

Whiteford, Taylor & Preston L.L.P.
Memorandum

TO: J. Thomas Sadowski, Jr.
Executive Director
Maryland Economic Development Corporation

cc: Katie Parks, Director of Community Development

FROM: Kimberly J. Min

DATE: February 14, 2025

RE: HB 97/SB 409; Amendments to Tax Increment Financing Act

Executive Summary:

The amendments to the Tax Increment Financing Act, Sections 12-201 through 12-213 of the Economic Development Article of the Annotated Code of Maryland (the “**TIF Act**”) create uncertainty in the well-established statutory framework for Maryland tax increment financing (**TIF**), and will make the ability to issue and market tax-exempt bonds under the TIF Act more complex, and accordingly more expensive for the following reasons:

- The expansion of permitted uses for TIF bond proceeds could disrupt market investor expectations and create unintended costs to the authorizing jurisdiction in its current form. Currently, the Maryland TIF Act permits the use of TIF proceeds to primarily fund hard infrastructure and site remediation needs (as well as costs of issuance and reserve funds), all of which have a direct correlation to property values within the District. Disrupting the institutional investor perception of the uses of proceeds could have a negative impact on marketability and costs associated with the issuance and servicing of bonds. Maryland has a strong investor base that has a strong appetite for TIF Bonds because of this correlation and history of successful projects.
- The expanded uses for TIF bond proceeds generally could complicate and potentially jeopardize federal tax exemption and create uncertainty that authorized uses could threaten tax exemption, further increasing associated costs to the authorizing jurisdiction and ultimately the taxbase within the District.

Background of Tax Increment Financing Act:

The TIF Act authorizes a political subdivision of the State of Maryland (the “**State**”) to (i) designate a development district, sustainable community or RISE Zone (each a “**District**”), (ii) issue bonds to use the proceeds thereof (“**TIF Bonds**”) to pay for improvements within the District, and (iii) use the incremental increase in tax revenues in the District to pay for improvements within the District or repay the TIF Bonds. The increase in tax revenue (increment) is measured from the assessable base of the property within the District at the time the District was established by the county or municipal corporation.

The revenues collected from the incremental taxes above the assessable base (“**TIF Funds**”) are required by Sections 12-203 and 12-208 of the TIF Act to be deposited into a special fund held by the political subdivision (the “**Special Fund**”). Currently, there are limitations that TIF Bonds can be used only for capital-type expenditures in accordance with Section 12-207, with limited exceptions, and may not be used for working capital.¹ TIF Funds can be used either to repay TIF Bonds or for the uses specified in Section 12-207. TIF Funds can be deposited into the Special Fund even if no TIF Bonds have been issued² and then used for the purposes listed in Section 12-207. If there are TIF Bonds outstanding, then TIF Funds in the Special Fund first must be used to pay the amounts due on the TIF Bonds for the applicable fiscal year and then the remaining TIF Funds may be used for other purposes. Under Section 12-209, any remaining revenues in this special fund after current debt service on TIF Bonds is paid, or public improvements are funded with TIF Funds, either may be transferred to the political subdivision for its general use, or may accumulate in the Special Fund.

Many political subdivisions within the State form a District and use TIF Funds to advance priority developments within the District. The political subdivision often uses this tool by issuing governmental bonds (the TIF Bonds) to provide a supplemental capital source to fund early infrastructure improvements that are expected to support the development of private projects in the District. The improvements funded with the TIF Bonds are usually publicly owned to allow the TIF Bonds to qualify for federal tax exemption.

¹ This can include resident and business relocation costs. Section 12-207(a)(4). In Prince George’s County, there is the additional permitted non-capital use of marketing development district facilities and other improvements.

² Section 12-209 of the TIF Act

When TIF Bonds are issued, many times the TIF Bonds are issued as tax-exempt obligations and sold on the public market or in limited (negotiated) offerings to institutional investors. In addition to the requirements applicable to TIF Bonds under the TIF Act, tax-exempt TIF Bonds are required to meet statutory and regulatory requirements under the Internal Revenue Code (“IRC”) and regulatory requirements issued by the Securities and Exchange Commission. Usually, TIF Bonds easily meet the IRC requirements for federal tax exemption³ because the TIF Act funds publicly owned infrastructure improvements, which avoids many of the restrictions relating to private use of property funded by tax-exempt bonds. Also, there are limitations in the IRC on using tax-exempt bond proceeds for working capital purposes.

When TIF bonds are sold either on the public market or in a limited offering, the “market” for the bonds is usually institutional investors that are seeking a higher fixed yield (interest rate) on their investment. Investors look to rely on repayment from TIF Funds collected from the properties within the District because the assessed value of property benefiting from the public improvements increases. Maryland TIF Bonds typically have competitive pricing for the political subdivision issuers, in part because of the clearly defined and well established TIF Act, and a well managed TIF program across the State.

Amendments to Tax Increment Financing Act:

House Bill 97 was introduced on January 8, 2025, a copy of which is appended to this Memorandum, and Senate Bill 409 subsequently was introduced January 20, 2025 (“HB 97/SB 409”).⁴ HB 97/SB 409 includes amendments to the TIF Act, generally as follows:⁵

³ Under the TIF Act, bonds issued are exempt from state income taxation regardless of whether they meet the IRC requirements for federal tax exemption.

⁴ HB 942 was introduced on January 31, 2025, and separately proposes to amend the TIF Act to allow for a District to include non-contiguous real property parcels if they have been designated by the political subdivision. This amendment does not impact the analysis of HB 97/SB 409.

⁵ This Memorandum does not provide an analysis of HB 97/SB 409 that are part of the Economic Development Revenue Bond Act or the amendments to the Baltimore City Charter. However, of note, HB 97/SB 409 creates the ability to designate a “project area” and establish a “project area plan” by a county or municipal corporation for the legislative purposes listed in Section 12-103(b). It is not entirely certain how the project area or project area plan coincide with a District under the TIF Act.

- Creates the ability of a political subdivision to form an “authority” and expands the powers of an authority to issue bonds under the TIF Act with the approval of the political subdivision.
- Expands the ability to use both TIF Bonds and TIF Funds for a more expansive list of uses (Section 12-207), some of the most significant being:
 - Working capital, which previously was prohibited by the TIF Act because the prior limited uses were capital in nature⁶
 - Issuing loans for the purpose of encouraging development
 - Administrative overhead, legal or other operating expenses of the authority, including fees and expenses of consultants
 - Housing expenditures not within the District to replace housing units lost within the District, which previously expenditures of TIF Bonds and TIF Funds only could be made for uses within the or directly serving District.⁷
 - Affordable housing or homeless assistance, to lend, grant or contribute funds to a person, public or private entity, housing authority or nonprofit entity.
 - An incentive or other consideration paid with respect to the District
 - Public infrastructure outside the District if would benefit the District
 - Make loans from one District to another District
 - As a grant to the political subdivision to offset the tax revenues contributed to the Special Fund⁸
 - For convention, conference or visitor centers.⁹

Analysis of Amendments to Tax Increment Financing Act:

In general, the introduction of the concept of the broader ability to create a revenue authority as an entity authorized to issue bonds for the benefit of a District would seem

⁶ HB 97/SB 409 does not eliminate the prohibition on acquiring working capital by an authority in Section 12-110(b)(2) unless secured by a letter of credit or interest in property. It is not clear whether the proposed use of TIF Bonds and TIF Funds is intended to be more expansive than the Maryland Economic Development Revenue Bond Act, which is also amended by HB 97/SB 409. Also, “working capital” was grouped with reserves and capitalized interest, which are related to the issuance and existence of bonds. Working capital is not, so it is a little confusing to have it grouped into this subsection.

⁷ Section 12-207 of the TIF Act.

⁸ This was already permitted under Section 12-209 of the TIF Act.

⁹ Arguably, this already was permitted under Section 12-207(6) (to construct or rehabilitate buildings for a governmental purpose or use).

to further the economic development objectives for political subdivisions within the State. Based on our review of HB 97/SB 409, the establishment of the general option to create a revenue authority would not on its face negatively impact the existing powers granted by the TIF Act.

However, there are concerning provisions in HB 97/SB 409 that would have a harmful impact on the TIF Act, which historically has been a stable and predictable tool for economic development throughout the State:

1. Typically TIF Funds are generated from increased property values that result from the private development that is supported by the public infrastructure improvements within the District funded with TIF Bonds. The expansion of the potential uses of TIF Bonds, beyond capital improvements and related costs, to less concrete purposes does not have the same level of connection to the potential to increase property tax assessments. If the property tax assessments do not increase a sufficient amount, then there are less TIF Funds available to repay TIF Bonds.
2. The expansion of the permitted uses of TIF Bonds will create uncertainty for the issuance and marketability for TIF Bonds.¹⁰ The federal tax-exemption requirements limit the eligible uses of TIF Bonds primarily to capital expenditures and bond related costs. The more expansive statutory limits proposed in HB 97/SB 409, however, have the potential to confuse potential investors as to whether the TIF Bonds will be used for actual capital improvements to the District or will be redirected elsewhere. It would be more predictable to keep limits on the use of TIF Bonds for capital expenditures within the District.
3. The ability to utilize TIF Bonds or TIF Funds beyond the boundaries of the District have the potential to dilute the anticipated amount of TIF Funds because the potential increase to property values would be more attenuated to the manner in which the TIF Bonds or TIF Funds are spent outside the District.
4. The expansion of uses may not qualify for tax exemption, thereby creating potentially higher costs if TIF Bonds are perceived to be vulnerable to losing their tax-exempt status because the legislatively permitted uses would not necessarily

¹⁰ HB 97/SB 409 does not distinguish between the uses of TIF Bonds and TIF Funds, a distinction that would create more certainty about the impact of the amendments to HB 97/SB 409.

J. Thomas Sadowski, Jr.
Executive Director
Maryland Economic Development Corporation
February 14, 2025
Page 6

qualify for tax exemption.¹¹ An example is that many of the added uses would not qualify as capital expenditures but instead as working capital. There generally is a limit on the amount of tax-exempt bonds that can be used for working capital and so the ability to issue bonds for uses that would not qualify for tax exemption does not create the anticipated benefit.¹²

Enclosure

¹¹ This same analysis could be applied to bonds generally issued by political subdivisions and authorities under the revisions to 12-101 et seq under HB 97/SB 409.

¹² It would be possible to issue taxable bonds but those interest rates would be priced closer to what any other borrower might pay because it does not get the benefit of the discount of federal tax exemption, although it still would have state tax exemption.