New Ohio Law Changes Community Reinvestment Area Exemptions for Commercial and Industrial Projects

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On January 2, Governor DeWine signed into law Senate Bill 33 (S.B. 33), which makes significant changes, effective in early April, to the laws governing Ohio community reinvestment areas (CRAs) and, in particular, the requirements and procedures for implementing CRA exemptions for commercial and industrial projects.

The amendments in S.B. 33 can be broadly grouped into two categories: (i) changes to the procedures and requirements for designating CRAs, and (ii) changes pertaining to CRA exemptions for commercial and industrial projects.

In the first category of changes, S.B. 33 extends the power to designate CRAs to limited home-rule townships. It also eliminates the requirement that the Director of the Ohio Department of Development confirm certain findings in CRA resolutions.

The second category of changes pertain to the scope of CRA exemptions for commercial and industrial projects. The changes in this category include:

- increasing, from 50% to 75%, the percentage of assessed valuation of commercial or industrial projects that can be exempted from taxation without approval of the local school district;
- increasing, from $1,000,000 to $2,000,000, the threshold level of income tax generated by a CRA-exempted project that triggers the requirement for a municipality to share income tax revenue with an impacted school district;
- requiring the Department of Development to promulgate a model CRA agreement for commercial and industrial projects;
- modifying the content and recipients of annual reporting performed by political subdivisions that designate CRAs;
- decreasing, from five years to three years, the amount of time that a property owner is prohibited from entering into a CRA agreement for a commercial or industrial project due to the discontinuation of another project in Ohio subject to a real property abatement; and

- requiring the Ohio Department of Development to publish on its website CRA agreements for commercial and industrial projects.

Some of the changes in S.B. 33, like authorizing limited home-rule townships to designate CRAs and increasing the CRA exemption percentage that triggers school district approval, enhance the ability of Ohio to compete for commercial and industrial projects. However, the impact of S.B. 33 on Ohio CRA policy will depend greatly upon its implementation. Members of the Ohio General Assembly were clear in S.B. 33 that political subdivisions are not required to use the model agreement that will be promulgated by the Ohio Department of Development. Thus, political subdivisions remain free to negotiate terms and conditions tailored to specific projects, so long as those terms and conditions do not conflict with requirements of the Ohio Revised Code. This should give political subdivisions the necessary flexibility to continue to use CRAs to compete effectively for commercial and industrial projects.

Authorizing Limited Home-Rule Townships to Designate Community Reinvestment Areas

S.B. 33 extends the authority to designate CRAs to townships that have adopted a limited home-rule government pursuant to Chapter 504 of the Ohio Revised Code. Under current law, counties and municipalities are the only political subdivisions authorized to create CRAs. Generally speaking, a township must have a population of at least 2,500 and, if the population is fewer than 5,000, estimated resources of at least $3,500,000, to adopt a limited home-rule government.

A limited-home rule township will be able to designate only property within its unincorporated territory as a CRA. Notably, counties will also retain the authority to designate CRAs that are within, or include, unincorporated territory of a limited home-rule township. A business or developer evaluating a site in a limited home-rule township should carefully consider on a case-by-case basis whether to first approach the county or the township about designating a CRA.

Eliminating Ohio Department of Development Approval of CRAs

The Ohio Revised Code requires a political subdivision to first survey the housing located within a proposed CRA and then adopt a resolution finding that housing facilities or structures of historical significance are located in the CRA and new housing construction and repair of existing facilities are discouraged. Current law requires the Department of Development to affirm the findings in the resolution and to verify that the structures eligible for exemption under the resolution are consistent with zoning restrictions within the CRA. S.B. 33 eliminates these requirements—thereby eliminating the Ohio Department of Development's role in this portion of the CRA approval process.

As a practical matter, it is unclear the extent to which this will expedite or otherwise streamline the amount of time it takes for a political subdivision to create a new CRA and begin granting exemptions thereunder. A political subdivision is still required to submit each CRA resolution to the Department of Development and is prohibited from granting any exemptions under a CRA resolution until the Department assigns the CRA a unique state-assigned designation.

Requiring a Model CRA Agreement for Commercial and Industrial Projects

CRA exemptions operate differently under Ohio law for residential versus commercial or industrial projects. For residential projects, the CRA resolution specifies the duration and percentage of the exemption, which is then applied uniformly to all projects that the political subdivision's housing officer determine qualify for the exemption. For commercial and industrial projects, by contrast, the CRA resolution does not set the duration or percentage of the exemption.[1] Instead, the duration, percentage, and other terms and conditions are set forth in a CRA agreement that the property owner and political subdivision must execute before construction of the project commences, allowing the political subdivision to determine the appropriate duration and percentage on a project-by-project basis.

Current law prescribes specific language and terms that are required to be included in each CRA agreement. S.B. 33 eliminates the prescribed language and, instead, requires the Department of Development to create, by rule, a model agreement, which "may include any terms necessary for the administration and enforcement of such agreements.., but must include" a new list of mandatory terms codified at O.R.C 3735.671(B)(1)-(B)(8).

The new required terms in S.B. 33 are remarkably similar to the specific language and terms required under the current law, but certain property owner fees are eliminated and, on the whole, the new required terms afford slightly more drafting flexibility. While the changes to the required terms are not, themselves, very significant, the model agreement could cause a bigger impact, depending upon what the Department of Development elects to include in the model agreement and how political subdivisions react to and utilize the model agreement.

S.B. 33 makes clear that a political subdivision "may, in its discretion" use the model agreement. Localities are free to use their own forms or craft new forms so long as those forms do not conflict with the terms required pursuant to O.R.C 3735.671(B)(1)-(B)(8).

An important takeaway is that the new law does not confer upon the Department of Development authority to impose through rulemaking or the model agreement mandatory requirements beyond those set forth in the Ohio Revised Code. It remains to be seen whether the Department will include broader terms than those required by statute. Regardless, political subdivisions serious about attracting commercial and industrial projects should keep in mind that their authority to collaborate creatively with proposed project owners and craft flexible deal terms remains intact, so long as those deal terms do not conflict with the Ohio Revised Code.

Increasing the Exemption Percentage that Triggers School District Approval

Under current law, a political subdivision that seeks to exempt greater than 50% of the real property taxes attributable to a commercial or industrial structure is required to first obtain approval from the board of education of each impacted school district, unless certain other payments to be received by the impacted school district are estimated to reach prescribed levels. S.B. 33 increases that threshold from 50% to 75%.

Increasing the Applicable Income Tax Sharing Threshold

Under current law, a municipality that provides a CRA exemption for a project that creates $1,000,000 or more in new employee payroll must either negotiate a compensation agreement with the impacted school district or make annual payments to the school district amounting to 50% of the municipal income tax revenue in excess of certain infrastructure costs attributable to the project. S.B. 33 increases that new employee-payroll threshold from $1,000,000 to $2,000,000, as adjusted annually by the Department of Development for inflation according to a statutory formula.

Notably, S.B. 33 does not adjust the new employee-payroll threshold for income tax revenue sharing for enterprise zone abatements, making the CRA a more attractive tool for a municipality looking to incentivize a project generating significant jobs growth.[2]

Reducing the Penalty Period for the Discontinuation or Relocation of a Project

Under current law, an owner of an abated commercial or industrial project that ceases operations at the project site before the expiration of the abatement term is prohibited from entering into a new CRA or enterprise zone agreement for a period of five years.[3] S.B. 33 reduces that penalty period to three years for a CRA abatement. Notably, however, S.B. 33 does not amend the parallel provision in the enterprise zone code. As a result, a property owner that discontinues operations at a CRA project prior to the expiration of the CRA term can enter into either a CRA or EZ agreement for a new project in three years. In contrast, a property owner that discontinues operations at an EZ project can enter into a CRA agreement for a new project in three years, but cannot, without a waiver from the Department of Development, enter into an EZ agreement for a new project until five years has passed.[4]

Other

S.B. 33 also contains additional amendments, including, among others, modifications to the annual CRA reporting that political subdivisions must submit to the Ohio Department of Development[5] and a requirement that the Department of Development publish on its website copies of all CRA agreement entered into for a commercial or industrial projects.[6]

Vorys encourages you to contact your Vorys attorney with any questions you may have. For questions on S. B. 33 or CRA agreements please contact: Scott J. Ziance, 614.464.8287, sjziance@vorys.com; Aaron S. Berke, 330.208.1017, asberke@vorys.com; Christopher J. Knezevic, 614.464.5627, cjknezevic@vorys.com; Sean P. Byrne, 614.464.8247, spbyrne@vorys.com; Jonathan K. Stock, 614.464.5647, jkstock@vorys.com; or Elissa Wilson, 614.464.6224, rewilson@vorys.com.

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[1] Commercial and industrial projects in a so-called “pre-1994 CRA” are exceptions to this rule, a topic beyond the scope of this client alert.

[2] Although the $2,000,000 threshold applies to both (i) residential and (ii) commercial or industrial projects, the latter are more likely to generate enough new employee payroll to trigger income tax revenue sharing. Political subdivisions and property owners structuring residential deals should, however, be

mindful of construction period new employee payroll.

[3] O.R.C. Section 3735.671(C).

[4] O.R.C. Section 5709.633(A)(2).

[5] O.R.C. Section 3735.672 (A).

[6] O.R.C. Section 3735.672(C).