

The Sustainable Working Waterfronts Toolkit

*The Tiff Over TIF:
Extending Tax Increment Financing
to Municipal Maritime Infrastructure*



THE TIFF OVER TIF: EXTENDING TAX INCREMENT FINANCING TO MUNICIPAL MARITIME INFRASTRUCTURE

CAN CRA'S USE TAX INCREMENT REVENUE TO MAKE NAVIGATION AND OTHER IMPROVEMENTS TO SOVEREIGN SUBMERGED LAND OUTSIDE THEIR BOUNDARIES

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ABSTRACT

Harbors, inner harbors and their navigational connection to the streams of maritime commerce are the economic and cultural lifeblood of most waterfront communities. Oddly, this connection has often been disregarded in the development and financing of municipal plans. Working waterfront communities need to find new and creative means to finance or co-finance improvements to their maritime infrastructure. One such means is through redevelopment planning and the financial vehicle known as Tax Increment Financing (TIF). Typically associated with dry land, TIF allows the incremental increase in property taxes from a base year to be captured from a defined geographic area and used to fund activities within that area. By the end of the 1980s, many states were utilizing TIF to address inner city blight. In most cases, the authorization for TIF remains imbedded in statutes that create “redevelopment districts” – based on statutory definitions of “slum” and “blight.” Because working waterfronts often lie within the urban core, the landside facilities that keep these waterfronts working also lie within these so-called “blight districts.” However, waterfront blight districts can fail to include the waterside of their waterfront, including navigation infrastructure and natural resources that may contribute to both on-water and waterfront blight. Moreover, in many cases, municipal boundaries themselves end at the waterfront, compounding the jurisdictional problem. Expending TIF revenue to support on-water harbor improvements outside these TIF districts and their associated municipalities may be legally problematic. This article explores the issues associated with TIF financing in Florida for maritime infrastructure outside of the redevelopment district that provides the tax increment and suggests options for local governments, including targeted statutory reform.

I. Introduction: The Florida Context

Like most states, Florida authorizes its local governments to create Community Redevelopment Districts to transform areas considered to be suffering from “slum” and “blight.”¹ These districts utilize an essentially revenue-neutral financing vehicle referred to as Tax Increment Financing, or TIF,² to help to redevelop the district. TIF funds are administered pursuant to a plan that is implemented by a Community Redevelopment Agency (CRA).³ The CRA model and its unique financing vehicle have proven to be very popular in Florida and elsewhere. There are now more than 200 CRAs in Florida,⁴ many of which encompass working waterfronts. In many cases, where a CRA lies within a waterfront community, the CRA district boundary ends at or very near to the waterline. Moreover, where the CRA lies within a municipality, the municipality’s

¹ See Florida Statute § 163, pt. III (2012).

² For a relatively recent discussion of the historical and policy background of TIF, *see generally* Richard Briffaut, *The Most Popular Tool: Tax Increment Financing and the Political Economy of Local Government*, University of Chicago Law Review 65 (2010), available at

<http://lawreview.uchicago.edu/sites/lawreview.uchicago.edu/files/uploads/77.1/77-1-TaxIncrementFinancing-Richard%20Briffault.pdf>. *See also* David E. Cardwell & Harold R. Bucholtz, *Tax-Exempt Redevelopment Financing in Florida*, 20 Stetson Law Review 667 (1990-1991).

³ *See infra* notes 31-36 and accompanying text.

⁴ CRAs are considered to be special districts under Florida law. *See* Florida Statute § 189.403(1) (2012). Pursuant to Chapter 189, Florida Statutes, the Florida Department of Economic Opportunity maintains a statewide database of special districts that can be sorted based on attributes.

jurisdiction often also ends at or near the waterline.⁵ The failure of these jurisdictional boundaries to extend into the water and encompass critical maritime infrastructure and natural resources creates a level of regulatory and jurisdictional uncertainty that exacerbates the municipal planning disconnect between the water and the waterfront.

As federal and state resources for navigation and other improvements on submerged lands have become scarcer, Florida communities have had to look harder for revenue to remove derelict vessels, conduct channel improvements, install mooring fields, and undertake environmental restoration and sea level rise adaptation projects – all arguably valid redevelopment purposes under the Florida law. In at least two instances of which the authors are aware, Florida Community Redevelopment Agencies have either spent or considered spending funds from revenues generated through TIF district property taxes to address navigation improvements, even though the TIF districts themselves do not extend into the water.⁶ In these cases, property owners within the district are or would be financing activities that take place outside the district, typically on state-owned submerged lands.

While it is clear that CRAs may direct funds for redevelopment within their boundaries, Florida's CRA statute does not expressly authorize expenditures for improvements that are outside of the districts whose property owners contribute the tax increment. While the general question of the propriety of TIF expenditures outside of the district boundaries has not been litigated in Florida, a Florida Attorney General Opinion from 2009 has interpreted Chapter 163 to mean that CRA funds may not be used on capital improvements outside the district.⁷ Several other states have drafted or amended their CRA laws to specifically authorize expenditures beyond district boundaries for limited purposes.⁸

Florida's waterfront CRAs would benefit from the ability to confidently spend TIF revenue, improving sovereign submerged lands through the removal of derelict vessels, the upgrade of navigation channels, the installation of mooring fields, environmental restoration and climate adaptation, and other improvements that keep waterfronts working. Below we discuss the legal issues associated with such extra-jurisdictional TIF spending in Florida, and propose options to provide greater certainty to existing and future waterfront CRAs.

II. Florida's Waterfront Boundary Conundrum

The Florida Department of Economic Opportunity maintains a database of 207 community redevelopment districts within the state, most of which employ tax increment financing for

⁵ Some of Florida's most emblematic working waterfronts have municipal boundaries that do not extend past their shorelines, including the City of Port St. Lucie, Port St. Joe and Fernandina Beach. *Community Redevelopment Area*, Official website, City of Port St. Lucie: <http://www.cityofpsl.com/community-redevelopment-area/cra-area.html> (last visited Dec. 28, 2012); *Port St. Joe Redevelopment Agency Redevelopment Plan*, July 2009 at pg. 28, available at http://www.celebrateportstjoe.com/file/Redevelopment/PSJRA2009Update_FINAL_5_10.pdf (last visited Dec. 28, 2012).

⁶ Both instances involved the removal of derelict vessels.

⁷ See *infra* notes 54-56 and accompanying text.

⁸ See *infra* notes 58-62 and accompanying text.

revenue generation.⁹ Of these 207 districts, more than 25% appear to have urban waterfronts associated with them.¹⁰ Unfortunately, there does not appear to be any publically accessible geo-referenced database that identifies the relationship between CRA district and local government boundaries in Florida. Therefore, and to the extent feasible, individual waterfront CRA and municipal websites were accessed to locate both district and municipal boundaries. Only 31 of the identified waterfront community websites had enough information available to determine where both the CRA and municipal boundaries ended. Of these 31 districts, only 9 had CRA district boundaries that extend past the shoreline to encompass significant on-water areas. For example, the City of Punta Gorda CRA boundary clearly extends past the shoreline and up to the city limits, covering an area that extends well into the Peace River.¹¹ However, most of the municipal/CRA waterfront boundary relationships we researched did not follow this example. The City of Palmetto, for example, has a municipal boundary that extends well into the Manatee River, but the City of Palmetto CRA district boundary extends only a short distance beyond the shoreline.¹² As we discuss, CRAs with these configurations may be compromised in their ability to use TIF money to address on-water improvements.¹³

III. The Florida Community Redevelopment Act: Briefly

A. The Community Redevelopment Area

Community Redevelopment Areas are districts in which locally generated monies are used to foster redevelopment. The Florida Community Redevelopment Act (Act), adopted in 1969, is intended to help communities revitalize downtowns, preserve historic structures, and enhance the CRA district.¹⁴ Chapter 163, Part III of Florida Statutes authorizes local governments to designate up to 80 percent of a municipality as a CRA.¹⁵ Under Florida Law, local governments may designate specific areas as CRAs when the area is determined to be “slum” or “blighted.”¹⁶

Both these terms are defined generally and through lists of factors that apply to each.¹⁷ Arguably the more lenient of the two, a “blight” finding requires that there be “a substantial number of deteriorated, or deteriorating structures, in which conditions, as indicated by government-maintained statistics or other studies, are leading to economic distress or endanger life or

⁹ See *supra* note 4; Florida Department of Economic Opportunity: <http://dca.deo.myflorida.com/fhcd/sdip/OfficialListdeo/> (last visited Dec 23, 2012).

¹⁰ Our analysis did not extend to waterfront communities on freshwater rivers and lakes.

¹¹ *Community Redevelopment Agency*, City of Punta Gorda, Florida: <http://www.ci.punta-gorda.fl.us/gov/commdevagency.html> (last visited Dec. 22, 2012).

¹² City of Palmetto & CRA Boundaries 2012, <http://palmettocra.org/wp-content/uploads/2012/02/2011CRAReferenceMap.pdf> (last visited Dec. 22, 2012).

¹³ Counties may also host CRAs. However, county boundaries extend over submerged lands to the limits of the state’s political jurisdiction, and are constitutionally created. Florida Constitution, Ch.7.

¹⁴ See Melva Macfie, et al., *Establishing a Community Redevelopment Area in Your Waterfront Community*, Conservation Clinic, University of Florida Levin College of Law 2 (2006), http://www.law.ufl.edu/pdf/academics/centers-clinics/clinics/conservation/resources/establishing_comm_redev_area.pdf.

¹⁵ Florida Statute § 163.340(10) (2012). This restriction only applies to CRAs created in Florida after July 1, 2006.

¹⁶ Florida Statute § 163.355 (2012).

¹⁷ Florida Statutes §§ 163.340(7)-(8) (2012).

property,” and that at least two out of the relevant list of factors are met.¹⁸ Thus, a threshold requirement would appear to be the presence of “deteriorated or deteriorating structures.” However, the definition thereafter removes this requirement and requires only one factor from the list to be present when there is agreement among all relevant local taxing authorities.¹⁹ Relevance of these factors to an on-water blight finding is discussed further below.

To document that the required conditions exist, local government must survey the proposed redevelopment area and prepare a “Finding of Necessity.”²⁰ If the Finding of Necessity determines that the required conditions exist, the local government may create a Community Redevelopment Area to provide the tools needed to foster and support redevelopment of the specified area.²¹

B. The Community Redevelopment Agency

The Community Redevelopment Agency administers all the activities and programs within a specified Community Redevelopment Area.²² A CRA Board, comprised of five to nine members, directs the agency.²³ City or county government appoints the CRA Board.²⁴ The local governing body may also appoint itself as the CRA Board, which is fairly common.²⁵

C. The Community Redevelopment Plan

The Community Redevelopment Agency creates and implements a Community Redevelopment Plan, which is tailored to the unique issues and goals of the Community Redevelopment Area and must conform to the local comprehensive plan.²⁶ The statute sets forth minimum requirements for the plan,²⁷ which will govern how expenditures are made within the District.²⁸ For coastal communities, this includes “maintaining or reducing evacuation times” and “ensuring protection of property against exposure to natural disasters,”²⁹ both of which could be considered appropriate to on-water infrastructure and improvements. By using the revenue generation vehicle known as Tax Increment Financing (TIF), a CRA can help finance redevelopment programs and projects to improve the “blighted area.”

¹⁸ Florida Statute § 163.340(8) (2012).

¹⁹ *Id.* However, the term “blighted area” also means any area in which at least one of the factors identified in paragraphs (a) through (n) are present and all taxing authorities subject to Florida Statute § 163.387(2)(a) agree, either by interlocal agreement or agreements with the agency or by resolution, that the area is blighted.

²⁰ Florida Statute § 163.355 (2012).

²¹ *Id.*; *see also* Florida Statute § 163.356 (2012).

²² Florida Statute. § 163.356 (2012).

²³ Florida Statute § 163.356(2) (2012).

²⁴ *Id.*

²⁵ Florida Statute § 163.357 (2012).

²⁶ Florida Statute § 163.360 (2012).

²⁷ The plan must be “sufficiently complete to indicate such land acquisition, demolition and removal of structures, redevelopment, improvements, and rehabilitation as may be proposed to be carried out in the community redevelopment area; zoning and planning changes, if any; land uses; maximum densities; and building requirements. Florida Statute § 163.360(b) (2012).

²⁸ *See* Florida Statute § 163.387(1)(a) (2012).

²⁹ Florida Statute § 163.360(7)(e) (2012).

D. Financing the Plan: The Community Redevelopment Trust Fund

Tax Increment Financing (TIF) and revenue bonds fund most Community Redevelopment Areas,³⁰ though these are not required to establish a CRA and other sources may be used. However, if these financing vehicles are employed, the Governing Body must establish a Community Development Trust Fund.³¹ Florida amended its redevelopment statute to authorize TIF in 1977.³²

To begin the TIF process, the assessed valuation of all real property within the TIF district is determined at a fixed date, and the value becomes the “frozen tax base.”³³ The designated taxing authorities continue receiving property tax revenues based on the frozen value, which are available for general government purposes.³⁴ However, the “increment,” that is, property tax revenues generated from increases in real property value within the district, is deposited into the CRA Trust Fund and dedicated to public improvements and general development and rehabilitation of the redevelopment area.³⁵ Therefore, in theory, TIF induces redevelopment that otherwise would not occur because the incremental revenues pay for public expenditures, which then encourages private investment in the area. Private investment subsequently creates more incremental revenues for public improvements, which engenders more private investment, and so on, in a cyclical fashion.³⁶ Eventually, if successful, the TIF district expires, leaving an economically improved area generating higher taxes due to increased property values.³⁷

IV. CRAs, TIF and Working Waterfronts

As previously discussed, many Florida communities have created CRAs to revitalize their downtown waterfronts. On-water navigation and related improvements, including environmental restoration and sea level rise adaptation projects, can be just as important to this effort as the landside infrastructure. These improvements include, but are not limited to, derelict vessel removal, installation of mooring fields, navigation improvements including dredging, aids to navigation, signage, and even environmental restoration and sea level rise adaptation projects.³⁸ Florida’s Community Redevelopment Act specifically targets coastal communities. In the section concerning Findings of Necessity, the Florida legislature recognized that economically and physically distressed coastal areas should be revitalized and redeveloped to improve their social

³⁰ See Florida Statute § 163.385; see Florida Statute § 163.387 (2012); see Harry M. Hipler, *Tax Increment Financing in Florida: A Tool for Local Government Revitalization, Renewal, and Redevelopment*, FLA. B.J. 66 (July/Aug. 2007).

³¹ See Florida Statute § 163.353 (2012).

³² Act of June 28, 1977, Ch. 391. 1977 Laws of Florida 1930.

³³ See Briffault at 67.

³⁴ *Id.*

³⁵ *Id.*; see also Florida Statute § 163.387 (2012).

³⁶ Briffault at 68; see also Florida Statute § 163.345(a) (2012).

³⁷ Briffault at 68.

³⁸ The construction of an oyster reef provides one example of a project that can be both an environmental restoration and sea level rise adaptation project. See Brian P. Piazza, Patrick D. Banks and Megan K. La Peyre, *The Potential for Created Oyster Shell Reefs as a Sustainable Shoreline Protection Strategy in Louisiana*, 13 *Restoration Ecology* 499 (2005).

and economic conditions.³⁹ Further, in defining a Community Redevelopment Area, the Legislature included a “coastal and tourist area that is deteriorating and economically distressed due to outdated building density patterns, inadequate transportation and parking facilities, faulty lot layout or inadequate street layout, or a combination thereof which the governing body designates as appropriate for community redevelopment.”⁴⁰

CRAAs have been used in waterfront communities to revitalize and maintain land-based infrastructure, including docks, boat slips, boardwalks and pavilions, and to build aquariums, boat storage, mechanic bays, and educational riverwalks.⁴¹ CRAAs could also be useful to waterfront communities to plan for and fund on-water improvements that serve as the waterborne transit link to the waterfront, and to enhance the recreational, commercial and natural resource value of the waterfront. However, when a Florida CRA boundary does not encompass these on-water areas, it is not clear that the CRA is legally permitted to use funds to undertake the improvements.

V. The Community Redevelopment Act and On-Water Financing

There is currently no binding law in Florida that addresses the issue of using TIF revenue outside a CRA boundary for improvements to adjacent submerged lands, or for any other purpose. Therefore, whether a CRA has the power to use TIF funds for improvements to the adjacent waterways largely depends on interpretation of the governing Florida statute. Two questions arise in this context: 1) whether on-water “blight” is the sort of blight the statute intended to ameliorate; and 2) whether TIF funds expended for this purpose can be spent on improvements outside the boundary of a “land-locked” CRA district. The first question is more easily answered.

E. Deteriorating Maritime Infrastructure and Natural Resources as Blight

Although the statute clearly has a bias toward landside redevelopment, especially for housing and transportation infrastructure, its language seems sufficiently broad to encompass the variety of on-water improvements being considered here. The initial blight definitional requirement of “deteriorated or deteriorating structures” does create difficulties, though the term “structure” is not defined in the Act. Presumably dredged channels, aids to navigation and derelict vessels could qualify as “structures” for this purpose. Assuming this were the case, several factors needed for a “blight” finding could readily be construed to include on-water infrastructure and derelict vessels.⁴² Moreover, even in the absence of a generous interpretation of deteriorated or

³⁹ Florida Statute § 163.335(4) (2012).

⁴⁰ Florida Statute § 163.40(10) (2012). This language in this provision demonstrates the statute’s landside bias.

⁴¹ The Florida Department of Economic Opportunity administers the Waterfronts Florida Partnership Program. The Department’s website documents activities of designated waterfront communities – most of which are also CRAAs - including best practices and case studies. *Waterfronts Florida Partnership Program*, Florida Department of Economic Opportunity: <http://www.floridajobs.org/community-planning-and-development/programs/technical-assistance/community-resiliency/waterfronts-florida-program> (last visited Feb. 18, 2013).

⁴² Florida Statute § 163.340(8)(a)-(n) (2012). These might include (a) Predominance of defective or inadequate street layout, parking facilities, roadways, bridges, or public transportation facilities; (d) Unsanitary or unsafe conditions; (e) Deterioration of site or other improvements; (j) Incidence of crime in the area higher than in the remainder of the county or municipality; (k) Fire and emergency medical service calls to the area proportionately higher than in the remainder of the county or municipality; (m) Diversity of ownership or defective or unusual

deteriorating structures, blight can be found where only one of the factors is present and all relevant local taxing authorities approve.⁴³

The Act's *Workable Program* section gives communities authority to utilize “appropriate private and public resources to eliminate and prevent the development or spread of slums and urban blight” and “to encourage needed community rehabilitation.”⁴⁴ The removal of derelict vessels – which are defined as “abandoned and dilapidated boats, often causing health and safety threats”⁴⁵ – fits neatly into the statutory purpose. Similarly, channel dredging, aids to navigation, and moorings can be analogized to transportation improvements that seem well suited to redevelopment goals in a blighted waterfront community seeking to improve water-based transportation and the connections to maritime commerce and recreation.⁴⁶ Even environmental restoration and sea level rise adaptation activities fit within statutory goals for improving conservation and recreation in blighted areas.⁴⁷

Finally, there is no absolute requirement that all of the area within the CRA qualifies as slum or blighted. Deteriorating or inadequate on-water infrastructure can contribute to landside blight, and improvements to that infrastructure can contribute to waterfront redevelopment and revitalization. As long as these activities and projects are articulated in the redevelopment plan and lie within the CRA boundaries, it is difficult to imagine they would be considered inappropriate to ameliorating blight in a water-dependent community seeking to redevelop its waterfront.

F. Activities on Submerged Lands Outside the CRA

Whether a CRA can undertake these improvements on submerged lands outside of the District boundaries seems more problematic. The definitions of “community redevelopment” and “redevelopment” argue against such an interpretation. These terms are defined as “undertakings, activities or projects in a county, municipality or community redevelopment agency in a community redevelopment area...”⁴⁸ Numerous other references in the statute refer to activities taking place “in the redevelopment area.”⁴⁹ The overriding focus of the section on redevelopment plans stresses planning for activities that are within the redevelopment area,⁵⁰ and TIF revenue must be spent pursuant to that plan.⁵¹ There is only one specific use of the term “outside the redevelopment area” – authorizing expenditure of funds for the “relocation of site occupants.”⁵²

conditions of title which prevent the free alienability of land within the deteriorated or hazardous area; or (n) Governmentally owned property with adverse environmental conditions caused by a public or private entity.

⁴³ Florida Statute § 163.340(8) (2012).

⁴⁴ Florida Statute § 163.350 (2012).

⁴⁵ See Florida Statute § 705.101; see also *Abandoned Vessels*, Florida Fish and Wildlife Conservation Commission: <http://myfwc.com/boating/waterway/derelict-vessels/abandoned-vessels/> (last visited Dec. 19, 2012).

⁴⁶ See Florida Statute § 163.340(8)(a) (defining blight as including defective or inadequate public transportation facilities).

⁴⁷ See Florida Statute § 163.335(2) (2012).

⁴⁸ Florida Statute § 163.340(9) (2012) (emphasis added).

⁴⁹ *Id.*; See Florida Statute §§ 163.340(10), (24) (2012).

⁵⁰ See Florida Statute § 163.360 (2012); see Florida Statute § 163.362 (2012).

⁵¹ See Florida Statute. § 163.362(9) (2012); see Florida Statute § 163.387(1)(a) (2012).

⁵² Florida Statute § 163.387(6)(d) (2012).

These references militate against a broader interpretation that would allow a CRA to expend funds on activities outside its geographic boundaries.

A Florida Attorney General's Opinion supports this interpretation. On June 19, 2009, Florida Attorney General Bill McCollum opined that expenditure for capital improvements outside district boundaries is unlawful.⁵³ In that instance, a Florida non-profit corporation operating a shelter facility in the Southeast Overton/Park West CRA in Miami was relocating to a new building outside the district boundary, but within a proposed future district. The CRA wanted to use its funds to help build the new facility.⁵⁴ After reviewing the statutory references discussed above, the Attorney General concluded that the Act limits expenditure of CRA funds on capital improvements to those improvements made on property within the district.⁵⁵

The Attorney General Opinion leaves open the question of whether expenditures other than capital improvements can be made outside of the district boundaries. However, it would seem that improvements to waterside transportation infrastructure such as mooring fields, aids to navigation and channel improvements would qualify as capital improvements, thus restricting expenditures to the CRA's borders. Environmental restoration and sea level rise adaptation projects could arguably also qualify as capital improvements.⁵⁶ It is less likely that the removal of derelict vessels would be considered a capital improvement project, unless perhaps it was part of a larger project that required removal of the vessels in order to accomplish the larger project.

Informal telephone conversations by the authors with several Florida CRA Directors suggested that they would be hesitant to spend money outside of their district for fear of legal challenges.

VI. Other States' Approaches

The issue of extra-jurisdiction TIF spending has been addressed through legislation in several states. In North Carolina, TIF funds are generally spent inside the boundaries of the TIF district; however, TIF funds can also be spent outside the district if necessary to encourage development within it.⁵⁷ In Minnesota, the legislature allows tax increments to be "pooled," or used for

⁵³ Community Redevelopment Agency – Relocation Expenses, 2009 Opinion Attorney General 32 (2009), <http://www.myfloridalegal.com/ago.nsf/Opinions/E166FAD57B67BC4C852575DA005D03C0> (last visited Dec. 21, 2012).

⁵⁴ *Id.*

⁵⁵ *Id.* Florida Statute Section 163.3164(7) provides that: "Capital improvement" means physical assets constructed or purchased to provide, improve, or replace a public facility and which are typically large scale and high in cost. The cost of a capital improvement is generally nonrecurring and may require multiyear financing. For the purposes of this part, physical assets that have been identified as existing or projected needs in the individual comprehensive plan elements shall be considered capital improvements.

⁵⁶ See Florida Statute § 215.681(1)(a) (2012) (authorizing issuance of Florida Forever bonds "... for capital improvements to lands and water areas that accomplish environmental restoration, enhance public access and recreational enjoyment, promote long-term management goals,...").

⁵⁷ Joseph Blocher and Jonathan Q. Morgan, *Questions About Tax Increment Financing in North Carolina*, University of North Carolina School of Government, Community and Economic Development Bulletin 4 (Aug., 2008); North Carolina General Statute § 159-103(a) (2012), available at: http://www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_159/GS_159-103.html.

activities located outside of TIF district boundaries where they were collected.⁵⁸ Pooling amounts for redevelopment districts are limited to 25% of total tax increment funds, with possible increases of up to 10 percentage points as allowed by the statute for housing projects.⁵⁹ California also permitted TIF districts to spend revenue outside the geographic confines of the district in some instances.⁶⁰ However, because of budget woes and the manner in which revenue sharing is structured in California, the state has completely eliminated all community redevelopment areas and the TIF revenue stream that supports it.⁶¹

VII. Potential Options for Accessing TIF Revenues for On-Water Improvements

Florida waterfront communities seeking to utilize TIF as a means to address blight through improvements over submerged lands have several choices, depending on the political geography (and political will) of the community. Communities with conterminous CRA and municipal boundaries, such as Punta Gorda, and that extend sufficiently far into the water to undertake improvements, likely need only ensure that the proposed improvements have been addressed by the CRA redevelopment plan, or amend the plan to address them – a relatively straightforward task. In those instances where either the CRA or the municipality are landlocked, or both, more complex statutory processes must be followed, statutes amended, home rule powers asserted, or creative interpretations based on the common law pursued. These are discussed below.

G. Amending CRA and/or City Boundaries

Landlocked waterfront communities and CRAs can consider amending their boundaries to encompass as much of the contiguous submerged lands as necessary to create the political space needed to undertake on-water improvements. Where municipal jurisdiction already extends sufficiently far into the water, the community can pursue the statutory process for amending the CRA boundaries to meet the municipal boundary. This requires much the same factual findings and procedures as the initial formation of the CRA.⁶² Blight must be found,⁶³ notice provided, hearings held,⁶⁴ and the plan amended.⁶⁵

⁵⁸ *TIF Pooling*, Minnesota House of Representatives: <http://www.house.leg.state.mn.us/hrd/issinfo/tif/pooling.aspx> (last visited Dec. 28, 2012); Minnesota Statute § 469.1763 (2012).

⁵⁹ *Id.*

⁶⁰ See SB 71 Bill Analysis, Coachella Valley Redevelopment available at: ftp://leginfo.public.ca.gov/pub/97-98/bill/sen/sb_0051-0100/sb_71_cfa_19970507_145545_sen_floor.html.

⁶¹ *The 2012-13 Budget: Unwinding Redevelopment*, Legislative Analyst's Office: http://www.lao.ca.gov/analysis/2012/general_govt/unwinding-redevelopment-021712.aspx (last visited Feb. 18, 2012).

⁶² Florida Statute § 163.361 (2012).

⁶³ Florida Statute § 163.361(4); Florida Statute § 163.355. These are the general rules for modifying CRA boundaries. Please refer to the Florida Statutes, Ch. 163, for further guidance on how to specifically modify your area's CRA boundaries.

⁶⁴ Florida Statutes §§ 163.361(1)-(2). The governing body must also give public notice of the hearing in a newspaper that has general circulation in the area of the CRA.

⁶⁵ See Florida Statute § 163.360(9) (2012).

In instances where both the municipality and the CRA are land-locked, municipal boundaries must also be modified. This can be accomplished in two ways: by annexation or by special legislation. Annexation can be voluntary or compulsory, and there are different standards for each. Compulsory annexation of submerged lands is problematic because these lands do not fit neatly into the sorts of lands the statute contemplates – populated space for “urban purposes.”⁶⁶ Voluntary annexation offers a simpler procedure in which the owner(s) of the land to be annexed petition the municipality.⁶⁷ The property to be annexed must be contiguous and “reasonably compact.”⁶⁸

Since municipalities are created by statute, they can also seek special legislation to modify their boundaries.⁶⁹ Florida municipalities have successfully pursued both paths to modify their political boundaries to encompass submerged lands for the purpose of pursuing on-water navigation improvements. In 2006, the City of Bradenton Beach sought and received special legislation to extend their boundaries to encompass the area proposed for a mooring field.⁷⁰ In 2007, the State of Florida, owner of the contiguous submerged lands, petitioned the Town of Fernandina Beach for a voluntary annexation,⁷¹ also to encompass a proposed mooring field. Neither engendered controversy. Interestingly, neither community has extended its CRA out to the new city limits.

H. A Riparian Rights Rationale and the CRA

One policy-based rationale for reading the Community Redevelopment Act to preclude spending TIF funds outside the TIF district stems from the fact that these funds are derived from taxes on real property owners within the District, and should therefore – absent clear legislative intent to the contrary – be spent to improve real property within the District. However, waterfront property owners also possess riparian (or littoral) rights⁷² – which are recognized property interests that attach to the property.⁷³ These rights include the right to ingress and egress, a qualified right to “wharf out,” and the right to an unobstructed view.⁷⁴

⁶⁶ Florida Statute § 171.043(1) (2012) (“The total area to be annexed must be contiguous to the municipality's boundaries at the time the annexation proceeding is begun and reasonably compact, and no part of the area shall be included within the boundary of another incorporated municipality. . . . Part or all of the area to be annexed must be developed for urban purposes.”).

⁶⁷ Florida Statute § 171.044 (2012).

⁶⁸ *Id.*

⁶⁹ *The Local Government Formation Manual 2012-2013*, Florida House of Representatives Economic Affairs Committee, at 53, available at:

<http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?PublicationType=Committees&CommitteeId=2721&Session=2013&DocumentType=General%20Publications&FileName=2012-2013%20Local%20Government%20Formation%20Manual.pdf>.

⁷⁰ House of Representatives 1217, 2006 Legislature, (Florida 2006).

⁷¹ Mark Hurst, *City Annexes Egans Creek Land for Mooring*, The Florida Times Union, Aug. 23, 2006, available at: http://jacksonville.com/tu-online/stories/082306/nen_4518073.shtml.

⁷² Although technically “riparian” land refers to land abutting streams and rivers and “littoral” land refers to land abutting a lake or the ocean is termed “littoral” land, the two terms have been used somewhat interchangeably by the courts. See Theresa Bixler Proctor, *Erosion of Riparian Rights Along Florida’s Coast*, 20 Journal of Lane Use & Environmental Law 117, 121 (2004).

⁷³ Florida Statute §253.141(1) (2012).

⁷⁴ See Proctor, 121-126 (characterizing riparian rights in Florida).

A riparian rights rationale for extra-jurisdictional TIF expenditures stems from the fact waterfront property taxpayers within the TIF district have a distinct property interest that extends over the submerged lands outside the district. Presumably, at least some part of the property value against which taxes are assessed can be attributed to this property interest. In essence, this rationale extends the CRA boundaries into the contiguous navigable waters by operation of the common law, at least to the extent that proposed improvements relate to exercise of riparian rights. For example, the riparian right to an unobstructed view could arguably validate the use of district TIF funds to remove a derelict vessel that is otherwise outside the CRA's geographically described boundaries.

I. Seeking an Attorney General Opinion

The options described above, including the essential question of extra-territorial TIF spending on and over contiguous submerged lands, could be initially pursued through an opinion from the Florida Attorney General. Under Florida Statute 16.01(3), an officer of the state, county, municipality, other unit of local government, or political subdivision may make a written request for an official opinion from the Attorney General on a question of law relating to the official duties of the requesting officer.⁷⁵

This request would need to distinguish the 2009 opinion stating that CRA funds can only be used for capital improvements within the district boundaries – which might prove difficult if many of improvements are, in fact, capital improvements. Moreover, even with an opinion confirming the ability of a CRA to use TIF funds for on-water improvements outside its district, Attorney General Opinions are not law or binding on a court; they are advisory only, and a CRA's decision to spend could still be found unlawful in a court of law.⁷⁶

J. Amending the Community Redevelopment Act

The most elegant solution for Florida would be to amend the Community Redevelopment Act with narrowly tailored language to authorize the use of TIF funds for on-water improvements on contiguous submerged lands that are outside the CRA's geographic boundaries. This could be accomplished by amending the definition of Community Redevelopment Area to include contiguous submerged lands based on the rationale that on-water improvements will contribute to ameliorating waterfront blight,⁷⁷ and by amending the statute's blight definition and Finding of Necessity requirements to more clearly encompass on-water factors that contribute to blight on and off the water. Other provisions of the statute, such as the *Workable Program* section, could more clearly address the relevance of on-water improvements to blight remediation.⁷⁸ Alternatively, a new provision could authorize existing and new CRAs to plan for and expend funds for specified purposes on contiguous submerged lands outside the CRA boundary. This

⁷⁵ Florida Statute §16.01(3) (2012).

⁷⁶ *Frequently Asked Questions About Attorney General Opinions*, Florida Office of the Attorney General: <http://myfloridalegal.com/pages.nsf/Main/dd177569f8fb0f1a85256cc6007b70ad> (last visited Dec. 22, 2012).

⁷⁷ Florida Statute §163.340(10).

⁷⁸ Florida Statute §163.350 (2012).

latter approach would enable existing CRAs to simply amend their plan, rather than also having to amend the boundaries.

VIII. Home Rule Authority to Use Tax Increment Financing

A final option that bears mentioning, although a detailed analysis is beyond the scope of this article, is based on the theory that local governments have home rule authority to use the TIF vehicle for programs and activities outside the scope of the Community Redevelopment Act.⁷⁹ The Act would likely preempt any local effort to create a parallel process for redevelopment of slum and blighted areas. However, a local TIF program to develop and implement municipal harbor management plans without the necessity of a blight finding may be sufficiently distinct to avoid preemption. This option implicates state constitutional questions concerning the authority of local governments to levy taxes, and additional research would be required to validate its use. However, TIF is not a new tax, just a reallocation of existing revenue pursuant to local priorities, which is a fundamental attribute of local governments.

IX. Conclusion

Community Redevelopment Acts have fallen on hard times since the economic downturn that began in 2008, due to reliance on a revenue stream dependent on steadily rising property values. However, all indications are that the real estate market has turned the corner and property values will once again climb. As this occurs, CRAs should once again be in a position to generate revenue for redevelopment improvements. Waterfront communities should revisit their comprehensive plans, CRA plans and other community visioning processes and consider whether they adequately consider the waterside infrastructure in or adjacent to their jurisdictional boundaries. The Florida legislature should consider amending the Community Redevelopment Act to make it clear that this infrastructure is of the sort the Act contemplates and that CRAs can spend revenue from the Redevelopment Trust Fund to make on-water improvements over submerged lands that are contiguous to, but outside of, CRA boundaries. Finally, the Florida Legislature should require that CRAs and other special districts furnish spatially explicit geo-referenced jurisdictional maps in a specified format that can be accessed through the Department of Economic Opportunity's database.

⁷⁹ Article VIII of the Florida Constitution establishes Home Rule powers for Florida local governments. Florida Constitution, Article VIII. Counties derive sovereign powers through Article VIII, Section One of the Florida Constitution, which authorizes the adoption of county charters. Florida Constitution, Article VIII § 1(c); *see* *Lowe v. Broward County*, 766 So. 2d 1199 (Florida District Court of Appeals, 2000). Charter counties have broad home-rule power and may enact any ordinance not inconsistent with state law or the state and Federal Constitutions. Florida Constitution, Article VIII, § 1(g); *see* *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Florida District Court of Appeals, 1983). Similarly, municipalities may establish a government and enact their own ordinances under Section Two, Florida Constitution, Article VIII, § 2. Local government regulations must also not be inconsistent with state and Federal laws. *Gustafson v. City of Ocala*, 53 So. 2d 658 (Florida 1951).

The *Sustainable Working Waterfronts Toolkit* is available at:

<http://www.WaterAccessUS.com>

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