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Office of Legislative Council
Re: H.508 (Town of Bennington); Downtown District

H.508 (Town of Bennington): Downtown District Amendments

I. Past and Present Amendments to the Bennington Downtown District

H.508 proposes to amend § 506 (Creation of Bennington Downtown District) of the Bennington charter to allow the Select Board to change the area of the Downtown District. Currently, the territorial limits of the District may be changed only upon a majority vote of the voters at an annual or special meeting. The amendment would allow the Select Board to vote to change the area of the District after a minimum of one public hearing. H.508 also proposes to amend § 510 to remove the District tax exception for “properties used exclusively for residential purposes” and replace it with “owner-occupied residential properties.”

Past charter amendments altered the District from a temporary special district to a permanent improvement district. Act No. M-6 of 2005 repealed § 207 of the charter, which expressly provided for the default expiration of the Downtown District. Act No. M-6 also removed the District Commission and reserved District powers to the Select Board.

II. Distinguishing the Districts, Assessments, and Taxes

A. Assessment Districts v. Service Districts

State law provides very few bright line distinctions between the subordinate “districts” of local government. In general categories, local districts include: assessment districts, improvement districts, maintenance districts, special taxing districts, and special service districts. With the exception of special service districts, most of these local units fall under the umbrella term of “assessment district.” To understand the distinction between “assessment districts” and “service districts” in Vermont law, this section will note some differences between fire districts formed under 20 V.S.A. chapter 171, and assessment districts delimited under 24 V.S.A. chapter 87.

One distinction that may be drawn is that special service districts are “units of government” that have independent officers, a legislative body, or governing board; generally, “assessment districts” are defined boundaries within which a tax, assessment, or fee is levied by the municipality’s legislative body.¹ In Vermont, the powers of a fire district are reserved to a prudential committee.² Fire districts are required to elect a clerk, a treasurer, and a collector of taxes; and may vote to authorize the appointment of a district manager.³ In contrast, the legislative body of a municipality establishes an assessment district under 24 V.S.A. chapter 87 and levies the associated tax. Chapter 87 does not contemplate the establishment of an independent body or officers to operate the assessment district.

A second distinction that may be drawn is that special service districts have corporate powers; generally, assessment districts do not. In Vermont, fire districts may: 1) establish taxes for certain services;

¹ Sato & Van Alstyne, *State and Local Government Law* 5-8 (2d. ed. 1977).

² 20 V.S.A. § 2601.

³ 20 V.S.A. § 2485; 20 V.S.A. § 2601.

2) expend funds for district purposes;⁴ 3) contract for the preservation of property;⁵ 4) purchase and hold property real and personal property;⁶ 5) exercise eminent domain for the preservation of its fire apparatus;⁷ and 6) sue and be sued.⁸ Assessment districts have no corporate powers set by 24 V.S.A. chapter 87.

The distinctions between service districts and assessment districts matter when evaluating the power to expand district boundaries and levy assessments upon property owners. Service districts supply general needs and apply a general tax.⁹ Assessment districts are temporary and impose special assessments on a limited area for the payment of local improvements.¹⁰

B. Special Assessment v. Taxation

It is generally stated that taxes, such as ad valorem property taxes, are levied upon individuals and property for the support of government.¹¹ In contrast, special assessments are imposed only on property in a delineated area for the payment of local improvements. Assessments are special and local impositions that are levied “only on those properties which receive the benefit of a particular public improvement.”¹²

Vermont law requires that a special assessment be tied to a “public improvement which is of benefit to a limited area of a municipality to be served by the improvement[.]”¹³ Further, special assessments “may be apportioned among the properties to be benefited thereby according to [grand list value], the frontage thereof, the added value accruing to each property by reason of the public improvement [...] or by any method [...] which results in a fair apportionment of the cost of the improvement in accordance with the benefits received.”¹⁴ In reviewing the provisions of 24 V.S.A. chapter 87 and conflicting provisions of a charter, the Vermont Supreme Court has stated that “the authority delegated by the Legislature to a municipality to levy special assessments is strictly construed[.]”¹⁵

Vermont law aligns with the general principles of the “benefit conferred theory.” The benefit conferred theory states that the power to impose a local assessment is founded in the benefit that is

⁴ 20 V.S.A. § 2601.

⁵ 20 V.S.A. § 2604.

⁶ 20 V.S.A. § 2605.

⁷ 20 V.S.A. § 2606.

⁸ 20 V.S.A. § 2607.

⁹ See In re Orosi Public Utility District, 196 Cal. 43 (1925) (Stating: “There is an obvious distinction to be drawn between an act providing for the formation of an assessment district, which practically authorizes property owners without notice to place burdens on the property of others for the sole purpose of improving their own property, and an act providing for the formation of a quasi-municipal corporation or a municipality.”).

¹⁰ See First Baptist Church of St. Paul v. City of St. Paul, 884 N.W.2d 355, 359 (“Determining whether a particular charge imposed by a city government is an exercise of the taxing power or the police power requires a reviewing court to examine the charge’s ‘primary purpose.’ If ‘a city’s true motivation was to raise revenue—and not merely to recover the costs of regulation,’ the charge is a tax. The city’s characterization of the nature of the charge is relevant, but not conclusive.”).

¹¹ *Id.* See also, Martin v. City of Tigard, 72 P.2d 619 (2003) (Discussing difference between special benefit conferred on specific properties and general benefit conferred on community at large).

¹² Kirchner v. Giebink, 150, Vt. 172, 182 (1988).

¹³ 24 V.S.A. § 3252.

¹⁴ 24 V.S.A. § 3253.

¹⁵ Downtown Rutland Special Tax Challengers v. City of Rutland, 159 Vt. 218, 220 (1992).

conferred upon the burdened property owner.¹⁶ When a special assessment is used to support general government, the result may be a confiscation of property that may violate constitutional protections against takings, due process, or the proportionality of taxes.¹⁷ However, the constitutional issues may be avoided or alleviated when a municipality assesses a special fee pursuant to a municipal police power rather than an assessment under the taxing power.¹⁸

III. Vermont Statutes Relating to Improvement Districts

A. State Designation of Downtown Development Districts

Under 24 V.S.A. § 2793, a municipality may apply to the Vermont Downtown Development Board to have an area within the municipality designated as a “downtown development district.” The State Board shall designate a downtown district if it finds that the municipality has satisfied the criteria set forth in 24 V.S.A. § 2793(b). As part of the findings, the Board considers whether the municipality has “provided a community reinvestment agreement” that has been executed by authorized representatives of the municipality, business and property owners, and community groups that support downtown interests. The “community reinvestment agreement” must contain “a source of funding and resources necessary to fulfill the community reinvestment agreement” which may be demonstrated by a commitment to implement “a special assessment district created to provide funding to the downtown district[.]”¹⁹

If the State Board designates a downtown district pursuant to 24 V.S.A. § 2793, a downtown development district and projects within the district shall be eligible for certain incentives.²⁰ In addition to other incentives, a designated downtown district is provided “the authority to create a special taxing district pursuant to chapter 87 of this title for the purpose of financing both capital and operating costs of a project within the boundaries of a downtown development district.”²¹

For the purposes of 24 V.S.A. chapter 76A (Historic downtown development), a “special assessment” is defined as:

¹⁶ Barnes v. Dyer, 56 Vt. 469 (1884) (stating “In our statutes providing for general taxes, a fixed standard of apportionment has always been adopted, securing uniformity, as far as practicable, in theory at least, in respect to persons and property within the jurisdiction of the body imposing the taxes. *There is greater reason for adhering to this rule in respect to provisions for special assessments.* When the money of the few is taken for the benefit of the whole, it is in substance the exercise of despotic power. It is justice when an equivalent is given. In the case of a local improvement, there is an equivalent for the assessment when it only equals the special benefit to the property benefited. But it is the right of the citizen to have the law, which reaches into his pocket specially, so guarded as to secure him approximate justice according to legal and constitutional principles.”)

¹⁷ First Baptist Church of St. Paul v. City of St. Paul, 884 N.W.2d 355. See also Allen v. Drew, 44 Vt. 174, 188 (1872) (*In dicta* “We have no doubt that a local assessment may so transcend the limits of equality and reason, that its exaction would cease to be a tax, or contribution to a common burden, and become *extortion* and *confiscation*. In that case, it would be the duty of the court to protect the citizen from *robbery* under color of a better name.”) (Emphasis not added).

¹⁸ *Id.* See also Kirchner v. Giebink, 150, Vt. 172, 183 (1988) (stating that where statute delegates a narrow, limited authority to impose a fee or user charge, the court will defer to broader provisions granting power to impose special assessment).

¹⁹ 24 V.S.A. § 2793 (b)(2)(C)(i).

²⁰ 24 V.S.A. § 2794.

²¹ 24 V.S.A. § 2794(a)(14).

“a tax assessment pursuant to chapter 87 of this title or a municipal charter, among all commercial owners, or a significant portion thereof, within a downtown development district to impose an incremental tax assessment above the amount otherwise assessed, for the purposes of supporting downtown interests.”²²

24 V.S.A. § 2791 does not separately define “special taxing district” as that term is used in § 2794(a)(14).²³

B. Chapter 87 Special Assessment Authority

Under 24 V.S.A. chapter 87, a municipality may make a special assessment “for the purchase, construction, repair, reconstruction, or extension of a water system or sewage system, or any other public improvement which is of benefit to a limited area of a municipality to be served by the improvement[.]”²⁴ Special assessment is defined as “a tax assessed against one or more properties receiving the benefit of a particular public improvement, as distinguished from a tax on the entire grand list of a municipality.”²⁵ The special assessment may be apportioned among the benefitted properties by any method “which results in a fair apportionment of the cost of the improvement in accordance with the benefits received.”²⁶

A special assessment shall only be levied: 1) by vote of a majority of the qualified voters of the municipality; or 2) “if all the owners of record of property to be assessed, or of any interest therein, consent in writing to the assessment.”²⁷ Further, “the vote or the consent shall include approval of the method of apportionment of the assessment.”²⁸

C. Development Districts Established in Charter

City of Burlington, 24 App. V.S.A. ch. 3, §§ 321 to 327

The City of Burlington establishes the boundaries of the Downtown Improvement District and the Church Street Marketplace District in § 321 of the City charter. § 323 provides that the boundaries of the Church Street Marketplace District may be expanded upon recommendation of the Church Street Marketplace Commission. The boundaries may only be expanded if all of the following conditions are met:

- “(1) Notification of the consideration of the expansion is given in writing to all persons owning property in the contemplated area of expansion;
- (2) A legally warned public hearing on the question is conducted;

²² 24 V.S.A. § 2791(8).

²³ Note: the sections governing village downtown designation (24 V.S.A. § 2793a) and new town center development districts (24 V.S.A. § 2793b) also use the term “special taxing district” to describe a district established pursuant to 24 V.S.A. chapter 87 for the purpose of financing capital and operating costs of a district project.

²⁴ 24 V.S.A. § 3252.

²⁵ 24 V.S.A. § 3251(4).

²⁶ 24 V.S.A. § 3253.

²⁷ 24 V.S.A. § 3254.

²⁸ *Id.*

(3) Two-thirds of the membership of the City Council present and voting approve the extension; and

(4) The expanded boundaries do not extend beyond the boundaries of the Downtown Improvement District above defined.”²⁹

§ 325 of the charter provides that the annual Downtown Improvement District tax shall be as recommended by the Commission and assessed by the City Council. Burlington’s charter provides for common area fees in § 326, and sets out a procedure for the determination of District fees and their relationship to the benefits conferred by the District:

“The City Council after public hearing and after considering the advice of the Commission shall establish standards to aid in the determination of the benefits described herein and shall levy such common area fees upon such properties in the proportion that it judges such properties to be benefited by the construction and/or operation of the Marketplace. An important but not necessarily exclusive factor in determining the extent to which the fair market value of such property has been enhanced by virtue of the construction and/or operation of the Marketplace. The amount raised by such assessments shall be appropriated to the Church Street Marketplace District.”³⁰

City of Rutland, 24 App. V.S.A. ch. 9, § 36.4

The City of Rutland is granted the power to assess impact fees and special benefit assessments within parts of the City that are designated by the Board of Aldermen.³¹ The City charter also provides an express exception from the general provisions set out in 24 V.S.A. chapter 87:

“Notwithstanding the purposes for which special assessment may be made under 24 V.S.A. § 3252, the City of Rutland may adopt special assessments for the purpose of funding special marketing management and promotional programs and neighborhood or district programs in accordance with the provisions of the Rutland City charter. Notwithstanding the assessment procedure under 24 V.S.A. § 3254, establishment of assessment district boundaries, modification thereof, imposition of a special assessment, and determination thereof, may be undertaken by the Board of Aldermen or the Rutland Redevelopment Authority by ordinance. Special assessments may be collected by the Rutland City Treasurer or the Rutland Redevelopment Authority under the provisions of 24 V.S.A. § 3255, in full within 90 days of imposition, in installments over a term not to exceed 10 years, or annually under a continuing resolution of the Rutland Board of Aldermen or the Rutland Redevelopment Authority.”³²

Town of St. Johnsbury, 24 App. V.S.A. ch. 151, § 2

The Town of St. Johnsbury charter establishes the boundaries of the Downtown Improvement District in charter. The St. Johnsbury charter does not contain a procedure for the expansion of the District. St. Johnsbury levies common area fees upon “the owners of taxable properties located in the

²⁹ 24 App. V.S.A. ch. 3, § 323(a).

³⁰ 24 App. V.S.A. ch. 3, § 326(b).

³¹ 24 App. V.S.A. ch. 9, § 36.4(3).

³² 24 App. V.S.A. ch. 9, § 36.4(4).

District, excepting such portions of properties used for owner-occupied residential purposes.” The charter establishes that common area fees shall be apportioned as:

“(i) A flat fee per taxable parcel identifiable on the grand list. [or]

(ii) A flat fee per taxable parcel plus a formula based on [...] square footages of commercial space, number of apartments, square footage of lot size, linear footage of frontage, number of parking spaces provided, number of parking spaces [...] or any equation which raises fees adequate to meet an annual Commission budget with a method that reasonably apportions costs to property owners in relation to the benefit that accrues to them.”³³

³³ 24 App. V.S.A. ch. 151, § 2(4).