



Business Improvement Districts: Potential for Public/Private Conflicts

Friday, September 15, 2017 General Session; 8:00 – 10:00 a.m.

Mark E. Mandell, Mandell Municipal Consulting

DISCLAIMER: *These materials are not offered as or intended to be legal advice. Readers should seek the advice of an attorney when confronted with legal issues. Attorneys should perform an independent evaluation of the issues raised in these materials.*

Copyright © 2017, League of California Cities®. All rights reserved.

This paper, or parts thereof, may not be reproduced in any form without express written permission from the League of California Cities®. For further information, contact the League of California Cities® at 1400 K Street, 4th Floor, Sacramento, CA 95814. Telephone: (916) 658-8200.

This image shows a full page of blank white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page, providing a template for writing or drawing. There are no margins, text, or other markings present.

**Business Improvement Districts:
Potential for Public/Private Conflicts**

By

Mark E. Mandell
Mandell Municipal Counseling

August 17, 2017

I. Introduction

Over the past several decades, Business Improvement Districts (“BIDs”) have become an increasingly common feature of downtowns and other commercial areas. Business owners and their landlords often appreciate BIDs because they provide localized marketing, sanitation, security, and other services. These services can help commercial areas that are oriented along public streets to more effectively compete with privately owned and managed commercial developments. Cities find BIDs attractive because—with minimal investment of general fund tax dollars—a BID can help “liven up” an aging commercial area, ideally leading to increased civic pride, economic development, and increased tax revenue for the city.

Because their proponents promise that BIDs will be largely self-managed and self-funded, cities sometimes allow them to be formed with minimal involvement from city staff and elected officials. This can lead to problems down the road. The establishment and operation of a BID involves a fair amount of cooperation between entities that often have distinct--and sometimes conflicting—interests and goals. The purpose of this paper is to identify some issues that city attorneys may want to discuss with city management and staff at the beginning of the establishment process.

II. What is a BID?

A. Basic Description.

Many possible conflicts stem from misunderstandings about the basic nature of BIDs. Therefore, it might be helpful to start off by explaining what a BID is. For this paper, I propose the following description:

A Business Improvement District is a program of a city under which the city levies an assessment against businesses or property to fund services or improvements that benefit the assessed businesses or property.

The program of services, improvements, and assessments are described in documents created during the establishment process. The description of the program is typically created by a BID consultant. A city council can only establish a BID after the owners of the businesses or property have indicated their support (or lack of opposition) for the BID via a petition; a ballot or protest proceeding; or both.

Services and improvements are generally provided by a nonprofit organization, often called an ‘owners’ association,’ which is under contract to the city. The owners’ association also generally prepares an annual report, which is used by the city as the basis for annual decision making.

Below, I describe in more detail each aspect of this description.

B. “A Business Improvement District is a program of a city...”

Two statutory schemes authorize the establishment of BIDs: (i) the Parking and Business Improvement Area Law of 1989¹ (the “’89 Law”) and (ii) the Property and Business Improvement District Law of 1994² (the “’94 Law”).³ BIDs governed by the ’89 Law are funded by assessments against businesses. BIDs governed by the ’94 Law can be funded by assessments against businesses, assessments against property, or a combination of the two types of assessments.

All cities have the authority to utilize their choice of the ’89 Law or the ’94 Law.⁴ In addition, charter cities, unless prohibited by the terms of their charter, can use their home rule powers to levy assessments and establish BIDs.⁵ Typically, when a charter city proceeds in this manner, it adopts a local “procedural ordinance” that incorporates as municipal law the terms of either the ’89 Law or the ’94 Law, with locally desired modifications.⁶ BID proceedings are then conducted directly under the procedural ordinance, rather than pursuant to state law.

The term “business improvement district” is commonly used to refer to all BIDs, whether created under the ’89 Law, the ’94 Law, or a typical charter city procedural ordinance.⁷ However, none of these authorities authorize the creation of a special district, as that term is normally used under California Law.⁸ BIDs are not entities that have a separate legal existence from the cities that establish them, nor are BIDs political subdivisions that have their own governing boards.⁹

Instead, a BID is a form of assessment district, not unlike assessment districts formed under the Landscaping and Lighting Act of 1972¹⁰ or the Benefit Assessment Act of 1982¹¹. In this context, a “district” is understood not to mean a “governmental subdivision”, but to mean “an area fixed,

¹ Str & Hwy Code §36500 *et seq.*

² Str & Hwy Code §36600 *et seq.*

³ Some older BIDs were established under the Parking and Business Improvement Area Law of 1965 (Str & Hwy Code §36000 *et seq.*). Such BIDs were funded by special taxes, rather than by benefit assessments. Because the California Constitution now requires two-thirds voter approval for special taxes, new BIDs are rarely, if ever, established in this manner. (*see* Cal. Const. Art. XIII A, §4 and Cal. Const. Art. XIII C, §2 for voting requirements).

⁴ Although this paper will refer generically to “cities”, BIDs can also be established by counties and by certain joint powers authorities. (Str & Hwy Code §36508 [’89 Law] and §36608 [’94 Law]). A city can create a BID that extends into another city, or an unincorporated area of a county, but only with the consent of the relevant city councils or county boards of supervisors. (Str & Hwy Code §36521.5 [’89 Law] and §36620.5 [’94 Law]).

⁵ *See, Redwood City v. Moore* (1965) 231 Cal.App.2d 563, 582 [home rule authority to levy assessments].

⁶ Common types of modifications include changes to the types of services and improvements that can be funded, changes to petition requirements, and changes to time limits on the life of a BID before it must be renewed.

⁷ Technically, a BID established under the ’94 Law is a “property and business improvement district” (Str & Hwy Code §36614.5) while a BID established under the ’89 Law is a “parking and business improvement area” (Str & Hwy Code §36511). The word “district” appears nowhere in the ’89 Law.

⁸ *See, e.g.,* Gov’t Code §56036(b)(5) (excluding “special assessment districts” from the class of special districts subject to the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000).

⁹ Note that, in contrast with statutory schemes that permit the creation of special districts, the ’89 Law and the ’94 Law do not include authorizations for BID’s to exercise so-called “corporate powers,” such as the right to sue and be sued or the right to enter into contracts. (*see, e.g.,* Gov’t Code §61060 *et seq.* [community services districts] and Hlth & Saf Code §13861 [fire protection districts]). Instead, the city exercises its own corporate powers when administering the BID program.

¹⁰ Str & Hwy Code §22500 *et seq.*

¹¹ Gov’t Code §54703 *et seq.*

established, and formed by a city...that is specially benefited by, and assessed, or to be assessed, to pay the costs and expenses” of that which is funded by the assessment.¹² A BID is not, itself, a unit of government. Instead, a BID is a program of the city that establishes it.

C. “...under which the city levies an assessment against businesses or property...”

In most downtowns and commercial areas, it is common for businesses to rent the spaces in which they operate, rather than own their own buildings. In that situation, assessments against businesses are paid by assessed business, while assessments against property are paid by the landlords. Note, however, that it is common for commercial leases to pass on special assessments to tenants in what amounts to an automatic rent surcharge.

Assessments against businesses are usually collected by cities along with their business license taxes.¹³ Assessments against property are usually collected on the property tax roll.¹⁴

The practice of collecting BID assessments along with existing taxes almost certainly increases compliance and reduces collection costs. Nonetheless, cities do incur costs associated with these collection methods, and counties do deduct a service charge from assessments that they collect on the tax roll on a city’s behalf.

Under the ’94 Law, no assessment can be levied against “properties zoned solely for residential use, or that are zoned for agricultural use.”¹⁵ Presumably, this restriction can be omitted from charter city local procedural ordinances.

D. “...to fund services or improvements...”

BIDs most commonly fund services, such as security services, sanitation services, and marketing services.¹⁶ So long as the services properly benefit assessed businesses or property, the scope of services that can be provided under either the ’89 Law or the ’94 Law is essentially unrestricted.¹⁷

BIDs can also acquire, construct, install, and maintain improvements. These might take the form of bus benches, trash receptacles, or other street furniture. It is also common for BIDs to install

¹² This definition is borrowed by me from Gov’t Code §56075, which defines “special assessment district” for purposes of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000.

¹³ Assessments against hotels in connection with BIDs that fund tourism-related services are usually collected by cities along with transient occupancy taxes, and calculated as a percentage of rents. Because hotel BIDs, which generally encompass the entire territory of a city but only involve assessments against hotels, involve a different set of issues than typical BIDs, they will not be further discussed in this paper.

¹⁴ The ’94 law provides that “assessments levied on real property may be collected at the same time and in the same manner as for the ad valorem property tax, and may provide for the same lien priority and penalties for delinquent payment.” (Str & Hwy Code §36631). Gov’t Code §51800 authorizes the collection of municipal assessments (implicitly including assessments levied under a charter city procedural ordinance) by counties along with property taxes.

¹⁵ Str & Hwy Code §36632.

¹⁶ Both the ’89 Law and ’94 Law use the term “activities” rather than “services.” However, due to the requirements of Propositions 218 and 62, it can be analytically useful to analyze all activities of BID, including the public events that have traditionally been funded by BIDs, as services being provided to assessed businesses or properties.

¹⁷ Str & Hwy Code §36513 (’89 Law) and Str & Hwy Code §36606 (’94 Law).

banners on existing street lighting standards (poles). The scope of permissible improvements is very broad, essentially encompassing any tangible property with an estimated useful life of at least five years.¹⁸

E. "...that benefit the assessed businesses or property."

Proposition 218, which was adopted by the voters in 1996 and added Articles XIII C and XIII D to the California Constitution, sets forth requirements that assessments against property must be tied to "special benefits."

For purposes of Proposition 218, "special benefit" means:

[A] particular and distinct benefit over and above general benefits conferred on real property located in the district or to the public at large. General enhancement of property value does not constitute "special benefit."¹⁹

The "special benefit" requirements are that:

An agency which proposes to levy an assessment shall identify all parcels which will have a special benefit conferred upon them and upon which an assessment will be imposed. The proportionate special benefit derived by each identified parcel shall be determined in relationship to the entirety of the capital cost of a public improvement, the maintenance and operation expenses of a public improvement, or the cost of the property related service being provided. No assessment shall be imposed on any parcel which exceeds the reasonable cost of the proportional special benefit conferred on that parcel. Only special benefits are assessable, and an agency shall separate the general benefits from the special benefits conferred on a parcel. Parcels within a district that are owned or used by any agency, the State of California or the United States shall not be exempt from assessment unless the agency can demonstrate by clear and convincing evidence that those publicly owned parcels in fact receive no special benefit.²⁰

¹⁸ Str & Hwy Code §36510 ('89 Law) and Str & Hwy Code §36610 ('94 Law).

¹⁹ Cal.Const. Art. XIII D, §2(i). Str & Hwy Code §36615.5, a provision of the '94 Law, attempts to further define "special benefit" to mean:

[A] particular and distinct benefit over and above general benefits conferred on real property located in a district or to the public at large. Special benefit includes incidental or collateral effects that arise from the improvements, maintenance, or activities of property-based districts even if those incidental or collateral effects benefit property or persons not assessed. Special benefit excludes general enhancement of property value.

This definition incorporates language from *Dahms v. Downtown Pomona Property* (2009) 174 Cal.App.4th 708, which interprets Proposition 218 in the context of a BID. Note, however, that the constitutional language of Proposition 218, as interpreted by *Dahms* and other published court decisions such as *Silicon Valley Taxpayers Assn v. Santa Clara County Open Space Auth* (2008) 44 Cal.4th 431, has superior authority to statutory language in the '94 Law. Str & Hwy Code §36622(k)(2) also restates certain requirements of Proposition 218, incorporating language from *Dahms*.

²⁰ Cal.Const. Art. XIII D, §4(a).

Assessments against businesses are not subject to the requirements of Proposition 218.²¹ However, as a result of the adoption by the voters in 2010 of Proposition 26, an assessment against businesses requires two-thirds voter approval as a special tax unless it meets one of several enumerated exceptions.²² The exceptions most relevant in the context of BIDs are for:

(1) A charge imposed for a specific benefit conferred or privilege granted directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of conferring the benefit or granting the privilege. [or]

(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.²³

Under Proposition 26:

The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity.²⁴

A complete discussion of the requirements of Propositions 218 and 26 is beyond the scope of this paper. It is often a useful exercise, when designing a BID program under either set of rules, to describe each service in terms of being provided to the businesses or property assessed, and then describe why that service would be useful to assessed businesses or property. This is most easily done for services that are provided directly in front of a business or property (such as security or sanitation), are clearly done on behalf of businesses (such as directories and wayfinding aids), or are events that can be participated in only by assesses (such as training programs and seminars). It can be more difficult in connection with sponsorship of events, such as concerts-in-the-square,

²¹ *Howard Jarvis Taxpayers Assn v. City of San Diego* (1999) 72 Cal.App.4th 230.

²² Cal.Const. Art. XIII C, §§ 1(e) & 2(d).

²³ Cal.Const. Art. XIII C, §§ 1(e)(1) & 1(e)(2). Gov't Code §53378 attempts to further define "specific benefit" and "specific government service" for purposes of these constitutional provisions. It provides that:

A specific benefit is not excluded from classification as a "specific benefit" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific benefit to the payor.

It also provides that:

A specific government service is not excluded from classification as a "specific government service" merely because an indirect benefit to a nonpayor occurs incidentally and without cost to the payor as a consequence of providing the specific government service to the payor. A "specific government service" may include, but is not limited to, maintenance, landscaping, marketing, events, and promotions.

No court has interpreted the applicability of these definitions with respect to the constitutional language.

²⁴ Cal.Const. Art. XIII C, §1(e).

that are attended by the public but are arguably provided to the businesses as a means of attracting customers to assessed businesses.

F. “The program of services, improvements, and assessments are described in documents created during the establishment process.”

The '94 Law requires that a “management district plan,” containing specific information about the proposed BID, be prepared for each BID at the beginning of the establishment process.²⁵ Additionally, if assessments are to be levied against property, Proposition 218 requires that the assessment be supported by a “detailed engineers report” prepared by a registered professional engineer.²⁶ The engineers report typically includes, among other things, analysis describing how the proposed assessment complies with the substantive requirements of Proposition 218.

These documents are sometimes combined into a single document; otherwise the engineers report is included as an exhibit to the management district plan.²⁷ In either event, it is important that these documents be prepared together, as the services, improvements, and assessments described in the management district plan must be supported by, and consistent with, the descriptions and analysis contained in the engineer’s report.

The management district plan and engineers report, together with resolutions adopted by the City Council during the establishment process, serve as a sort of “constitution” for a '94 Law BID. Though the '89 Law does not require a management district plan or an engineers report, the resolutions and ordinances establishing an '89 Law BID contain much of the information required of a management district plan and similarly serve as the “constitution.”

G. “The description of the program is typically created by a BID consultant.”

While BID programs can be designed in-house or by the business or property owners who propose establishment of the BID, it is typical for these programs to be created by a specialized BID consultant. Consultant fees are sometimes paid by the city and are sometimes paid by BID proponents. It is not uncommon to reimburse these costs from the initial BID assessments; however, if the BID is not successfully established, there will be no assessments from which to make reimbursements. In that event the city (or the proponent group) will have essentially lost the money it advanced.

Regardless of who pays the consultant’s bills, consultants typically work very closely with the proponent group as a starting point for designing the BID program. They then meet with other business and property owners at community meetings and via one-on-one contacts. A key goal of consultants is typically to develop a program that has wide support and is likely to be approved (or not to be protested) by affected business or property owners. It is not uncommon for BID

²⁵ Str & Hwy Code §§36621 and 36622. Note that pursuant to §36621(b), the management district plan must be available made available upon request during the petition process. Therefore, the management district plan must be completed prior to the commencement of circulation of the petition.

²⁶ Cal.Const. Art. XIII D, §4(b).

²⁷ Str & Hwy Code §36622 provides that “The management district plan shall include... (n) In a property-based district, a detailed engineer's report prepared by a registered professional engineer certified by the State of California supporting all assessments contemplated by the management district plan.”

consultants to continue in an administrative or consulting role once a BID is formed. Those services are typically funded with BID assessment proceeds.

H. “A city council can only establish a BID after the owners of the businesses or property have indicated their support (or lack of opposition) for the BID via a petition; a ballot or protest proceeding; or both.”

Establishment of a BID under the '89 Law requires the following steps:

1. The city council adopts a “resolution of intention” setting forth the details of the BID program, a date and time for a public hearing, and other information required by statute.²⁸
2. Within seven days of adopting the resolution of intention, a complete copy of that resolution must be mailed to each business owner in the territory of the proposed BID.²⁹
3. The city must mail to each business a “joint notice of public meeting and public hearing.”³⁰ This “joint notice” is typically mailed along with the copy of the resolution of intention.
4. No earlier than ten days after mailing the “joint notice,” the city council must hold “at least one public meeting at which [the city council] shall allow public testimony regarding the proposed...new...assessment.”³¹
5. No earlier than forty-five days after mailing the joint notice, and no earlier than seven days after the public meeting, the city council must hold a public hearing.³²
6. At the public hearing, the city council must consider oral and written protests.³³ If written protests meeting the requirements of Section 36524 of the Streets & Highways Code are received (and not withdrawn) from “the owners of businesses in the proposed area which will pay 50 percent or more of the assessments proposed to be levied”, then proceedings must be abandoned for no less than one year.³⁴ Otherwise, the city council may (but is not required to) adopt an ordinance establishing the BID.³⁵

Establishment of a BID under the '94 Law requires the following steps:

1. Proponents circulate a petition, and obtain signatures from “property or business owners in the proposed district who will pay more than 50 percent of the assessments proposed to be levied.”³⁶ If any proposed assessee will pay more than 40 percent of the assessment, that assessee’s obligations in excess of 40 percent do not count towards this calculation.³⁷ The '94 Law requires that the petition include a summary of the management district plan,

²⁸ Str & Hwy Code §36522.

²⁹ Str & Hwy Code §36523(b).

³⁰ Str & Hwy Code §36523.5 and Gov’t Code §§54954.6(a)(2) & 54954.6(c)

³¹ Gov’t Code §§54954.6(a)(1) & 54954.6(c)(1).

³² Gov’t Code §§54954.6(a)(2) & 54954.6(c)(1).

³³ Str & Hwy Code §36523.5.

³⁴ Str & Hwy Code §36525(a). However, “if the majority protest is only against the furnishing of a specified type or types of improvement or activity within the area, those types of improvements or activities shall be eliminated.” (Str & Hwy Code §36525(b)).

³⁵ Str & Hwy Code §36527. The city council may, at this time, make certain modifications to the proposed BID, such as eliminating territory from the BID or reducing all assessments. (Str & Hwy Code §36526).

³⁶ Str & Hwy Code §36621(a).

³⁷ *Ibid.*

which must include: (i) “a map showing the boundaries of the district;” (ii) “information specifying where the complete management district plan can be obtained;” and (iii) “information specifying that the complete management district plan shall be furnished upon request.”³⁸

2. The city council adopts a “resolution of intention.”³⁹
3. If the BID includes assessments against property, the city must conduct a property-owner assessment ballot proceeding pursuant to Proposition 218.⁴⁰ This involves mailing a notice and ballot to each affected property owner at least forty-five days prior to the public hearing. For more information about conducting assessment ballot proceedings, refer to the League of California City’s Proposition 26 & 218 Handbook.
4. If the BID includes assessments against businesses, the city must notice and conduct a public meeting and public hearing pursuant to Section 54954.6 of the Government Code, as outlined in the discussion of the ’89 Law.⁴¹
5. The city council holds a public hearing.
6. After conducting the public hearing, the city council must abandon proceedings in connection with an assessment against property if the ballots submitted (and not withdrawn) in opposition to the assessment against property exceed the ballots submitted (and not withdrawn) in support of that assessment.⁴² For purposes of this calculation, ballots are weighted by the amount of the assessment obligation of the parcel.⁴³
7. After conducting the public hearing, the city council must abandon proceedings for at least one year in connection with an assessment against businesses, if written protests meeting the requirements of Section 36623(b) of the Streets & Highways Code are received (and not withdrawn) from “the owners or authorized representatives of businesses in the proposed district that will pay 50 percent or more of the assessments proposed to be levied.”⁴⁴
8. Except to the extent it is required to abandon proceedings by virtue of protests or the assessment ballot proceedings, the city council may (but is not required to) adopt a resolution of formation that establishes the BID.⁴⁵

By adopting a local procedural ordinance, a charter city can change or eliminate these requirements, except for the assessment ballot proceeding requirements applicable under

³⁸ Str & Hwy Code §36621(b).

³⁹ Str & Hwy Code §36621(c).

⁴⁰ Str & Hwy Code §36623(a). Such proceedings are governed by Cal.Const. Art XIII D, §4 and Gov’t Code §53750 *et seq.*

⁴¹ Str & Hwy Code §36623(b).

⁴² Gov’t Code §§53753(e)(4) & 53753(e)(5).

⁴³ Gov’t Code §§53753(e)(4)

⁴⁴ Str & Hwy Code §36623(b).

⁴⁵ Str & Hwy Code §36625(a). The city council may, at this time, make certain modifications to the proposed BID, such as eliminating territory from the BID or reducing assessments. (Str & Hwy Code §36624). If only the assessment against property or the assessment against businesses has been blocked by protests or the ballot proceeding, and the other type of assessment has also been a part of the proceedings, then the other type of assessment may still be adopted as proposed. (Str & Hwy Code §36623(c)).

Proposition 218 to assessments against property and the notice, meeting, and hearing requirements applicable under Section 54954.6 of the Government Code to assessments against businesses.

It is not unusual for cities, including general law cities, to create additional procedural steps, such as a petition requirement for BIDs established under the '89 Law. One reason for imposing additional requirements can be to gauge stakeholder interest before using municipal resources to develop a BID program. Cities can impose such requirements because under both the '89 Law and the '94 Law a city council always has the discretion (i) not to adopt a resolution of intention to establish a BID and (ii) not to establish a BID. Consequently, city councils can impose additional requirements on BID proponents by refraining from taking action on a BID unless both locally requirements and statutory requirements have been met.

I. "Services and improvements are generally provided by a nonprofit organization, often called an 'owners' association'..."

Cities can structure BIDs so that the services and improvements are provided directly by the city. However, it is much more common for services and improvements to be provided either by an existing nonprofit organization (such as a chamber of commerce) or by a nonprofit organization formed by BID proponents specifically to serve the BID. Such a nonprofit is often called an "owners' association."

Owners' associations are governed by their articles of incorporation and bylaws. They usually are governed by a board of directors that is elected, in a self-administered proceeding, by the business or property owners subject to the assessment. Those owners usually constitute the membership of the association. The associations usually have an administrative staff (sometimes consisting of little more than an executive director), but often contract with specialized firms, such as security firms, to provide most services and improvements.

The '94 Law permits the management district plan to specifically identify an owners' association and to mandate the use of that association. Specifically, the '94 Law provides:

The management district plan may, but is not required to, state that an owners' association will provide the improvements, maintenance, and activities described in the management district plan. If the management district plan designates an owners' association, the city shall contract with the designated nonprofit corporation to provide services.⁴⁶

The '94 Law further provides that:

An owners' association is a private entity and may not be considered a public entity for any purpose, nor may its board members or staff be considered to be public officials for any purpose. Notwithstanding this section, an owners' association shall comply with the Ralph M. Brown Act [California's open meetings law] at all times when matters within the subject matter of the district are heard, discussed, or

⁴⁶ Str & Hwy Code §36651.

deliberated, and with the California Public Records Act for all records relating to activities of the district.⁴⁷

While the '89 Law does not include the concept of an “owners’ association,” the use of this type of nonprofit organization for delivery of services is common in connection with '89 Law BIDs. Additionally, the '89 Law does require the appointment by the city council of an “advisory board” which has duties in connection with annual proceedings.⁴⁸ It is common for city councils to appoint the board of directors of the owners’ association to serve in this role.

J. “...which is under contract to the city.”

The relationship between a city and an owners’ association is contractual.⁴⁹ Typically the core provisions of the contract between a city and an owners’ association are that:

- (i) the city agrees to pay the owners’ association the proceeds of the BID assessment, sometimes with a deduction for administrative and collection costs incurred by the city; and
- (ii) the owners’ association agrees to use those proceeds to fund BID services and improvements as set forth in the management district plan and/or other documents governing the BID.

These contracts also usually include most of the provisions that are typically found in municipal contracts, such as insurance, audit, termination, reporting, and similar provisions.

The '94 Law provides that “the city council may execute baseline service contracts that would establish levels of city services that would continue after a property and business improvement district has been formed.”⁵⁰

K. “The owners’ association also prepares an annual report, which is used by the city as the basis for annual decision making.”

Both the '89 Law and the '94 Law require that annual reports be filed with the City Council.⁵¹ These reports (i) must include specified information about the BID services, improvements, assessments and budget for the upcoming fiscal year and (ii) may propose changes to the BID.⁵²

⁴⁷ Str & Hwy Code §36612 (citations omitted).

⁴⁸ Str & Hwy Code §36530.

⁴⁹ See, e.g., Str & Hwy Code §36651 (“Owners’ association’ means a private nonprofit entity that is under contract with a city to administer or implement improvements, maintenance, and activities specified in the management district plan.”)

⁵⁰ Str & Hwy Code §36634. This provision does not make clear at what point in the process it is appropriate to enter into such a contract, or who would be the other party to that contract.

⁵¹ Str & Hwy Code §36533 (filing requirement for advisory boards under '89 Law) and Str & Hwy Code §36650 (filing requirement for owners’ associations under '94 Law). Under the '94 Law, no report is required before the first year of operations. (Str & Hwy Code §36650(a)).

⁵² *Ibid.* Care should be taken to ensure that any changes would not increase an assessment or expand the businesses or properties subject to assessment. Such changes are subject to the procedures set forth in Proposition 218 or Gov’t Code §§54954.6(a) & 54954.6(c).

Additionally, though not required, it is common for these reports to include a summary of achievements and activities from the concluding fiscal year.

Under the '89 Law, each fiscal year, in order to levy the assessment, the city council must conduct annual proceedings. These proceedings involve the following steps:

1. The city council approves the annual report, either as filed by the advisory board or with modifications.⁵³
2. The city council adopts a resolution of intention.⁵⁴
3. Not less than seven days before the date scheduled in the resolution of intention for a public hearing, the city clerk publishes the resolution of intention once in a newspaper of general circulation in the city.⁵⁵
4. The city council accepts oral and written protests and holds a public hearing.⁵⁶
5. Proceedings must be abandoned if written protests are received (and not withdrawn) from owners of businesses that will pay 50 percent or more of the assessments proposed to be levied.⁵⁷
6. Otherwise, the city council may adopt a resolution confirming the annual report (with or without changes) and levying the assessment for the fiscal year.⁵⁸

Under the '94 Law, after receiving the annual report, “the city council may approve the report as filed by the owners' association or may modify any particular contained in the report and approve it as modified.”⁵⁹ If the city council chooses to modify the report, it must conduct specific proceedings.⁶⁰

The '94 Law, unlike the '89 Law, does not require a public hearing and protest proceeding each year. However, each '94 Law BID has a limited duration (specified during establishment proceedings).⁶¹ The '94 Law provides that “Any district previously established whose term has expired, or will expire, may be renewed by following the procedures for establishment” set forth in the '94 Law.⁶² Consequently, while there is no annual public hearing, '94 Law BIDs are subject

⁵³ Str & Hwy Code §36533(c).

⁵⁴ Str & Hwy Code §36534(a).

⁵⁵ Str & Hwy Code §36534(b).

⁵⁶ Str & Hwy Code §§36535(a) & 36524.

⁵⁷ Str & Hwy Code §36525(a).

⁵⁸ Str & Hwy Code §§36525(b) & 36525(c).

⁵⁹ Str & Hwy Code §36650(c). It is not clear what happens if the city council rejects or takes no action on the report. Normally, it might be presumed that approval of the report is a prerequisite to the levy of the annual assessment. However, Str & Hwy Code §36625(b), relating to the adoption of the resolution forming a BID under the '94 Law, provides that “the adoption of the resolution of formation...shall constitute the levy of an assessment in each of the fiscal years referred to in the management district plan.” This language implies that, as soon as a BID is established, the assessment is formally levied for all fiscal years of the planned life of the BID.

⁶⁰ Str & Hwy Code §§36650(c) & 36636(c).

⁶¹ Str & Hwy Code §36622(h) (management district plan must include “the specific number of years in which assessments will be levied. In a new district, the maximum number of years shall be five. Upon renewal, a district shall have a term not to exceed 10 years. Notwithstanding these limitations, a district created pursuant to this part to finance capital improvements with bonds may levy assessments until the maximum maturity of the bonds.”).

⁶² Str & Hwy Code §36660(a).

to periodic renewal/reestablishment proceedings that include all the steps required for establishment proceedings.

III. Conceptual Issues

The formal relationship between the public and private entities associated with the establishment and operation of a BID can often be confusing to stakeholders.

Much of this confusion occurs because stakeholders are not aware of the distinction between a business improvement district (which is a city program) and an owners' association (which is a private organization under contract to the city). Stakeholders frequently assume that an owners' association *is* a business improvement district. They also assume, effectively, that (i) a business improvement district is a type of special district that possesses governmental powers and (ii) the board of directors of the owners' association serves as the legislative body of that special district.

These assumptions can lead stakeholders to understand the BID establishment and operating process roughly as follows:

When petitioned by business or property owner stakeholders, a city holds a mail ballot election regarding establishment of a BID. If the stakeholders approve the ballot measure proposing the management district plan for the BID, then the BID is incorporated as a nonprofit corporation. The stakeholders, as members of the new BID, then elect a board of directors to govern the BID. The board of directors levies the assessment as set forth in the management district plan; hires staff; provides the services and improvements described in the management district plan; and issues annual reports that are filed with the city. The city assists the BID by acting as the BID's agent for collection of assessments.

Under this model, which is not supported by the relevant statutes, the owners' association takes on the role of a special district, and the city is reduced to a role somewhat like (i) the role a local agency formation commission plays in the formation of a new special district and (ii) the role a county plays in the collection of municipal taxes.

Some common practices lead to this confusion. In everyday speech, it is very common for city staff, elected officials, stakeholders and the public to refer to the owners' association as "the BID," to the owners' association board of directors as "the BID board," and to the executive director of the owners' association as "the executive director of the BID." Also, many owners' associations confusingly have the same name as the BID they serve (for example the Central Downtown Business Improvement District, Inc. might serve a BID called the Central Downtown BID). BID proponents also tend to stress, when speaking in support of the establishment of a BID, the concepts of BID self-governance, stakeholder control, and independence from the city.

A problem with this conception of BIDs is not only that it is technically incorrect, but also that it is potentially undemocratic. The services provided by BIDs to businesses and property are paid for through assessments against those businesses and properties, but have the potential to impact

the general public. Employees and contractors of owners' associations often patrol, clean, decorate and improve streets, sidewalks and other public spaces in the territory of a BID. But those spaces are still municipal property that is open to all members of the public. The owners' association, which is a private, internally governed, organization of business and property owners, does not govern these public spaces and cannot create enforceable rules of conduct for these spaces. Yet owners' associations often employ uniformed security personnel who operate on these spaces.

Because the membership of the owners' association is usually comprised of the businesses and property owners who are assessed; owners' associations often see BID assessment proceeds as "their money" rather than "public money." However, BID assessments are not dues voluntarily paid by members to a voluntary association. Assessments are a mandatory levy that must be paid by all assessed businesses or property owners, regardless of whether the business or property owner supported the assessment, desires to pay, or has chosen to "join" the owners' association. The levy of these sorts of involuntary assessments, even if supported in a mail ballot proceeding by most of those subject to the assessment, is power possessed by cities, but not generally possessed by private organizations. Assessment proceeds are public funds that are earmarked for a specific purpose.

Ultimately, a BID is a city program and the owners' association provides services under contract to the city. This can potentially lead to municipal liability for decisions and actions taken by the owners' association. Although owners' associations typically are insured and execute indemnities in favor of a city, often owners' associations are cash poor, with the assessments as their main source of funding. As a practical matter, it is impossible to entirely eliminate all legal risk to the city.

It is important that city staff and elected officials are aware of potential stress points in the relationship between cities and the entities and stakeholders associated with a BID.

IV. Things to Pay Attention To

A. Notices and Documents

The process of establishing a BID involves the production of a number of documents that are provided to business and property owners to help them understand what is proposed. These documents can include notices, petitions, ballots and management district plans. It is generally in the public interest that these documents be as complete, factual and neutral in tone as possible, since these documents are, for the most part, issued or approved by the city. If these documents are not complete, factual and neutral in tone, business and property owners can feel misled.

However, these documents are often initially drafted by proponents of the proposed BID or by consultants who work closely with those proponents. The proponents have a strong interest in "selling" the proposed BID to stakeholders who might sign petitions, submit protests, or cast ballots in connection with the proposed BID. Therefore, it is important that city legal and

management staff review these documents not only to ensure that they comply with applicable legal requirements, but also that they are complete, factual, and have an appropriate tone.

B. Specificity of Management District Plan

As noted earlier, a management district plan (or other council-adopted document) serves as the “constitution” for a BID. Proponents often desire that the Management District Plan include much flexibility regarding how money can be spent. This desire is understandable, given the difficulty of planning a new, long term program. However, too much flexibility can allow for delivery of a program that might not seem to match what was promised. Too much flexibility arguably can also undermine the benefit analysis that legally justifies the amounts of assessments. City staff should consider the level of flexibility that the city is comfortable with.

C. Security Services

Security services can be especially controversial. It is a good idea for city and police department management to explore early in the process what kind of security is envisioned in order to determine their comfort level with those plans.

D. Administrative Expenses

There are two sorts of administrative expenses associated with a BID: (i) expenses incurred by the city and (ii) expenses incurred by the owners’ association. It should be determined early on to what extent city expenses, such as expenses associated with collection of assessments, administration of the owners’ association contract, or administration of annual proceedings, will be funded from assessment proceeds. Especially if the owners’ association is an organization that has functions beyond providing BID services and improvements, it can be important to define what owners’ association administrative expenses can be funded with assessment proceeds. These choices should be covered in detail in the contract between the city and the owners’ association.

E. Cash Flow

The collection method used for assessments will affect the schedule on which a city received assessment proceeds. In some cases, this schedule may not synchronize well with the BID’s fiscal year. Care should be taken to make sure that all interested parties have a good understanding of the schedule on which proceeds are likely to be available; as well as the means for their use. Many cities transfer proceeds to the owners’ association as they come in. Other cities maintain proceeds in a segregated account, and use that account to reimburse the owners’ association for expenses or directly pay bills incurred by the owners’ association. These choices should be covered in detail in the contract between the city and the owners’ association, and should be discussed with proponents early in the process.

F. Proposition 26 and 218 Risk

Legal challenges against new assessments are not uncommon, and legal threats against new assessments are quite common. If an assessment is under challenge, or likely to be challenged, a city will commonly consider “impounding” the assessment proceeds until the challenge (or threat of challenge has ended). Cities explore the idea of impounding because they realize that once proceeds are paid to the owners’ association and expended on services, those proceeds will not be available for refunds or satisfaction of judgments. Impounding thus buffers a city’s general fund from refund/judgement risk. Owners’ associations, understandably, do not like impounding, since they cannot pay for services if their funding is being held by the city. It is a good idea to discuss this issue early in the process and document impounding rights, if any, in the contract between the city and the owners’ association.

As a related issue, proponents and owners’ associations may be less risk adverse with respect to Proposition 26 and 218 risks than the city. City legal staff should be aware of this possibility when reviewing engineers reports and assessment methodologies.

G. Policy Development

Proponents often hope that the owners’ association will play a role in helping the city develop policies and programs that might be desired by businesses or property interests. City management and legal staff should consider their comfort level with using assessment proceeds for this purpose.

H. Designation of Owners’ Association

The management district plan for a ’94 Law BID can designate a specific nonprofit organization that will serve as the owners’ association. Such a designation obligates the city to contract with that nonprofit. Theoretically, it could be very difficult for a city negotiate a contract with an owners’ association if it has no legal alternative to using that association. Furthermore, if the city is locked to a specific nonprofit, it may be difficult for the city to effectively enforce the contract. Consequently, city management and legal staff should consider whether such a designation in the management district plan is appropriate.

I. Baseline Services

Business and property owners often worry that cities will see the establishment of a BID as an opportunity to reduce existing services provided by the city within the territory of the BID. During the establishment process, it is common for proponents to ask cities for a formal contractual guarantee that these “baseline” services will be maintained if the BID is established. Such a guarantee, if given, would tie the hands of future city councils with respect to the expenditure of city general funds. As BIDs have long lives, and as it is impossible to predict city revenues and service levels into the far future, it is important for cities to give very careful consideration to any decision to grant such a guarantee. It can be very difficult to draft language that ensures baseline services within a BID, but does not interfere with future decisions about how to respond to future budgetary constraints or changes to city services.

J. Internal Organization of Owners' Association

Like any private corporation, an owners' association is governed by its articles of incorporation and bylaws. These documents determine who is a member of the corporation and how the corporation selects its board of directors. Outside of the BID context, a city generally has little interest in the internal organization of corporations that it contacts with. However, businesses and property owners subject to assessment in connection with a BID generally expect that the board of directors of an owners' association will be selected in an inclusive process that fairly involves all those subject to assessment. Cities therefore may want to have input into the provisions included in the bylaws.

As a related issue, despite efforts of owners' association officers and management staff to encourage stakeholder participation, owners' associations (especially owners' associations associated with small BIDs) often become dominated by a relatively small number of stakeholders who actively attend meetings and volunteer their time to work on association management or projects. There is a tendency for stakeholders who are not part of this dominant group to seek help from the city in solving perceived "leadership" problems with the association. City management and elected officials should be aware of this dynamic, and should consider the extent to which they are willing to become involved in helping to resolve these sorts of conflicts.

K. Meetings and Records

Business and property owners who serve on owners' association boards often are not used to the type of open meeting and open records requirements that have become second nature to long-time public officials and staff. Small owners' associations often have extremely small staffs, and therefore depend on board members to volunteer their time to directly perform management and operational functions. This dynamic can make it hard for board members to comply with open meeting laws. City management and legal staff should be aware of the possibility of this dynamic, and should consider the extent to which they will attempt to provide open meetings and open records training and support to owners' associations.

Where the nonprofit organization has functions that are unrelated to the BID for which it is owners' association, it can be difficult for the organization to determine which of its meetings and records are subject to open meeting and open record requirements.

L. Types of Businesses

Where the area to be served by a proposed BID is large or diverse, it is common for some types of businesses (or the owners of property occupied by those businesses) to be much less supportive of a proposed BID than others. For example, it is common for doctors, dentists and other professionals who don't depend on "drop-in" customers to be less supportive of a BID than retailers and restaurants. Similarly, when a business area is centered on a square or park, businesses that are relatively distant from the area center are often less interested. Often these businesses (or their landlords) benefit less from proposed services and improvements, and are

therefore subject to a lower assessment. However, despite a relatively low assessment, they may still remain opposed.

The petition, ballot proceedings, and protest rules applicable to BIDs all weight the “vote” (or voice) of a stakeholder by the amount of his or her assessment. This potentially means that a small number of stakeholders will account for a large majority of the weighted voice. Thus, it is sometimes possible for a BID to be established despite the existence of a large number of small stakeholders. City Management staff and elected officials may want to be aware of the possibility of this dynamic. A city council always has the option to not establish a BID, even if the BID has survived petition, ballot proceeding or protest hurdles.

V. Conclusion

BIDs can be an exciting type of public-private partnership. However, as noted in this paper, they can present a number of challenges for cities.

Many of these challenges can be mitigated if city management, city legal staff, and elected officials are aware of potential challenges and start thinking about them *early* in the process. As a practical matter, most issues are most effectively addressed by discussion before the management district plan is prepared and before the petition goes into circulation. It is not a good idea to rely entirely on the efforts of proponents, BID consultants, or junior city staff during the pre-petition phase. Doing so can have the effect of delegating key public policy choices to the proponent group. Therefore, it is a good idea to have management staff (including the police chief if a security program is proposed) active early on in meeting with proponents and BID consultants and to have management and legal staff carefully review the management district plan before it goes to petition.