February 16, 2018

Director of Research and Technical Activities
Governmental Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Via email to: director@gasb.org

Re: Project No. 24-16ED

Dear Director:

We write to strenuously disagree, for many reasons, with the GASB’s proposal at Question 4.6 to exempt from Statement 77 coverage those tax increment financing (TIF) expenditures that fund public infrastructure. Such expenditures are consistent with the GASB’s definition of “tax abatement.” If adopted as proposed, 4.6 would mean that a very large—and poorly disclosed—form of economic development tax abatement would effectively be exempted from Statement 77’s coverage. It would require governments to make and defend subjective distinctions between private and public infrastructure. It would contradict the existing positive language in Statement 77 requiring disclosure of non-abatement commitments that are a part of abatement deals (including dedicated infrastructure). And it would undermine that part of Statement 77 requiring the disclosure of revenue losses suffered passively by one government due to the actions of another.

Instead of undermining Statement 77 with a new loophole, we recommend that the GASB instead issue a clean TIF-reporting rule clarifying that all such abatements are covered under the Statement.
Specifically, the Exposure Draft proposes:

4.6.  Q—Would the answer in Question 4.40 in Implementation Guide 2017-1 differ if the agreement states that the building constructed by the developer is or will become an asset of the government?

A—Yes. An arrangement in which the improvements result in an asset of the government is substantively the same as the transaction described in Question 4.77 in Implementation Guide 2016-1 and, therefore, does not meet the definition of a tax abatement in Statement No.77, Tax Abatement Disclosures. Although the transaction in Question 4.77 in Implementation Guide 2016-1 diverts incremental tax revenues to repay debt issued by the government and the arrangement in this question rebates the incremental tax revenues to a developer, both are approaches to financing improvements to an asset of the government. The same would be true if, instead of a building, the developer had installed new sidewalks, sewers, or water mains that are ancillary to the developer’s building and those ancillary capital assets become the property of the government.

For several reasons, we consider this to be an ill-advised idea that would undermine Statement 77—indeed, it would effectively dismantle parts of it. Specifically:

**Applying a Tax Rebate or Diversion to Infrastructure is Consistent with the GASB’s Definition of a Tax Abatement**

In its opening definition of a tax abatement (at Paragraph 4), the GASB says it is:

A reduction in tax revenues that results from an agreement between one or more governments and an individual or entity in which (a) one or more governments promise to forgo tax revenues to which they are otherwise entitled and (b) the individual or entity promises to take a specific action after the agreement has been entered into that contributes to economic development or otherwise benefits the governments or the citizens of those governments [emphasis added].

Infrastructure contributes to economic development by enabling more employment, improving productivity, protecting public health, etc., and it benefits governments by enhancing property values and thereby improving tax revenues. Hence we don’t understand the distinction implied by the GASB’s answer to Question 4.6. The transaction described is consistent with the GASB’s definition of an abatement.
TIF Districts, though Costly to Multiple Local Governments, Often Benefit Only One Taxpayer, or Very Few Taxpayers

Statement 77 is explicitly intended to help financial statement users

“better assess..., (c) where a government’s financial resources come from and how it uses them, and (d) financial position and economic condition and how they have changed over time.”

Recalling how the GASB satisfied itself that tax abatements meet its prevalence and magnitude tests for Board consideration, TIF districts can be very common (at least three states have had more than 1,000 of them: Illinois, Iowa and Minnesota), very concentrated (Chicago has more than 150, capturing about 10 percent of the city’s property tax base) and are often beneficial to a single taxpayer or to a very small number of taxpayers.

Especially in projects involving isolated parcels or large parcels that are being converted from, say, a rail yard to condominiums, often a single taxpayer is benefiting from tax expenditures that are funding infrastructure which the taxpayer otherwise might have been obligated to fund itself (e.g., through a development or impact fee). This is true whether the mechanism is a “pay as you go” reimbursement that this question addresses or a greatly accelerated benefit from an up-front infusion of public monies made possible by the TIF diversion and floating of project-dedicated, low-interest (i.e., tax-exempt) bonds backed by the diversion.

For example:

Port Covington in Baltimore is a project of the privately-held Sagamore Development Corporation. In 2016, it received a $660 million TIF for infrastructure to redevelop its more than 260-acre site that has few current occupants and is cut off by barriers of water and an Interstate highway. The resulting ability to create a new mixed-use neighborhood, which in turn will drive enormous increases in property values, will be driven by the existence of the new infrastructure.

Mesa del Sol in Albuquerque is a project of Forest City Covington, which includes Forest City Enterprises, a publicly-traded firm. The mixed-use project was awarded a tax increment development district (TIDD) of $500 million in 2007 to begin the development of one of the largest undeveloped parcels in any U.S. city. Built, as its name implies, on a mesa, the project benefited the one taxpayer that owned it.

Nebraska Furniture Mart, a division of Berkshire Hathaway, received a sales-tax TIF for $802 million from the small Dallas suburb of The Colony to build infrastructure
(street improvements and a parking garage) and ongoing expenses—for 40 years—in a 433-acre mixed-use development project that NFM will develop for other occupants. A contemporary news report states that The Colony projected the TIF footprint would capture half of the city’s sales tax revenue.¹

Because TIF districts constrain a jurisdiction’s ability to grow its tax base to mirror a growing population’s needs (by diverting revenue from general funds for such long periods of time, as many as 35 to 40 years), they are absolutely salient to the issue of how tax abatements affect a locality’s financial and economic condition.

**Infrastructure is Often the Largest Use of TIF Proceeds**

Although inadequate monitoring and disclosure of TIF prevents us from assigning a share of such expenditures to infrastructure, it is our belief, based on having reviewed many projects and studies, that infrastructure is often the leading use of TIF expenditures, or invariably among the very largest uses. This is true because many states prohibit the payment of TIF proceeds for the construction of privately-owned structures, and because the other remaining, commonly allowable uses of TIF funds (such as planning, demolition or decontamination) may cost less than newly-built infrastructure.

We also note, based on a review of a 50-state guide to TIF published by the Council of Development Finance Agencies in 2009², that infrastructure is always listed as an eligible activity and that some states specify a long list of types of eligible infrastructure (California terminated TIF in 2011.) Here, for example, are passages of Illinois’ statutory uses:

> Beautification components & related hardware, bike lanes in street right of way, bridge construction & repair... convention centers, curb & sidewalk work... decorative pavers... drainage facilities... force mains, hiking & biking trails... lift stations, lighting, park improvements, parking structures, pathways that facilitate intermodal transportation, pedestrian bridge systems that link commercial centers to transit systems, pedestrian platforms for rail or light rail transit systems & similar facilities... public buildings, public roads, public tunnel systems for private buildings, publicly owned & maintained utilities, sanitary sewers, sewer expansion & repair, sewer pump stations & related equipment, sidewalks, storm drainage, street construction & expansion, traffic signals & related equipment, wastewater treatment facilities, water supply...
If Question 4.6 were Adopted as Proposed, It Would Require Governments to Make and Defend Subjective Distinctions Between Public and Private Infrastructure

The afore-cited Port Covington project in Baltimore includes TIF funds for kayak landings, but we assume the benefiting kayak rental firms will be private. The same blurring of public and private benefit can arise in parking garages with dedicated spaces, bike trails that traverse public and private properties, the afore-mentioned “pedestrian bridge systems that link commercial centers to transit systems,” etc.

Another example are “destination retail” establishments such as Cabela’s outdoor sporting goods stores, where abatement agreements sometimes include a “museum,” legally structured as a condominium and deeded to a locality, yet existing wholly within a private retail establishment. To quote from a Cabela’s Securities and Exchange Commission filing:

> In six (6) of the Cabela’s retail store locations (SD, KS, PA, TX – 2, and UT) Cabela’s has declared a condominium on their building for purposes of separating out a portion of the retail store as a public museum. By doing so, Cabela’s has been able to obtain certain financing (normally in the form of bonds) and, in exchange for the financing, Cabela’s has deeded the museum to the local municipality that issued bonds.3

TIF is the Largest Tax Abatement for Economic Development in Some States, and Some Very Costly TIFs are Poorly Disclosed to Investors and the Public

Although most states fail to adequately monitor or summarize the total amounts of local property and/or sales tax revenues that are diverted by TIF districts, we do know from a few states’ public agencies, or from diligent academics or non-profits, that TIF is the largest tax expenditure for economic development in some states.

The Illinois Comptroller, for example, has in the past collected data from the state’s more than 1,100 TIF districts and reported that they capture about $1.2 billion of local revenues annually—multiple times the size of the state’s largest tax abatement program. Minnesota’s Office of State Auditor reports that the 1,719 TIF districts there capture $194 million annually.4 In Missouri, the State Department of Revenue estimates that 474 TIF districts cost more than $415 million in 2016.5

But these states stand out for having such data: This aggregate opacity in TIF that prevails in most states is a strong argument for not only keeping infrastructure
expenditures within the “abatement” definition, but in fact, strengthening it to place all TIF-related tax diversions within the Statement 77 Note.

There are also some extremely costly individual TIF deals. In Good Jobs First’s database of “megadeals” (costing $50 million or more), there are numerous nine-figure TIF deals, even one costing more than $1 billion. In addition to the aforementioned Nebraska Furniture Mart, Sagamore Development and Forest City Covington TIFs, the largest in U.S. history was given to Cerner, a software company, which received a $1.6 billion triple-TIF from Kansas City, Mo. and the State of Missouri. Our Subsidy Tracker captures dozens of other nine-figure tax-break deals in which TIF is either the primary cost or a large component.

The GASB’s Proposal Contradicts Paragraphs B38-40 of Statement 77 (on Dedicated Infrastructure Obligations)

We laud the GASB for including Paragraphs B38-40 in Statement 77 because it is not unusual for localities and/or states to dedicate large sums from their transportation, water/sewer or other infrastructure budgets to tax-abated projects. Highway off-ramps, new water and sewer lines, rail spurs and local street, park, cycling and pedestrian improvements are common uses for such dedicated expenditures. Of course, when a single project receives a large share of such expenditures, it affects the resources available for the maintenance of infrastructure in every other part of the affected jurisdiction. For that reason, such expenditures are salient to both the jurisdiction’s depreciated infrastructure condition and to its ability to maintain property values and attract private investment (and thereby sustain its tax base).

Given this aspect of Statement 77, it seems contradictory that the GASB would now propose to exclude from disclosure TIF proceeds spent on public infrastructure. Such expenditures are, by definition, dedicated to the abated project because they all occur within the TIF district. As such, they are even more likely to benefit only one taxpayer, or just a few, than would, say, an off-ramp that was built for an abated project but serves both the abated project and its adjoining, non-abated parcels.

The GASB’s Proposal Would Undermine Paragraph B46 of Statement 77 (on Passive Revenue Losses)

If even more TIF diversions are now to be excluded from the definition of “abatement,” then we fear that Paragraph B46 of Statement 77, which requires governments to disclose revenues lost passively due to the actions of different governments, will be severely undermined. That is, if an actively abating
government is no longer required to report TIF-lost revenue as an abatement, then we fear that the reporting obligation under Paragraph B46 of passive revenue-losing governments will in turn be eliminated for such abatements.

Because TIF diversions most commonly capture property tax revenues, because public education is the service benefiting most from property taxes, and because school districts are the biggest passive losers of such revenue (since they seldom control TIF transactions), this would mean that Paragraph B46’s benefit would be severely undermined for fiscal analysis of tax abatements’ impact on education.

We know, for example, that about 55 percent of the roughly $1.2 billion captured by TIF in Illinois would otherwise go to K-14. While local property taxes are not quite so dominant a source of K-12 funding as they were a few decades ago (especially because of equity and adequacy litigation), they are still the largest single source of tax revenue for public education in the United States.

Thus this proposed change to Statement 77 would greatly reduce its value to public discourse and fiscal analysis, especially to the degree that CAFRs promise to better inform abatements’ impact upon intergovernmental fiscal effects generally and upon public education funding specifically.

If the proposed changes in the Implementation Guide go forward, schools would continue to lose money as a result of abatements and diversions, but those concerned about school finance would not be able to understand the cause of these loses since they would be rendered invisible by public infrastructure exclusions. The GASB shouldn’t be in the business of privileging one type of public good, say a public kayak dock, parking garage, or in-store “museum,” over another public good, such as public education. All abatements should be disclosed so that CAFR users can weigh the effects and merits of these tax expenditures as they see fit.

“Underwater” TIFs Are Costing General Funds Beyond the Increments

In our effort to discern TIF costs, we have noted many instances of “underwater” TIFs (i.e., those in which the tax increment never became sufficient or has over time become insufficient to cover the debt service). They are not only diverting revenue from local governments, but also drawing additional non-TIF monies out of general funds. This is presently opaque to CAFR users interested in the actual costs of tax abatements.

This makes full TIF abatement disclosure even more salient for inclusion in Statement 77: some TIFs are not just diverting large sums of growth-related
revenue for decades; some are also costing localities current-year revenue they expected to have for general fund purposes.

**Adopting Question 4.6 would Undermine the GASB’s Laudable Intention of Making Accessible the Full Cost of Tax Revenues lost to Abatements**

Stakeholders ranging from public officials and policy makers, academics and non-profits are already using Statement No. 77 data to better understand the prevalence and costs of tax abatements. Even with Statement No. 77, they have to hunt through several sections of the CAFR to draw together data on the full costs of TIFs (Tax Abatement Note, debt sections and supplemental financial information sections). If Question 4.6 is adopted, some of this information would disappear altogether, weakening the entire Statement No. 77 undertaking.

**Our Solution: A Clean TIF Question & Answer in the Implementation Guide**

Good Jobs First recommends that the GASB build on the existing best practices of some jurisdictions and issue a “clean” question and answer on TIF in the 2018 Implementation Guide.

In that Q & A, the GASB should clearly state that all forms of tax increment diversions and rebates are tax abatements and require that they be disclosed as such. Governments could also be encouraged to break out, in their disclosure, how much of such expenditures are for “public infrastructure” if they wish.

As we have communicated previously to the GASB (see appended here our email to the GASB dated November 28, 2017), we are finding a great deal of irregularity and incompleteness in how TIF expenditures are—or are not—being disclosed. With perseverance, we have identified and entered into Subsidy Tracker 2 some very substantial TIF expenditures (e.g., Chicago at $493 million; Denver at $107 million; Columbus Ohio at: $31 million; Kansas City, Mo. at $20 million; and Mishawaka, Wisc. at $20 million), but far too many are not appearing in Statement 77 Notes.

**Conclusion**

When Statement 77 was first issued, it was warmly welcomed by many stakeholders because it would, for the first time, make the costs of tax abatements discernible and accessible in one place. Initial implementation guidance that allowed debt-service TIFs to be excluded from Statement 77 began to turn understanding abatement
costs into a forensic accounting exercise. Now, a second TIF-reporting revision that would allow exclusion of “public infrastructure” threatens to further undermine Statement 77’s laudable goal of accessibly-reported abatement costs. It would contradict the GASB’s definition of tax abatement. It would exclude what is in many places the largest tax expenditure for economic development. It would undermine Paragraphs B38-40 of Statement 77 on dedicated infrastructure expenditures. Finally, it would undermine Paragraph B46 on passive revenue losses.

We hope the GASB will revisit its original intent in issuing Statement 77: to bring out of the shadows previously undisclosed costs that have a significant impact on many governments’ fiscal health. The GASB should close confusing loopholes rather than open new ones that would move us away from the goal of accessible, comprehensive reporting. A clean TIF-reporting guidance would best remedy that problem.

Thank you for your consideration of our comment.

Sincerely,

Greg LeRoy
Executive Director

Appendix: November 28, 2017 email from Good Jobs First to the GASB
Dear Dean and Pam,

We are writing to seek your guidance on what we should do when we come across a CAFR that appears to fail to comply with Statement 77, or appears to comply inaccurately.

We would also draw your attention to our recent e-bulletin at the end of this cover note, which focuses on Statement 77.

We have a modest experiential base for our query: To date, we (mostly Scott) have reviewed 857 CAFRs for years ending 12/31/16 and beyond, and posted the data in our new Subsidy Tracker 2 database.

**Lack of Adoption and/or Abatement Reporting**

Nearly 40 percent of the CAFRs we’ve examined make no reference to or accounting of any abatement data. Thirty-seven percent of the CAFRs we’ve reviewed make no mention of Statement 77, either in the section on newly adopted accounting statements, nor in the Notes section. Another 3 percent state that they have adopted Statement 77, but then disclose nothing about the costs of their abatements.

In contrast, we’ve seen dozens of local governments which report the adoption of Statement 77, followed by a simple sentence affirming that they had no reportable abatements in the reporting year. From our view, this latter disclosure is just fine. But those that fail to even acknowledge Statement 77 create uncertainty: do they have abatements and have chosen to ignore the Statement? We hope the new edition of your implementation guide might include a simple affirmation that if a government has no active abatements or passive losses, this should be affirmatively stated.

**Under-reporting of passive losses**

About 85 percent of the abatement losses we’ve recorded are those reported by active abating governments; 15 percent are reported as passive losses.
Two states exemplify the range of compliance we are seeing. The State of Nevada Controller’s Office did an exemplary job, issuing a comprehensive report of all passive local government revenue losses caused by state economic development programs.

By contrast, the Auditor of the State of Washington has failed to provide the information necessary for localities to comply with Statement 77’s passive-loss reporting requirements. King and Snohomish Counties, along with the City of Everett report that they’ve lost revenue as a result of State sales tax abatement awards to the aerospace and data center industries (the state controls both the state- and local-increment abatements), but that the state was unable to provide data concerning the size of those local losses.

At the local-compliance level, we would highlight examples from New Jersey and Pennsylvania. We have examined 37 New Jersey School Districts CAFRs, but only one (little Newton Township) correctly reported passive-loss data. The remaining districts offered excuses ranging from “the amount of loss is indeterminable” to “there is no loss since other taxpayers make up the lost funds.”

In Pennsylvania, local abatement programs are widespread and well-reported. These abatements typically result in passive losses at the county level. Some counties have done an excellent job of detailing these losses, while others have reported no passive losses at all. We deem the latter to not be credible.

So for all of the above-cited problems, we would ask: what is the action you recommend we take?

**TIFs**

We have made the decision to include debt-related TIF diversions, where they can be determined, in our Subsidy Tracker 2 data.

In previous conversations, you have relayed GASB’s opinion that debt-service TIFs need not be reported under Statement 77 because this information can be determined from disclosures in the debt finance section of the CAFR. We have found this not to be true in at least 55 of the CAFRs we have examined.

While it is generally true that there is information in CAFRs on the amount of debt service paid on TIF bonds, these figures are not synonymous with the actual amount of revenue diverted from — or paid from — the general fund for use within the TIF District. As you may know, TIFs are said to be “underwater” when debt service payments exceed the amount of available tax increment. (This happens when new, taxable improvements fall short of their projected values or when commercial property owners successfully challenge their property tax assessments, as sometimes happens in recessions. It can also involve sales tax shortfalls.)
Some of the CAFRs we have looked that show TIF debt service are apparently underwater (i.e., general funds are used to cover the difference; cities are loath to allow TIF bonds to default even though they are not general obligations). In such cases, using the debt service figure would *overstate* the incremental diversion. Conversely, in healthier TIFs, diverted revenues exceed the level of debt service payments as the borrower builds a reserve base. In those instances, reporting only the debt service payments would *understate* the amount of tax revenue lost to the general fund.

We know that TIF reporting remains an issue that the GASB will continue to monitor and refine. We continue to believe if the goal of GASB 77 is an accounting of revenue lost for general public purposes, then all TIF-driven revenue diversions should be made reportable under GASB Statement 77.

**Materiality**

We are aware that GASB is not in the business of prescribing levels of materiality concerning any statement, but we believe that regarding Statement 77 it would be useful for reporting bodies to disclose the amount they consider material to its implementation. The State of Washington established a $10 million threshold for its Statement 77 materiality standard, which invites a debate on whether such a number is too high. Without knowing what is considered material, it is impossible to know whether a reporting body established a materiality standard that renders the Statement meaningless.

We would be happy to schedule a call if you wish to discuss our observations and concerns further.

We look forward to your guidance on what is to be done about non-compliance.

Best wishes,

Greg and Scott

Greg LeRoy
Executive Director
Good Jobs First ~ [www.goodjobsfirst.org](http://www.goodjobsfirst.org)
202-232-1616 x 211
Notes


3 Cabela’s, First Supplement to Note Purchase Agreement, June 15, 2007, at: https://www.sec.gov/Archives/edgar/data/1267130/000120677410000434/exhibit4-7.htm  


February 16, 2018

Director of Research and Technical Activities
Governmental Accounting Standards Board
401 Merritt 7
PO Box 5116
Norwalk, CT 06856-5116

Via email to: director@gasb.org

Re: Project No. 24-16ED

Dear Director:

We write in opposition to one of two of GASB’s proposed amendments to its Implementation Guide in its Exposure Draft dated November 20, 2017 insofar as it covers Statement No. 77 on Tax Abatement Disclosures.

Specifically, we write here to strenuously disagree with GASB’s proposed answer to Question 4.8. We believe that the evidence we cite below from several states will convince the GASB that the arrangements it cites are garden-variety tax abatements which are widely understood and marketed as such. These are what we will call here “constitutional work-arounds,” in which companies receive property (and sometimes other) tax abatements through a legal sleight of hand involving temporary public ownership of private workplaces. States legally enable localities to do this so that they may compete with localities in other states that don’t need the work-around to grant abatements on private property.

4.8. Q—An Industrial Development Authority (IDA) of a county government enters into an agreement under which (a) the IDA issues debt to finance the construction of a building, (b) the IDA leases the building to a business for an amount sufficient for the IDA to make
annual interest and principal payments on the debt, and (c) the IDA transfers ownership of the property to the business after the debt has been fully repaid. Because the IDA is exempt from county property taxes as a government entity, the arrangement has the effect of exempting the business from the property taxes it would have paid had it taken immediate ownership of the building. Does this agreement meet the Statement 77 definition of a tax abatement for purposes of financial reporting?

A—No. This arrangement does not meet the definition of a tax abatement because the agreement between the IDA and the business does not result in the county government (or any other government that may levy property taxes on such property) forgoing tax revenues to which it is otherwise entitled. As long as the IDA is the owner of the building, the county government is not entitled to any tax revenue with respect to the building.

These Transactions Are Clearly Understood to be Tax Abatements

In at least several states—including Tennessee, New Mexico, Georgia, Missouri, North Carolina and Arizona, state constitutions effectively or partially prohibit the granting of property tax abatements. These are remnants of a late 19th-century wave of state constitutional “gift clause” amendments adopted in response to corporate influence which resulted in state spending that grossly benefited railroads and other large firms.

The states have responded by creating work-arounds, often involving the use of Industrial Revenue Bonds or Industrial Development Bonds, which are used to finance the construction of a facility that will be solely occupied by a private employer but technically owned by an economic development authority or other government entity for a period of 5, 10, 20 or even 30 years, during which it will owe no property taxes, as a “public” structure, akin for property tax purposes to a library or police station. In some cases, offsetting “Payments in Lieu of Taxes,” or PILOTs, are negotiated, which typically amount to deep discounts on what would otherwise be the company’s tax obligation.

Here is how the Economic Development Growth Engine (EDGE) program, a merged function of Memphis (Tennessee’s largest city) and Shelby County frames its work-around in its website’s Frequently Asked Questions:
12. How does Tennessee's tax abatement program compare to other states?

Tennessee’s approach to tax abatements is unusual, but not unique. Rather than simply authorizing industrial development boards (“IDB”) to grant tax abatements of real and/or personal property, Tennessee law requires that IDBs [Industrial Development Boards] take legal title to the property. Since IDBs are government entities, the property they have legal title to is exempt from ad valorem property taxes in Tennessee.¹

Here is how another Tennessee county, Knox, explains it on its website:

“Under the PILOT program, a property’s current property taxes are frozen for a number of years. In some cases, certain items of personal property are included, as well. The IDB owns the property and leases it back to the owner/developer through a leasehold agreement during the term of the PILOT.”²

Consider, for example, how a lawyer in Tennessee—in an article entitled “ABATING PROPERTY TAXES IN TENNESSEE...”—describes how that state uses such transactions to allow localities to compete with those in other, non-work-around states:

The site location firm representing the company applauds the county’s efforts but informs the county that every location that the company is considering offers the same incentives. The site location firm indicates that the county will need to abate the company’s property taxes for at least ten years to remain in contention for the plant.

Not all is lost, however, for the local government that wants to provide property tax incentives to attract a business or to revitalize its downtown. As mentioned above, the Tennessee Constitution specifically recognizes that property owned by a local government can be exempt from taxation. Relying on this exemption, a tax incentive program can generally be achieved by titling property in the name of a local government and then by leasing the property to the ultimate user.
The lawyer then goes on to caution readers about how to avoid any ownership claims that could upset the “tax abatement lease.”

It is thus tempting for the IDB to insert in the lease a provision automatically requiring the lessee to purchase the project at the end of the five-year period. However, this could be a mistake. By requiring the purchase of the project, the IDB could be deemed to have converted a document that would otherwise be considered a lease into an installment sale contract. As such, the ownership of the project would be deemed to not have been transferred to the IDB, and the project would have been subject to property taxation.

Finally, an IDB may want to include a provision in the tax abatement lease that calls the lessee’s attention to the statute requiring that the lessee must file an annual report with the state regarding the tax abatement lease.4

Note the terminology used by the counties and by the attorney: these are clearly understood to be tax abatements.

Here is how, in a PowerPoint presentation, the economic development department of Albuquerque, New Mexico’s largest city, explained the work-around to that state legislature’s Revenue Stabilization and Tax Policy Committee:5

![Image: why is an IRB useful to a company?](image)
Note that the city frames the transaction from the perspective of the company, in terms of the usefulness of the tax abatement: there is an agreement, the city agrees to forego tax revenue, and the taxpayer performs a quid pro quo by occupying and operating the structure.

In this example from New Mexico, Albuquerque also explains how this work-around enables another kind of tax abatement as well: the state’s Gross Receipts Tax is not due because the purchases of equipment are technically made by the public agency—and that is explicitly framed as New Mexico’s way of abating sales taxes the way many other states exempt new manufacturing equipment from sales tax:

...most states do not charge a “sales tax” on manufacturing equipment

More correctly, the City might have stated that as part of their economic development incentive codes, many states allow the abatement of sales taxes on new machinery and equipment tied to job creation projects.

The City’s presentation continues:
We agree that the abatement is not the amount of the bond; it is the $2.96 million and the $886,000 in real and personal property tax abatements and the $796,000 compensating tax abatement on the equipment purchased.

We would also draw the GASB’s attention to the comment on this matter submitted by the Georgia Budget and Policy Institute. It quotes a law firm briefing\(^6\):

> An absolute waiver of ad valorem taxes would be illegal under the Georgia Constitution as well as under basic principles of uniformity of taxation and equal protection of the laws... However, if a development authority owns the property and leases it to a private business, the property is in a different class and can be taxed advantageously.

We note that the same law article goes on to say:

> ...many lessee companies prefer not utilize the bonds for actual financing, but to purchase the bonds themselves in what is sometimes referred to as a “phantom bond” or self-purchased bond transaction. Because the lessee pays the annual debt service and receives the funds back as a payment of debt service on the bonds on a same day basis, there is no real financial or accounting impact in such a transaction. ...The bond framework provides a vehicle to put the legal title to the assets in the development authority, to access ad valorem tax incentives.

In other words, the transaction is all about the tax abatement.
Numerous Jurisdictions Are Already Reporting These Abatements As Such Under Statement 77

Perhaps the most discordant aspect of GASB’s proposed Implementation Guide amendment is the fact that numerous jurisdictions with this work-around are already openly acknowledging that they are abatements and reporting them as such in their first Statement 77-compliant CAFRs. GASB’s proposed answer to Question 4.8 would have them reverse course and fail to disclose such abatements in future CAFRs.

As we have informed GASB, Good Jobs First last year created Subsidy Tracker 2, a new online database to collect and make publicly available the new tax abatement data now being issued for the first time thanks to Statement No. 77. We have now entered this data for almost 2,000 jurisdictions, including numerous places in states with the work-around, and we are pleased to see that in many cases, governments are dutifully reporting the lost revenues.

Bernalillo County, New Mexico’s most populous, issued the most detailed Statement 77 Note of any CAFR we have yet examined. Each IRB-bundled abatement deal (dozens are detailed) is given a one-third page column with numerous project details, including “Legal authority under which tax abatement agreement was entered into,” to which projects routinely answer “NMSA §4-59 County Industrial Development Bond Act.”

In New York State, where Industrial Development Agencies (IDAs) have similar IDB-lease/public ownership of private workplace transactions and localities negotiate property tax discounts in the form of Payments In Lieu of Taxes (PILOTs), we are seeing new Statement 77 abatement data covering them. For example, in 2016 Nassau County lost $12 million to this program.

In Missouri, the state’s Chapter 100 bond program allows cities and counties to float bonds and use the proceeds to build facilities that are then leased to companies and remain tax-exempt. Already in localities, such as Kansas City, St. Joseph, St. Louis, Independence and Springfield, we have entries in Subsidy Tracker 2 with government-reported tax abatements covering Chapter 100 agreements.

In Arizona, the state’s Government Property Lease Excise Tax (GPLET) program provides for a company’s property to be conveyed to a government entity and then leased back to the company, which pays an excise tax. We already have abatement data in Subsidy Tracker for such agreements from Phoenix, Tempe, Flagstaff and Tucson.
Conclusion

The tax abatements detailed above that GASB proposes to exclude from Statement 77 coverage are clearly just that: tax abatements. Just because some states have created constitutional work-arounds, the effect of these transactions are exactly the same as other states’ property, sales and/or gross receipts tax abatements.

We are especially puzzled by GASB’s proposal to exclude these abatements given the Board’s recurring advice that labels don’t matter, while the net effect of an agreement is what really counts.

For example:

_A transaction’s substance, not its form or title, is a key factor in determining whether the transaction meets the definition of a tax abatement for the purposes of this Statement._ (Statement No. 77, Paragraph 4, “Scope and Applicability of this Statement“)

And:

_Although many tax abatements directly reduce the amount of taxes paid and do not involve the actual collection and return of taxes, the mechanism used to conduct the transaction is not relevant to determining whether a transaction meets the definition of an abatement._ (Question 4.40 in Implementation Guide No. 2017-1)

And:

_The Board identified three features that, in combination, set tax abatements apart from tax expenditures in general: the purpose of tax abatements, the type of revenue they reduce, and the existence of an agreement (as described in paragraphs B9–B11) with a specific individual or entity as the basis for the abatement._ (Statement No. 77, Appendix B, Paragraph B3)

Any fair and objective examination of the transactions occurring under the work-around programs like those we describe here would find that they consistently meet all three of the GASB’s litmus tests for tax abatements. Their purpose is economic development. They usually abate property taxes, and sometimes other taxes that are also abated by other states for the purpose of economic development. And they are governed by entity-specific government agreements involving quid pro quos as the bases of the abatements.
If a transaction’s substance, rather than its form or title, is indeed the controlling evidence, then GASB must reverse itself and include the agreements described in Question 4.8 as tax abatements to be disclosed under Statement No. 77.

Thank you for your consideration of our comment.

Sincerely,

Greg LeRoy
Executive Director

Notes

1 Memphis/Shelby County FAQ at: http://edgemem.com/pilot-program-frequently-asked-questions/

2 The Development Corporation of Knox County, Tennessee at: http://www.knoxdevelopment.org/BusinessAssistance/LocalIncentivePrograms/PILOTFinancing.aspx

3 G. Mark Mamantov, “ABATING PROPERTY TAXES IN TENNESSEE: AN ESSENTIAL TOOL IN THE ECONOMIC DEVELOPMENT TOOLBOX,” University of Tennessee, Tennessee Research and Creative Exchange (UT digital archive), at: http://trace.tennessee.edu/cgi/viewcontent.cgi?article=1023&context=transactions

4 Ibid.

