

Chambers

GLOBAL PRACTICE GUIDES

Definitive global law guides offering
comparative analysis from top ranked lawyers

Real Estate

USA- Trends and Developments
Fishman Haygood LLP

chambersandpartners.com

2018

USA TRENDS AND DEVELOPMENTS

Contributed by Fishman Haygood LLP **Authors:** Charles A. Landry, Louis S. Quinn, Jr, Megan Riess
Sterling Scott Willis

Trends and Developments

Contributed by Fishman Haygood LLP

Fishman Haygood LLP's real estate practice is a significant focus of the firm, with 13 real estate attorneys located in Baton Rouge and New Orleans, Louisiana. We also have an affiliated title company that is an agent for most of the major US title insurance companies. Key areas of practice are commercial construction, development, finance, land use, leasing, governmental incentives, planning and title insurance. In addition, we provide a full range of corporate, financing and litigation

services to our real estate clients. Our real estate attorneys have been involved in numerous landmark real estate transactions, including major commercial, office, healthcare, hospitality and industrial projects. We represent clients across the real estate spectrum in Louisiana and throughout the United States. Our boutique culture allows clients direct access to experienced partners who are recognised nationally for their excellence. We are known for getting deals done efficiently and well.

Authors



Charles A. Landry is a partner who is proficient in real estate development, public-private partnerships, land use and zoning, and real estate finance. He has assisted clients in a wide range of real estate transactions, such as residential developments (including Traditional Neighbourhood Developments), office buildings, shopping malls and centres, hotels and medical facilities, golf course communities and industrial developments. He is a leading expert in public-private partnerships in Louisiana and has represented parties in numerous complex projects. In addition, he has created Economic Development Districts throughout the State of Louisiana. Charles is widely recognised as one of the leading land-use attorneys in Louisiana. He is a founding member of the East Baton Rouge Zoning Advisory Committee, and served as its chair from its formation in 2003 through 2017. Charles has numerous professional memberships and contributes to many real estate publications.



Louis S. Quinn, Jr is a partner at Fishman Haygood LLP and practises in the areas of real estate, project finance and development, commercial lending, disaster recovery programmes, affordable housing public-private partnerships and commercial lending. He is a member of the American Bar Association, the Florida Bar Association, the Louisiana Bar Association, the Baton Rouge Bar Association, the National Association of Bond Lawyers and the American Institution of Architects. Louis serves his community as a former board member of the Baton Rouge Growth Coalition, former chairman and board member for the Boys and Girls Club of Baton Rouge, and chairman of the Finance Committee and a board member for The Dunham School of Baton Rouge.



Megan Riess is a partner and is experienced in the areas of real estate finance, tax credit and government incentives financing, sports and entertainment facility management. Currently, Megan is president-elect of the CREW New Orleans network, in which she has held a variety of leadership positions since 2010. She is also chair and former vice-chair of the ABA Real Property, Trust & Estate Law Section - Government Incentives Committee. Megan has contributed articles to publications relating to real estate.



Sterling Scott Willis is a partner in the firm and practises in the areas of real estate development, financing and leasing. He is a Fellow of the American College of Real Estate Lawyers, and currently serves on its Board of Governors. He is also a member of the American College of Mortgage Attorneys and the Trust & Estate Law Section of the ABA Real Property. Sterling has contributed to several publications relating to real estate.

Contributed by Fishman Haygood LLP Authors: Charles A. Landry, Louis S. Quinn, Jr, Megan Riess
Sterling Scott Willis

Executive Summary

- Real estate developers in Louisiana can receive tax dollars to enhance projects through Economic Development Districts (EDDs).
- EDDs are strictly defined geographic areas
- that are authorised and created by ordinance of the city and/or parish where they are located. The vast majority of the EDDs generate revenues for real estate projects from sales and use taxes and hotel occupancy taxes, though property taxes may also be used.

EDD Tax Dollars Spur Private Development

Louisiana's diverse building and development sites, skilled workforce and abundant natural resources make it one of the nation's most attractive locations for real estate development. To add to the appeal, the State's business-friendly tax environment provides significant competitive incentives.

One increasingly popular incentive is the establishment of Economic Development Districts (EDDs).

EDDs are special taxing districts that subject properties in a specific geographic area to taxes used for a "special purpose." An economic development district, as its name suggests, supports economic development as its "special purpose." EDDs can be any size, from a single building to all property controlled by a city or parish (Governing Authority). Typically, the Governing Authority will use an EDD to strengthen a community's economy by encouraging co-operative public-private development efforts, attracting new real estate projects, creating new jobs and increasing the tax base.

EDDs create a new category of tax dollars that can be used to finance a private project. In broad terms, EDDs allow private developers to receive tax dollars to close the gap between the financial demands of projects and the financing available to complete them. EDDs are often used to develop greenfield sites that are otherwise prohibitively expensive to improve or to reclaim blighted urban areas through infill redevelopment. EDDs may benefit projects whether for new construction or for the renovation of existing improvements.

EDD revenues can be used to reimburse the Governing Authority or private developers for costs associated with a project, such as for property acquisition; design and "soft" costs (including for professional services); debt service (through conventional debt and/or bonds issued by the EDD); and for actual construction and other "hard" costs. In addition to helping construct public and private buildings, parks and open areas, EDDs can help close the financing gap for streets, utilities, drainage, sewer lines and other necessary infrastructure.

Louisiana currently has more than 50 EDDs, and that number is growing. In New Orleans, for example, an EDD helped transform the infamous St. Thomas public housing project, once the country's most dangerous, into an award-winning affordable housing neighbourhood. EDDs have also supported the development of planned communities in Lake Charles and Zachary. Numerous hotels, retail complexes and other projects across the State owe their success to EDD dollars.

How it works (or "Fifty Percent of Something ...")

Louisiana EDDs may collect funds either as incremental taxes or as "new" taxes.

Incremental taxes are based on the increased or incremental amount the "Governing Authority" or taxing entity (usually one and the same) receives from the property located within the EDD. The calculation of incremental taxes begins with the amount of sales and hotel occupancy taxes collected within the EDD's boundaries for the year prior to the establishment of the EDD. The Governing Authority will continue to collect that base number after the establishment of the EDD. However, to the extent that future tax collections exceed this base number, the Governing Authority will pay an agreed percentage of this increase to the EDD. If taxes collected in a given year do not meet or exceed the base number, the Governing Authority will make no payment to the EDD.

An EDD may also receive funding through "new" taxes, rather than from a portion of existing taxes imposed by the Governmental Authority. An EDD has the authority to levy new sales and use, hospitality and/or property taxes within the EDD only. The maximum tax that an EDD may impose is 2% of the value of the good or service. By way of illustration, if an item or hotel stay within the EDD costs USD100, additional taxes of USD10 (based on a 10% sales or use tax, common throughout most parishes) and USD2 (the maximum tax an EDD may impose) would be payable, with the USD2 going directly to the EDD.

Under either the incremental or new tax approach, EDDs provide the Governing Authority with new sources of tax revenues on expenditures that would not take place in the absence of the EDD project. Neither method takes away from existing taxpayer funds. If the EDD project is successful in generating jobs, sales and revenues, the Governing Authority participates in the windfall by collecting additional taxes. If it is not successful, the Governing Authority is no worse off than before. Sure, it doesn't receive all of the upside but, as Chuck Barris famously said, "50 percent of something is better than 100 percent of nothing."

Getting to Yes on an EDD

Establishing an EDD is a multi-stage process that requires real estate know-how and a keen understanding of finance,

USA TRENDS AND DEVELOPMENTS

Contributed by Fishman Haygood LLP Authors: Charles A. Landry, Louis S. Quinn, Jr, Megan Riess
Sterling Scott Willis

Louisiana public law and the local political climate. Some of the key steps are:

Set boundaries. The geographic area of your EDD must be precisely defined to provide an accurate accounting of where taxes are generated that can be used for the project.

Court the community. If your geographic area includes any registered voters, 100% of them must agree to the establishment of the EDD. If they do not, the Governing Authority must hold an election. As a result, almost all EDDs in Louisiana have been created to avoid registered voters; businesses cannot be registered voters, so their consent is not needed.

Show them the value. An EDD must be approved by a Governing Authority and established by ordinance. Because establishing an EDD is viewed as an expenditure of public funds, the Louisiana Constitution—as interpreted by the Louisiana Attorney General’s office—requires that the Governing Authority have “a demonstrable, objective, and reasonable expectation of receiving at least equivalent value” in exchange for contributing EDD-generated funds to the project. To this point, many Governing Authorities require a third-party economic impact study to confirm the project’s value and boost community support. The study must be performed by a qualified expert. In addition to jobs information, the study typically looks at the additional sales and property taxes the project will generate and the value of any potential spin-off or multiplier effect.

Come to terms: the Governing Authority, the EDD and the developer must execute a Co-operative Endeavour Agreement (CEA) that details the overall transaction and the obligations of the parties. Although aspects of the CEA, such as its term or geographic coverage, may be amended, the more accurate and specific the initial CEA, the greater the chance of avoiding costly and time-consuming disputes down the road.

The CEA, which must be adopted by ordinance, sets forth each party’s contribution, the form of tax to be levied, the

use of the proceeds and the process for making distributions. The CEA also defines the term of the agreement, either by years, total payment amount or both.

Additional Requirements for the EDD

By law, an EDD is a political subdivision. It is therefore subject to Louisiana’s open meeting and public records laws, as well as its Code of Ethics. The EDD’s books must be available for inspection by the state auditor.

Navigating Louisiana

While EDDs in Louisiana are similar to those in other states, the State’s history gives a unique flavour to the governing legal, political and social environment. Traditions and attitudes about real estate development date back to the French colonisation of this area and, more recently, reflect the aftermath of Hurricanes Katrina and Rita.

In addition, Louisiana’s legal system is based on the French Civil Code system, as opposed to the English common-law approach. If a dispute arises involving an EDD, courts will look to the letter of the law, as opposed to its judicial construction and application, for guidance.

The Outlook for EDDs

EDDs have proven a valuable catalyst for development in Louisiana and across the United States. Today, there are thousands of EDDs operating in cities, counties and parishes of every size. California alone maintains more than 400 EDDs with an aggregate of more than USD10 billion in annual revenues, USD28 billion in long-term debt and USD674 billion of assessed land valuation. In Illinois, more than 250 cities have EDDs.

Louisiana’s existing EDDs are most frequently used to close the financing gap for commercial projects. Given the growing success and acceptance of EDDs, in the future we will likely see them applied to civic buildings and activities as well.

Fishman Haygood

201 St. Charles Avenue
Suite 4600
New Orleans, LA 70170-4600

Tel: (504) 586-5252
Fax: (504) 586-5250
Email: clandry@fishmanhaygood.com
Web: www.fishmanhaygood.com

FishmanHaygood