Bircham Dyson Bell

G&I Briefing

Tax Increment Finance – after the Local Government Resource Review

Introduction

TIF has been the great hope of the regeneration industry for almost as long as people can remember. Under the last government, expressions of interest were invited, only for progress to stall after 84 local authorities had submitted 124 bids. Birmingham, Leeds, London (for the Northern Line Extension) and Sheffield submitted the largest pilot proposals. The total funding sought ran to £2.33bn, with the highest bid being for £400m and the lowest for £750000.

Nick Maltby, Head of Projects (Commercial)
T +44 (0)20 7783 3773
E nickmaltby@bdb-law.co.uk

Once the Coalition came into power, the prospects for TIF at first looked bleak until Nick Clegg's announcement of 20 September 2010 at the Liberal Democrat Party Conference, '[And] I can announce today that we will be giving local authorities the freedom to borrow against those extra business rates to help pay for additional new developments.'

Nick Clegg's announcement was followed in October's Comprehensive Spending Review with statements to the effect that, 'New Powers to implement Tax Increment Financing will also be detailed in the coming white paper on local regional growth' (Para 1.81 at page 33) and 'Further detail on Tax Increment Financing and the future incentives and planning powers open to local authorities to support growth will be provided in a White Paper on local growth later this year'(Para 2.39 at page 50).

The Local Growth White Paper expanded on the CSR stating, at paras 3.38 – 3.41, '3.39 We will introduce new borrowing powers to enable authorities to carry out Tax Increment Financing. This will require legislation.

'3.40... We anticipate that TIF would, at least initially, be introduced under a bid-based process. Lessons from an initial set of projects will inform future use of the power.'

In January, CLG Ministers announced a Local Government Resource Review to consider among other things how TIF might be introduced. In mid July, CLG published a consultation document, 'Local Government Resource Review: Proposals for Business Rate Retention'. The consultation period lasts until Monday 24 October. It is the purpose of this article to consider where this document leaves English TIF and what the prospects are for the future.

 © Bircham Dyson Bell LLP 2011 50 Broadway London SW1H 0BL

Scotland

Before considering the position in England, it is worth recalling how TIF is being progressed in Scotland. On 5 November 2010, the Scottish Government published its Tax Incremental Finance Administration Pilot Scheme document and shortly afterwards approved the first scheme in Leith where £84m will be borrowed under a TIF. The document describes how the Scottish Government will allow up to six TIF pilots and the basis on which they will proceed. In the Scottish scheme local authorities take the risk of any borrowing associated with the scheme. The document covers the application of the 'But for' test; what ministers are looking for from schemes; the requirement for a business case; governance; the period of individual projects; the area of individual projects; displacement; the borrowing and repayment of debt; and monitoring and evaluation. As will be seen below the Scottish scheme shares many features of Option 2 of the Consultation Document.

Consultation Document

The wider context of the Consultation Document is a radical realignment of the business rate collection system in England so that authorities get to retain business rates collected by them with a top up for those authorities who are considered to collect too little and a tariff deduction against those who otherwise would retain too much. Authorities will get to retain additional business rates generated in their areas above an agreed baseline (subject to a levy for disproportionate gains) and will therefore be encouraged to pursue policies which encourage rather than stifle growth. However, the business rate multiplier will continue to be set centrally so there will be no adverse impact on business through the change. The new system would, as at present, be adjusted to reflect the five yearly business rate revaluations and there would be an option to reset the system for an authority if it was felt that resources no longer matched service pressures. The new system will be in place by 1 April 2013.

The new system creates both opportunities and challenges for authorities. The opportunity is that authorities will get to keep the proceeds of growth above the baseline and can either use these funds or borrow against them under the prudential borrowing system. The challenge is that where business rate income falls there will be no automatic reset (other than at ten year intervals potentially) and services will need to be cut. Authorities subject to a top up will have their top up indexed which will give some relief but the non-top up amount will still be subject to the issue that it may change adversely. Authorities who are subject to a tariff face a tougher regime insofar that not only is the non-top up amount liable to change adversely but the tariff will be indexed so it will be necessary to achieve growth that matches the indexation rate simply to stay still. The Consultation Document suggests that authorities may wish to pool their risk by way of mitigation. This is a more uncertain climate for local authorities than they have faced before and it remains to be seen how they will cope especially given the direction of travel indicated in the Government's 'Open Public Services' White Paper.

© Bircham Dyson Bell LLP 2011 50 Broadway London SW1H 0BL

Consultation Document: TIF Proposals

The Consultation Document sets out two ways that TIF could be operated within the business rates retention system detailed above. The first (Option 1) would allow authorities to determine for themselves whether to invest in a TIF scheme but would provide no special treatment. Under this system authorities would benefit from any uplift in business rates in the manner described above subject to any top up, tariff or levy and could decide to borrow against these additional rates if they wished. It would appear that authorities would be able to ascertain the impact of any levy in advance which would reduce any uncertainty. It would be up to the local authority to determine how such funds are invested. If a local authority were in a pool then the pool would determine how the additional business rates were allocated. This could give rise to the exciting possibility of projects being prioritised across for instance the whole of London. However, if a reset is to happen every ten years then it would be difficult to plan beyond this horizon (in contrast to the 25 year horizon of an Enterprise Zone).

Under Option 2 there would be a fund based system run by central government but free from the risk of loss to the levy or reset process. This could be similar to the Scottish system (we await 8 Technical Documents setting out the detail) and would give local authorities and developers the certainty of revenues against which to borrow. Under this system, the amount available would be rationed. Hence, while offering greater certainty, Option 2 runs the risk that it will be constrained. It remains to be seen the size of funds that might be available and how the competition would be organised.

Enterprise Zones

For completeness, it should be noted that TIFs will also occur within each Enterprise Zone. Enterprise Zones were announced in the 2011 Budget in March and there will be one Enterprise Zone per Local Enterprise Partnership. The London Enterprise Zone will be in the Royal Docks. In an Enterprise Zone any business rates above the current baseline can be retained for 25 years from April 2013 to support the priorities of the LEP. This is a longer period than is envisaged under Options 1 and 2.

Next Steps

As noted above, there will be a consultation period until 24 October 2011 and a Bill is likely to follow in December. The Bill can be expected to become law by 1 April 2013. Given the need to encourage growth now this is somewhat disappointing. As we have indicated elsewhere, it is our view that it would have been possible for the Government to bring forward a TIF scheme on the Scottish lines without the need for primary legislation but by implementing Paragraph 4(4A) of Schedule 8 to the Local Government Finance Act 1988. This would have allowed a number of pilots to commence in 2012.

The wider question is whether the arrangements set out in the Consultation Document represent the sort of implementation of TIF that the industry had hoped

© **Bircham Dyson Bell LLP 2011** 50 Broadway London SW1H 0BL

for. Insofar that the proposals give local authorities primary TIF powers (albeit through a combination of the business rate retention system and the prudential borrowing regime) they transcend the weakness of the Scottish system in its failure to give authorities the ability to pursue TIF without central government approval. Under Option 1 it will be open to local authorities to enter into private arrangements with developers under which developers underwrite the prudential borrowing undertaken by local authorities on their behalf on appropriate terms, as is the case in the US. However, whether this happens will depend on individual local authorities' appetite for risk and it is a pity that the Government has not framed a version of 'pay as you go' or developer-led TIF. There is also little here for upper tier authorities in a two-tier system or other organs of local government, such as Integrated Transport Authorities and Passenger Transport Executives. The key questions that need to be answered therefore revolve around the certainty of any levy under Option 1 and the timeframe of the reset as 10 year money may be less useful in pump priming regeneration than the 25 year money in an Enterprise Zone.

Conclusion

In summary, the proposals in the Consultation Document are broadly welcome but leave some unanswered questions, which may be clarified by the Technical Documents. However, it remains a shame, given the nature of Option 2, that the Government is not introducing pilot schemes now (if Paragraph 4(4A) is brought into force) rather than in 2013. This would give us the chance to learn more about the model and its place in our regeneration armoury now.

For further information on our range of services, or to view or download our publications, please visit www.bdb-law.co.uk

This briefing is not meant as a substitute for advice on particular issues and is written in general terms. You should seek specific advice before taking any action based on the information that this briefing contains.

*This firm is not authorised under the Financial Services and Markets Act 2000 but we are able, in certain circumstances, to offer a limited range of investment services to clients because we are regulated by the Solicitors Regulation Authority (the **SRA**). We can provide these investment services if they are an incidental part of the professional services we have been engaged to provide. This part of our business, including complaints and redress mechanisms if something goes wrong, is provided through the SRA and the Legal Ombudsman (**LeO**). The LeO is the independent complaints handling body for the legal profession.*

Bircham Dyson Bell LLP processes your personal data in connection with the operation and marketing of a legal practice and will occasionally send you information relating to the firm. If you would prefer not to receive this information, please notify us in writing.

If you would like us to amend your contact details, please send a fax or letter for the attention of the Client Records Administrator at Bircham Dyson Bell LLP.

Bircham Dyson Bell LLP is a member of Lexwork International, an association of independent law firms. For further information please visit www.lexwork.net

All Bircham Dyson Bell LLP marketing material is printed on recycled paper to support our ongoing commitment to the firm's environment policy.

© **Bircham Dyson Bell LLP 2011** 50 Broadway London SW1H 0BL