back end at the eleventh hour. The more that is answered up front, the smoother the entire process goes.

Q: What is the impression of the panel regarding making the assignment process more flexible?

A: Byl: Any assignment and reassignment must be in the same taxable year that the certificate of completion is received.

Barr: One of the big problems is that the rush is on for work in the last quarter of the year. I do not believe having to assign credits in the same year is useful. There is no requirement to get a certificate of completion within the same year of completing a project.

Anastor: Changes were made in 2005 or 2006 that made the assignment process easier. Changes in current proposed legislation will actually make the credits refundable. In regard to assignments, if you have to assign a credit and do not know who to assign it to, do not come in for your certificate of completion. The Attorney General's Office and Treasury have the opinion that if you have a credit and assign it, it must be taken in the same year that it is assigned.

Byl: Developers need to look for a buyer in advance to get the certification of completion to coincide with the assignment.

Q: What is the timeframe for the assignment legislation? (HB 5511)

A: Byl: Hopefully by April 1, 2008.

Q: Often site prep and site improvements overlay each other and are hard to separate. Are you going to come up with a list of what activities fall into what category?

A: Anastor: This is something that does need to be done. If the activity is related to the new construction of a building, this is site improvements, but if you are filling a hole that was a basement, that would be site prep. Gray areas exist when there is a site with soil conditions that do not allow for construction. It depends on whether the poor soil conditions are the result of a previous use or are naturally occurring poor soils. Sometimes caissons will be allowed because soils would not hold a foundation. The MEDC would love to have a list put together, but it is very time consuming and every project is different.

Q: What about the Environmental Liability Insurance issue?

A: Barr: There are a few projects out there where it was found to be appropriate to provide environmental liability insurance. Local authority is in the front on this issue. They decide if it is a reasonable cost. This would have to have DEQ approval for a project where you have minimal due care work but want insurance.

Byl: Sometimes the developer will want this, particularly if they are an out-of-state developer that does not understand the BEA process. There will not be much of this because of our BEA process.

Q: For land bank acquisition costs, is it the cost of property and any related costs associated with the acquisition?

A: Anastor: All REASONABLE costs. This is still evolving.

Q: Since Brownfield Redevelopment Authorities (BRAs) acted like land banks before land banks were created, when will BRAs be given the same privileges as land banks?

A: Byl: Not sure at this time. You must use land banks at this time to receive those privileges. There is a package of bills pertaining to downtowns (introduced in late November) that could further tweak Act 381. This gives small communities the opportunity to influence that legislation now.

Q: Will there ever be a state bond pool for BRAs to draw upon?

A: Anastor: We will take that idea into consideration.

Q: Non-core community infrastructure – does legislation provide for non-local taxes to go towards these?

A: Anastor: Non-local taxes are not available if the community does not have core community status. The idea was to offer additional tools to certain areas, not to take tools away from other communities.

Q: The trend in the past with the DEQ is to only approve costs necessary for 7a compliance. For single-family residential projects, the DEQ should look at opportunities for doing unrestricted residential.

A: Marolf: More public health protection could be generated with TIF support. Until we have a stable funding source, new state-funded work is going to stop, so communities will be relying on local TIF.

Q: In the past, the DEQ has not approved excavation costs for situations where contamination is above commercial but below residential. Will this ever change?

A: Marolf: Possibly, provide rationale why the incremental use would be wise.

Q: Excavation for commercial land use, but taking it to residential criteria. Is it an additional response activity or due care?

A: Marolf: Additional response activity.

.....END OF QUESTIONS...

...CLOSING REMARKS....

Van Dale - Final Points:

- 1) Activities that do not need DEQ approval can still be submitted for approval, if a community would feel more comfortable with that. For situations where you will be doing cleanup beyond the due care requirement, you will need to provide justification and make sure you provide the incremental cost for the additional work.
- 2) Regarding notice to the MEDC and the DEQ: In the past, the DEQ did not get into the process until the work plan showed up on Darlene's desk. Get the DEQ involved as soon as possible, even before you do a brownfield plan. For the DEQ notice of a brownfield work plan, you will need to send a copy of the notice to both Darlene and the district that the project is located in.
- 3) If you choose to perform BEA/due care tasks without DEQ approval, be aware that you take the risk of not having adequate information when you submit a work plan for implementing your due care.
- 4) Now that demolition and lead asbestos abatement is eligible, you must submit a work plan to the MEDC for approval
- 5) Regarding work plan review billing, Darlene is doing invoicing now. The DEQ may be billing for projects that have not captured TIF yet. Think about who is going to pay for these costs. It is possible to include in a reimbursement agreement and negotiate with the developer. The DEQ may develop a policy where we do not do a work plan review if they have unpaid invoices.

Anastor - Final Points:

- 1) Maintain consistency throughout the documents to expedite the process. Make sure that the brownfield plan and the Michigan Business Tax (MBT) application have the same reason for qualifying the property as a brownfield. If you have a brownfield plan that approves a property as functionally obsolete, then you need to make sure it has the same trigger on the MBT request.
- 2) For projects only seeking a MBT credit, the applicant is still required to identify eligible activities in the brownfield plan for that property. This is necessary to qualify for MBT credits, even if no TIF is being sought.
- 3) There is starting to be a separation between the definition of eligible property for MBT credit and Act 381. Just because the property is considered eligible under one program does not mean you qualify for the other.

Byl - Final Points:

Local municipalities need to be creative and flexible in using these tools.

Barr - Final Points:

- 1) Most of the credits in 2007 were not used up. Unused portions get carried over from year to year. This year they have approximately \$44 million-- only approved \$15 million last year. Projects that may not have been approved in the past, may actually be considered.
- 2) Keep an eye on the legislation coming out. There is a lot of opportunity to get involved and make things happen.

DISCLAIMER: The responses to the questions given above should in no way be taken as new policy. They are merely opinions and do not reflect the official position of the DEQ, MEDC, or any other panelist.