Tax Increment Financing: Louisiana Goes Fishing for New Business

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I. INTRODUCTION

Promoting economic development is a challenging task for politicians. Voters lean on their representatives to bring new businesses, new jobs, and new money into local economies. Spurred by pressure from their constituents, politicians creatively work to develop incentives to attract new growth. Unfortunately, politicians can get too creative and devise development plans that are more costly than beneficial. In Denham Springs, Louisiana, the politicians got too creative.
Politicians in Denham Springs recently took advantage of a new law in Louisiana that allows local government bodies to give large financial incentives to new businesses. The politicians plan to spend over fifty million dollars on the development of a Bass Pro Shops in Denham Springs. The constitutionality of this act has been challenged by a local taxpayer in the case, *Denham Springs Economic Development District v. All Taxpayers*,¹ which has quickly made its way to the Louisiana Supreme Court. The case gave the supreme court the opportunity to define the constitutional boundaries for legislative assistance to economic development in Louisiana.

Specifically, the case raises two constitutional questions. First, can voter-approved taxes be spent in any manner that politicians choose? Second, does the Louisiana Constitution permit state funds to be given to private businesses in the name of economic development?

Both the trial court and the first circuit court of appeal found in favor of the broad power of government to encourage economic development. The Louisiana Supreme Court reversed, but its decision avoided the constitutional issues by resolving the dispute on narrow statutory grounds. The end result is that a cloud of uncertainty still surrounds the future of tax increment financing in Louisiana.

Part II of this comment examines the complicated tax increment financing program Denham Spring hopes to use to develop the Bass Pro Shops. It details the statutes authorizing the proposal and discusses how other circuits have resolved challenges to the law. Part III discusses the Bass Pro Shops decision. This comment then analyzes the constitutional issues left unanswered by the court and focuses on why these issues must be resolved. Finally, this paper concludes by demonstrating the ineffectiveness of Louisiana's tax increment financing laws as a tool for economic development and suggests possible standards the state could use to ensure the program is applied fairly and efficiently.

II. TAX INCREMENT FINANCING

Even before Hurricanes Katrina and Rita, Louisiana's economy had room for improvement. In 2004, Louisianians earned on average $27,219. Comparably, residents in the southeastern United States had a per capita income of $29,754 during the same

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¹ Denham Springs Econ. Dev. Dist. v. All Taxpayers, 04-1674 (La. 02/04/05), 894 So. 2d 325.
period.\(^2\) Thus, residents of Louisiana earned $2,535 less than residents of similarly situated states.\(^3\) Especially in light of the recent natural tragedies that have befallen the state, Louisiana’s economy has drastic room for improvement.

Encouraging economic growth is always a difficult proposition, with potential solutions always generating considerable opposition. The Louisiana Legislature recently designed controversial legislation with the aim of creating growth. The new solution is called tax increment financing, which permits government subdivisions to use tax revenues to offer financial incentives to private businesses in hopes of encouraging new growth.\(^4\)

A. How It Works

Tax increment financing is a method of trapping incremental increases in tax revenues generated from new businesses and using them to fund local government projects. Generally, a state passes enabling legislation allowing city and parish governments to create special taxing districts.\(^5\) The district can be as small as a single building or as large as the government body creating it. The district then issues bonds and spends the subsequent revenue developing the area. Presumably the investments will bring new growth and new tax revenues. The districts use these new revenues to finance the bonds.\(^6\)

When a district is created, tax dollars are essentially divided into two streams. The first stream represents the amount of money the district received in taxes before the creation of the district. The second stream represents all increases in tax collection in the district after it is created. This amount collected in the first stream remains constant. Thus, if a district generated one million dollars in tax revenue before the creation of the district, local taxing authorities will continue to collect one million dollars in tax revenue. The amount in the second stream depends upon the level of new tax dollars collected. Using the one million dollar example,


\(^3\) Comparable southeastern states include: Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, Tennessee, Virginia and West Virginia.


\(^6\) Id.
any taxes collected in excess of one million dollars goes into this stream. Presumably increases are attributable to the district’s investments, so the district should be able to use this money to fund the redevelopment projects.7

B. How It Developed

In response to decreases in funding for urban renewal projects, states began looking for creative ways to use local tax dollars to generate growth in blighted districts. At the forefront of this movement was California.8 As people and wealth migrated out of city centers, California faced aged and deteriorated urban areas.9 In an effort to revitalize these areas, the state enacted the California Community Redevelopment Act of 1945. The Act allowed municipalities to create agencies for the purpose of attacking these problems. The legislation’s major problem was its lack of funding to the agencies.10 A solution to the lack of funds came in the form of the Federal Housing Act of 1949.11 This program provided grants and loans for urban redevelopment. The Act required that a locality must only furnish one-third to one-fourth of the overall costs of the project. Cities with money took advantage of this program, but many still searched for ways to increase funding for the projects.12

In 1951, California codified the Community Redevelopment Act and renamed it the Community Redevelopment Law.13 This law further enacted provisions that authorized tax increment financing.14 It would take another twenty years before tax increment financing became popular in other states.

As new leadership took over in the 1970s, funding for programs became tight. President Nixon put an eighteen month moratorium on all new federally funded urban renewal projects and, in the 1980s, President Reagan’s supply-side policies further reduced funding. In response, states began authorizing localities to

7. Id.
9. Id.
10. Id.
12. Tepper, supra note 8, at 36.
use tax increment financing as a way to trap local tax dollars for redevelopment programs. Today, nearly every state authorizes tax increment financing.\(^{15}\)

\section*{C. How It Works in Louisiana}

Louisiana's Cooperative Economic Development laws authorize tax increment financing.\(^{16}\) Since the last legislative revisions in 2002, four different categories of laws authorize tax increment financing. The first contains general rules that broadly authorize tax increment financing.\(^{17}\) The second authorizes tax increment financing in larger parishes and municipalities.\(^{18}\) The

\begin{itemize}
\item \(^{16}\) La. R.S. 33:9022 (2002).
\item \(^{17}\) La. R.S. 33:9020-9037.
\item \(^{18}\) La. R.S. 33:9033.3 provides special rules for municipalities with a population between 190,000 and 215,000 or over 400,000 and for parishes with a population between 400,000 and 475,000. La. R.S. 33:9033.3(A), 9033.3(N) (2002). Based on the 2000 census, this exception appears to only apply to Shreveport and New Orleans and the Parishes of East Baton Rouge and Jefferson. See United States Census 2000, US Census Bureau, http://www.census.gov.
\end{itemize}

These strange exceptions are indicative of the complexity and absurdity of these articles. Based on the legislative history, these articles are more a result of political pork-barreling than rational reasoning. For example, La. R.S. 33:9033.3 when first enacted only applied to municipalities with a population between 190,000 and 215,000. The bill was introduced by a group of representatives from Shreveport and, not surprisingly, Shreveport was the only city that met the article's criteria. 1998 La. Acts No. 56, § 1.

The legislature changed the law twice in 2001. The first revision added parishes with populations between 400,000 and 475,000 to the list of entities that can use this financing. The Act was introduced by a group of representatives and a Senator from Orleans, Jefferson, and East Baton Rouge Parishes. 2001 La. Acts No. 1002, § 1. Naturally, these were the only parishes that met the new criteria. However, the 2000 census indicates that Orleans Parish has a population of 484,674, so it was off the list. A second amendment added a provision so that municipalities with a population over 400,000 could use this financing. 2001 La. Acts No. 1034, § 1. This amendment added the city of New Orleans.

The next set of changes came in 2002 when a group of legislators from smaller districts introduced legislation creating La. R.S. 33:9038.1-9038.9. Rather than revisiting the entire tax increment scheme, they enacted new
third, added in 2002, allows tax increment financing in most other parishes and municipalities.\(^{19}\) The final category creates special districts throughout the state and grants them tax increment financing authority.\(^{20}\) The Bass Pro Shops project in the city of Denham Springs is controlled by the third category of laws.

The four categories of laws authorizing tax increment financing allow the use of two types of taxes to fund these projects—ad valorem taxes and sales taxes.\(^{21}\)

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*legislation that only applied to governmental subdivisions with populations below 200,000.*\(^{20}\) 2002 La. Acts. No 147, § 1. The law substantially differs from Revised Statutes 33:9033.3 (2002).

Louisiana’s tax increment financing system aims to let local public bodies encourage growth within their boundaries. Subdivisions encourage growth by making it more attractive to locate within their district than in neighboring districts. The result is that subdivisions begin competing with one another for new business opportunities. Realizing this reality, legislators have designed each new series of laws to allow their home towns to offer greater incentives than neighboring subdivisions. The result is a series of disjointed laws that place different districts on different playing fields.

The Legislature attempted to remedy the confusion in this area in 2004 with the passage of Louisiana Acts 897. The act amended the most recent tax increment financing law by eliminating the “with a population of not more than 200,000” requirement. Had the Legislature not enacted two other exceptions, this would have made the statute applicable to all parishes and municipalities. First, a specific exclusion was added to prevent municipalities with a population between 190,000 and 205,000 from using these provisions to finance hotel or convention center projects. This exception was specifically aimed at Shreveport’s planned convention center and hotel. Second, the act specifically excluded parishes with a population between 120,000 and 130,000. As of the 2000 Census, the only parish with such a population was Rapides Parish. In 2005, the legislature made several limited exceptions for Rapides Parish. 2005 La. Acts. No. 386, § 1; see also La. R.S. 33:9038.11.

21. Sales taxes are defined as those taxes “collected each year on the sale at retail, the use, the lease or rental, the consumption and storage for use or consumption of tangible personal property, and on sales of services, all as defined in R.S. 47:301 et seq., or any other appropriate provision or provisions of law as amended.” La. R.S. 33:9033.3(A)(2002), 9038.4(A)(2) (Supp. 2005). Louisiana Revised Statutes 9038.4 also allows subdivisions to use “hotel occupancy taxes, occupancy taxes, or similar taxes, or any combination of such taxes, levied upon the use or occupancy of hotel rooms,” as a means of financing tax increment financing projects. La. R.S. 33:9038.4(A)(2) (Supp. 2005).
1. Ad Valorem Taxes

Originally, local governments could only use ad valorem taxes to finance tax increment financing programs. Louisiana adopted tax increment financing in 1979. Louisiana Revised Statutes 33:9032 amended the laws controlling cooperative endeavor agreements by allowing the use of tax increment financing to fund cooperative endeavor agreements.

Louisiana Revised Statutes 33:9032 generally authorizes ad valorem increment financing, but this statute is short and undetailed. It fails to outline what procedures governmental subdivisions must follow and gives no direction regarding when this method should be used. The statute also requires that any bond proposals using ad valorem increments be put before the voters of the district. The lack of detail and the voter approval requirement make the statute unappealing to local politicians. As a result, Revised Statutes 33:9032 has had little significance.

In 2002, the Louisiana legislature enacted Revised Statutes 33:9038.3, which authorized a broader use of ad valorem increment financing. Originally, the statute only applied to municipalities and parishes with a population of less than 200,000, but this was amended in 2004 and 2005 to encompass the majority of Louisiana. Revised Statutes 33:9038.3 permits the use of ad valorem tax increments to either directly finance development projects or indirectly guarantee that development projects will be financed. An ad valorem tax increment is defined as "that portion of the ad valorem tax revenues for any or all participating tax recipient entities collected each year from property located within an economic development district which exceeds the revenues that would be collected for such tax recipient entities if

24. Id. Since its inception, Louisiana Revised Statutes 33:9032 has been left virtually untouched. In 1990, the legislature made several minor alterations to the article. Louisiana Revised Statutes 33:9035 was added, which restricts where districts can spend their revenues, and allows tax increment financing to be combined with other financing methods to fund projects.
27. La. R.S. 33:9038.1. The statute places specific limitations on the City of Shreveport and Rapides Parish.
such property were assessed at its value as of the year immediately prior to the year in which the district was established." 29 The statute also requires voters within the development area to approve the use of the tax increments. 30 Finally, there is a potentially major restriction on the size of the project. The statute restricts the aggregate amount of bonds that can be issued for a project. The amount of principle and interest accruing in a calendar year cannot exceed 75 percent of the tax increments estimated to be received in the first full calendar year after the project is completed. 31

Despite the new developments in the law, ad valorem financing is not the preferred method of financing. First, ad valorem taxes benefit local subdivisions. If ad valorem taxes are used to finance a project, only local government bodies make a commitment to the project. When sales taxes are used, the state can agree to pledge the four percent sales tax it receives. Second, the statute specifically requires voter approval, which is time consuming and costly. Third, ad valorem are directly paid by residents of the taxing district. Other taxes, e.g. sales and use taxes, are paid by whomever shops in the taxing district. Thus, by using ad valorem taxes, residents of a taxing district incur the full cost of the economic development. Finally, ad valorem taxes are controversial. Reassessing the value of property is time consuming, costly and subjective. Avoiding these taxes altogether is generally preferred by local politicians. As a result of these considerations, recent tax increment financing projects have shied away from using ad valorem taxes.

2. Sales and Hotel Occupancy Taxes

Since 1997, Louisiana's legislation has primarily focused on using sales tax increment financing. The original article authorizing this scheme appeared in 1990. Like the ad valorem statutes, the original sales tax statute was short, undetailed, and offered little help to government subdivisions. 32 The two more recent statutes offer more guidance. The first governs certain municipalities and parishes with larger populations, while the second provides regulations for most other governmental subdivisions. 33

29. Id.
30. Id.
31. La. R.S. 33:9038.3(F).
The rules governing the two most recent sales tax increment statutes are different in only a few respects. First, the more general provision allows districts to use hotel occupancy and other related taxes in addition to sales taxes to fund tax increment financing programs. The statutes limit larger subdivisions to sales tax revenues. Second, the statute governing larger entities restricts itself to municipalities with a population between 190,000 and 215,000 or over 400,000 and to parishes with a population over 400,000. The other statute authorizes almost every subdivision in Louisiana to use sales tax increment financing. Third, under the general statute, all governing authorities in a taxing district can join together and pool their collective tax increment revenues. The larger parishes and municipalities are not given this option. Fourth, the general statute permits government to divert the tax increments into a separate fund and then spend the money as it accrues. Therefore, these bodies have more flexibility in how they choose to finance their programs; larger subdivisions are not given this option. Finally, larger subdivisions are restricted to issuing revenue bonds having combined annual principal and interest payments of less than seventy-five percent of the first year’s estimated sales tax increments. The general statute has a three-part framework, which determines the maximum size of their bonds.

37. La. R.S. 33:9033.3(A), 9033.3(N) (2002).
38. La. R.S. 33:9038.1 (Supp. 2005). The statutes place limits on the City of Shreveport and Rapides Parish. For a further discussion of these restrictions see supra note 18.
42. La. R.S. 33:9033.3 (2002).
43. La. R.S. 33:9033.3(F) (2002).
44. La. R.S. 33:9038.4(F) (Supp. 2005):

[T]he amount of principal and interest falling due in any calendar year shall never exceed the greater of (1) eighty-five percent of the amount of the pledged sales tax increment estimated by the issuer to be received in the first full calendar year after the economic development project has been completed, (2) eighty percent of the amount of the pledged sales tax increment estimated by the issuer to be received in the second full calendar year after the economic development project has been completed, or (3) seventy-five percent of the amount of the pledged sales tax increment estimated by the issuer to be received in the third full calendar year after the economic development project has been completed.
3. Other Rules

Several limitations restrict the use of all types of tax increment financing. The law only allows districts to spend money on "reasonable or necessary costs incurred incidental to or in furtherance of an economic development project." The Revised Statutes also allow subdivisions to pool other money with their tax increment financing revenues to fund their projects. However, Louisiana does not have a blight or a causal connection requirement. Many other states condition tax increment financing on a finding of either blight within the district or that economic development will only occur if tax increment financing is used.

Reflecting tax increment financing's origins as a means to combat urban development, eighteen states use blight as a prerequisite to forming a tax increment financing district. Most states quantify the term blight by requiring a district to demonstrate that it meets certain characteristics such as unsafe and unhealthy conditions or excessive tenant vacancies.

Some states use tax increment financing to encourage new growth and use the requirement of a causal connection between the district and the development to ensure these ends are met. Although their respective tests vary, seventeen states require showing that the anticipated growth will not occur but for the district's investments.

4. Jurisprudence

Tax increment financing is a relatively new concept in Louisiana. Consequently, little jurisprudence exists.

45. La. R.S. 33:9035 (Supp. 2005) (Listing seven categories of acceptable expenses, such as the cost of planning the development, property acquisition, preparation costs, renovation costs, construction expenses, financing expenses and the district's capital costs associated with the project. Spending within these categories must still be reasonably related or attributable to an approved economic development plan. As the categories are simply examples, the reasonable or necessary test is all that must be met for an expense to be allowable under this statute.).


47. Bureau of Governmental Research, supra note 25, at 8–9.

48. Id. at 9.

49. La. R.S. 33:9032 (2002). The law was first enacted in 1979, but the recent overhauls in the law came in 1998 (La. R.S. 33:9033) and 2002 (La. R.S. 33:9038.4).
The first challenge to tax increment financing concerned a development project in New Orleans. *Council of the City of New Orleans v. All Taxpayers* held tax increment financing can be used to support middle- to low-income housing development projects.\(^\text{50}\) The city wanted to use sales tax increments from a newly built Wal-Mart to finance a mid- to low-income housing project. The project was challenged by a group of local residents hoping to keep Wal-Mart and the project out of their neighborhood. Both the district court and the fourth circuit ruled in favor of the city.

The case focused on issues similar to those in the *Bass Pro Shops* case.\(^\text{51}\) Appellees in *City of New Orleans* challenged the use of dedicated sales tax revenues for this project. The court’s decision raised the constitutional issue but did not address it because the statute governing the New Orleans project prohibited the use of dedicated sales taxes. Additionally, the project was upheld because the court found the sales taxes in question were not dedicated to a specific purpose. The sales taxes were intended for the city’s general treasury and could be spent for any public program. Dedicated tax dollars were found to be akin to those taxes supporting the School Board and the Regional Transit Authority.\(^\text{52}\)

The court resolved the larger issue of when the state is allowed to pledge its finances to private business endeavors in favor of the city.\(^\text{53}\) The appellees argued using public finances to benefit private entities violated Louisiana Constitution article VII, section 14, which prohibits the pledging, loaning, or donating of public funds for a private purpose. This argument failed for two reasons. First, the fourth circuit held that encouraging economic

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50. 03-0189 (La. App. 4th Cir. 2/24/03), 841 So. 2d 72.

51. The appeal also raised several other constitutional issues not contained in the *Denham Springs* appeal. A general challenge was made arguing the language of the tax increment financing statute is unconstitutionally vague for failing to adequately define economic development. *Id.* at 78. The court found the provisions listed in La. R.S. 33:9033.3(M) provided enough clarity so that a person of ordinary intelligence could understand its meaning. *Id.* at 79. The other contention asserted that the tax increment financing statutes are unconstitutional because they confer unequal privileges and financial advantages on purely private interests. *Id.* The court was quick to find that Louisiana Constitution article VII, section 14 allowed the government to join in cooperative endeavor agreements with private entities for public purposes. As it had already concluded the city's purpose was valid, the court dismissed this claim. *Id.* at 79–80.

52. *Id.* at 77–78.

53. *Id.* at 79–80.
development is a legitimate public purpose. Second, the constitutional article contains an exception allowing the use of public funds to aid and support the needy. Because the city was funding the construction of public housing for low-income families, this squarely fell within the exception. For these two reasons the court found the project constitutional.\(^{54}\)

Tax increment financing was again challenged in *Denham Springs Economic Development District v. All Taxpayers*,\(^{55}\) which is discussed in detail in Part III of this paper. Shortly thereafter, the Louisiana Supreme Court again reviewed a tax increment financing project in *World Trade Center Taxing District v. All Taxpayers*.\(^{56}\) As in the *Denham Springs* case, the court rejected a proposal seeking to use tax increment financing.

Wanting to encourage development in the largely vacant World Trade Center building, the Louisiana Legislature passed a unique tax increment financing statute.\(^{57}\) The statute created a special taxing district that would receive all hotel and occupancy tax revenues generated by the future hotel. The District was further given the authority to issue bonds to finance the renovation of the building and to fund the bonds with predicted collections from future hotel and occupancy taxes. The project was challenged by the Greater New Orleans Hotel and Lodging Association and by Ronnie J. Theriot. Ultimately, the case found its way to the Louisiana Supreme Court.\(^{58}\)

The case gave the court a second opportunity to decide if the Louisiana Constitution permits a governmental entity to give tax revenues to private businesses, but again the court avoided the question. A major contention between the parties was whether the World Trade Center statute amounted to "an unconstitutional donation of public funds by the Tax Recipients."\(^{59}\) The taxpayers asserted that article VII, section 14 of the Louisiana Constitution prohibits this type of transfer. The fourth circuit court of appeal held that giving tax revenues to private businesses violates article VII, section 14(A), unless the government has a legal obligation to finance the project. The court further held that none of the

\(^{54}\) *Id.*

\(^{55}\) 04-1674 (La. 02/04/05), 894 So. 2d 325.

\(^{56}\) 05-0374 (La. 06/29/05), 908 So. 2d 623.

\(^{57}\) La. R.S. 33:9038.21(A) (Supp. 2005).

\(^{58}\) *World Trade Center*, 908 So. 2d 623.

\(^{59}\) *Id.*
exceptions contained in article VII, section 14(B) applied to this project.\textsuperscript{60}

The Louisiana Supreme Court never made it to the constitutional question. Instead, its opinion focused on the statute's effect on the existing hotel and occupancy tax. The court concluded that the World Trade Center statute eliminated all taxes within the District and then reimposed new hotel and occupancy taxes for the benefit of the District. Article VI, section 29 of the Louisiana Constitution does not permit the legislature to exempt taxes when bonds are secured by the taxes. Because a portion of the taxes that were being exempted were secured bonds, the court concluded the statute was unconstitutional.\textsuperscript{61}

\textbf{III. \textit{Denham Springs Economic Development District v. All Taxpayers}}

Bass Pro Shops is a national retail chain offering a wide variety of outdoor sporting items. The plans for Denham Springs include over three and one-half football fields of retail space; the store will offer outdoor gear, clothing, and accessories for fishing, hunting, hiking, backpacking, wildlife viewing, camping, and cooking. A wide variety of fishing boats will also be available. The store plans include a restaurant, hotel, gift shop, and nature center. The

\textsuperscript{60} Id. (The District claimed that regardless of whether there was an unconstitutional donation, the act was still permitted under the exceptions found in section 14(B). Specifically, the District pointed to section 14(B)(1), which permits the use of public funds for "social welfare programs" designed for the benefit of the needy, and section 14(B)(3), which permits the use of public funds to issue bonds for public obligations. With respect to section 14(B)(1), the District argued the hotel would bring new development, new money, and new jobs to New Orleans, which in turn would benefit the needy. Under section 14(B)(3), the District contended they were issuing bonds to fulfill its legal obligation as imposed by the legislature in the World Trade Center statute. The fourth circuit disagreed. First, the exception in section 14(B)(1) is designed for projects primarily aimed at supporting the needy. Although a project can benefit private interests and the needy at the same time, the court was not blind to the fact this project was intended to build a privately controlled hotel. The argument for the section 14(B)(3) exception was also rejected. The court concluded that the local governing bodies, which collect the taxes, were under no legal obligation to finance the hotel project. Therefore, the exception did not apply.)

\textsuperscript{61} Id. at 637.
entire project will encompass seventy-five acres of previously undeveloped land and cost fifty million dollars.\(^6\)

To finance the proposal, the state of Louisiana and five local government subdivisions—Livingston Parish, Denham Springs, the Law Enforcement District, the School Board, and the Denham Springs Economic Development Corporation—have each agreed to pledge 72.2 percent of the sales taxes collected by Bass Pro Shops to pay off bonds that will be issued to finance the project.\(^6\)

With the bond revenue, the Denham Springs Economic Development District (District) is planning to construct a shopping center. It will then lease the facilities to Bass Pro Shops and later sell the entire facility to Bass Pro Shops for a nominal fee. The District hopes the project will inject new money and create new jobs in Livingston Parish.

One point neither side will argue is that the Livingston Parish (Parish) economy could use a boost. The Parish grew by 30 percent between 1990 and 2000.\(^6\) In comparison, the population of the state of Louisiana only grew by 6 percent during that same period.\(^6\) Despite this increase in size, retail growth in the Parish has not kept up with surrounding parishes. According to Dr. James Richardson, a Professor of Economics at Louisiana State University, Livingston Parish averages 408 persons per retail establishment. In contrast, the state of Louisiana averages 250 persons per retail establishment, and Livingston’s neighboring parishes average 225 to 300 persons per retail establishment.\(^6\)

The retail establishments in Livingston Parish have also failed to generate adequate sales per person.\(^6\) Dr. Richardson stated that the average sales per person in Livingston Parish is $4,623, while parishes near Livingston—Ascension Parish, West Baton Rouge

\(^{62}\) Press Release, Bass Pro Shops, Bass Pro Shops Plans for Store in Denham Springs, Louisiana (Nov. 10, 2003), http://www.basspro.com/serulet/catalog.cfm?appid=34&template=news_display.cfm&newsid21; Denham Springs Econ. Dev. Dist. v. All Taxpayers, 04-1013 (La. App. 1st Cir. 06/04/04), 885 So. 2d 1153, 1160.

\(^{63}\) Denham Springs Economic Dev. Dist. v. All Taxpayers, 04-1674 (La. 02/04/05), 894 So. 2d 325.


\(^{65}\) Id.

\(^{66}\) Id.

\(^{67}\) Id.
Parish, and East Baton Rouge Parish—average $8,855, $6,523, and $12,152 sales per person respectively. 68

According to Dr. James Richardson, once the Bass Pro Shops is complete, it should generate sales between $54 million and $110 million per year and create 500 to 700 new jobs. 69 The District is also hoping that other retail establishments will follow Bass Pro Shops to the area. The theory is that businesses, hoping to benefit from the high traffic volume Bass Pro Shops should generate, will build in the area. If all goes according to plan, Bass Pro Shops will help rekindle the faltering Livingston Parish economy.

The present controversy came to a head when, pursuant to the Bond Validation Act, 70 the District filed a Motion for Judgment seeking judicial validation of the Bass Pro Shops project. In response, A. Ponder Jones, a resident of Denham Springs, filed an answer, exception, and defenses to the project. 71 He argued that as a taxpayer, property owner, and resident of Livingston Parish, he had standing to challenge the proposal on a variety of grounds. Additionally, the Livingston Parish School Board responded by requesting a ruling on its ability to pledge its sales tax revenues to the project. 72 Both the trial court and the first circuit court of appeal found in favor of the District.

On appeal to the Louisiana Supreme Court, Mr. Jones advanced three arguments. First, he asserted the project violates the statute authorizing the use of tax increment financing, because the project calls for the use of dedicated taxes. Alternatively, he argued that if the statute permits the use of dedicated taxes, then the statute is in violation of the Louisiana Constitution. Finally, he

68. Id.
69. Denham Springs Econ. Dev. Dist. v. All Taxpayers, 04-1013 (La. App. 1st Cir. 06/04/04), 885 So. 2d 1153, 1160.
71. A. Ponder Jones is a ninety year old retiree living in Livingston Parish. Mr. Jones worked in the Baton Rouge school system from 1949 to 1973. During that time, he rose to a position where he oversaw the system’s finances. He then took a position with the Louisiana School Board Association where he advised school systems around the state with their finances. He retired in 1991, but stayed active in education by working as a consultant. When asked why he was so adamant about preventing the Bass Pro Shops project, Mr. Jones responded by saying he was working to protect the school district. “I told them if they left the school system out of it, they wouldn’t hear from me.” Mukul Verma, PROFILE: Champion or Spoiler?, 23 Greater Baton Rouge Business Report 53 (7/19/05).
72. Denham Springs Economic Dev. Dist. v. All Taxpayers, 04-1674 (La. 02/04/05), 894 So. 2d 325, 328.
claimed the entire project amounted to a pledge and a donation of government funds to a private entity, which violates article VII, section 14 of the Louisiana Constitution. The Louisiana Supreme Court ultimately struck down the project based on Mr. Jones’s statutory challenge.

According to Mr. Jones, taxes that are approved for the benefit of a particular program become dedicated to that program. In the case of the Bass Pro Shops project, Mr. Jones asserted that several of the taxes the District planned to use had been previously dedicated. Specifically, he claimed the electorate had dedicated four taxes: a 1% tax by Livingston Parish for street improvements, a .5% tax by Denham Springs for sewerage improvement, a .5% tax by the Law Enforcement District for the operation of the sheriff's office, and a 2.5% tax by the Livingston Parish School Board for salaries, utilities, and facility improvements.

The District responded that voters do not have the power to dedicate taxes. It claimed that article VI, section 29 of the Louisiana Constitution authorized local governing bodies to impose sale and use taxes, subject to voter approval. According to the District, the constitution requires voter approval to impose a tax, but it does not require voters to re-approve a tax before the revenues of that tax can be used for other purposes.

The Louisiana Supreme Court favored the argument of Mr. Jones. The statutes the legislature approved authorizing each of the four taxes and each of the propositions that were adopted by the voters had language confirming that tax revenues would be used for a specific purpose. Therefore, the court concluded the taxes are dedicated for the benefit of their designated programs.

The court next determined the legislature did not authorize the District to use dedicated taxes. However, the court’s findings on this point are questionable. The dispute over the extent of the legislature’s authorization originates from a subtle difference in the language of two of the sales tax increment statutes. The statute that specifically authorizes tax increment financing projects in

73. Although the court does not compare the articles, a review of La. R.S. 33:9033.3 with La. R.S. 33:9038.4 presents a striking difference. La. R.S. 33:9033.3, the statute concerning larger parishes and municipalities, states its tax increment financing projects “shall not [use] tax revenues previously dedicated for a special purpose.” La. R.S. 33:9033.3(A) (2002). This language is also present in the general sales tax increment statute. La. R.S. 33:9033 (2002). However, the statute implicated by Bass Pro contains no similar provision. Additionally, the statute states “all incremental increases in sales taxes” can be used for tax increment financing projects. La. R.S. 9038.4(A)(5) (Supp. 2005).
larger parishes and municipalities reads "[d]edication of sales tax increments to pay the revenue bonds . . . shall not include tax revenues previously dedicated for a special purpose."\(^7\) The fourth circuit cited this language in its opinion in *City of New Orleans* to find that dedicated sales tax increments cannot be used to finance tax increment financing projects.\(^7\) However, Denham Springs operates under a different tax increment financing statute. The applicable statute does not contain a clear restriction on the use of dedicated taxes.\(^7\) Instead, the statute states that all sales tax revenues may be used:

... provided that such revenues may be used for such purpose, subject to dedication by other law or by proposition approved by electors voting in an election for such purpose called by the taxing authority levying the tax, unless such use is permitted and upon a prior determination by the local governmental subdivision or other taxing authority that the baseline revenue collection is sufficient to satisfy such dedications and other statutory charges, and provided that all tax recipient entities affected, other than the state of Louisiana, enter into an intergovernmental agreement with the issuer authorizing and dedicating the inclusion of such incremental increase in sales taxes.\(^7\)

The Louisiana Supreme Court held that this provision acts as a barrier to the use of dedicated taxes.

How the supreme court manages to form any interpretation of Louisiana Revised Statutes 33:9038.4(A)(5) is astonishing. The entire section is a single 145 word sentence. From its text, the statute seems to allow the use of all incremental increases in sales taxes subject to two limitations. The first limitation allows local governments to only use certain sales taxes to finance projects. The second requires all affected government entities to consent to the project by entering into an intergovernmental agreement. The court bases its opinion on the first limitation.

Under the limitation, a local government subdivision is not allowed to use sales tax increments that have been dedicated by law or vote. However, the statute states that dedicated taxes can be used as long as (1) such use is permitted and (2) baseline revenue

\(^7\) La. R.S. 33:9033.3(A) (2002).
\(^7\) Council of the City of New Orleans v. All Taxpayers, 03-0189 (La. App. 4th Cir. 2/24/03), 841 So. 2d 72 at 77–78.
\(^7\) La. R.S. 33:9038.4 (Supp. 2005).
collection will satisfy government obligations. Who must permit the use of tax increments is not discussed in the article. The District and Mr. Jones both made compelling arguments as to the intention of the legislature. The position of the District was that the government subdivision entitled to the tax is the body which must permit the use of the tax. Under this interpretation, the Bass Pro Shops project is valid because the city, parish, sheriff, and school board have all voted to permit the use of the tax increments. This position is strengthened by the fact another tax increment financing statute clearly stated that dedicated taxes could not be used.\textsuperscript{78} When compared with the vague language in the present statute, it appears the District's argument is the correct one, but it was the argument of Mr. Jones that was ultimately accepted.

Mr. Jones argued the statute requires permission from the voters who originally authorized the tax. In other words, he claimed a dedicated tax can only be used if the electorate votes on the issue. However, if this is the legislature's intention, then why did they not use the same language as in the New Orleans statute? The court ultimately accepted the argument of Mr. Jones on pragmatic grounds. Had the court accepted the argument of the District, it would have then had to address the more difficult constitutional question of whether the legislature has the power to override a dedication of a tax. By accepting the argument of Mr. Jones the court was able to completely avoid this constitutional issue.

The court concluded by examining the impact the elimination of dedicated taxes would have on the Bass Pro Shops project. It held the project cannot survive without the use of the dedicated taxes. Therefore, the court had no choice but to strike down the project.

Within a few short months of the court's decision, residents of Denham Springs were asked to approve the use of all dedicated sales taxes for the project. Overwhelmingly, they said yes. Once again, Mr. Jones objected that the project is unconstitutional. However, Mr. Jones's objection was untimely. The first circuit ruled that Mr. Jones's filing came after the thirty day period provided by law. Consequently, the court found the project legal and valid, because no challenge had been timely filed. Mr. Jones has appealed this decision to the Louisiana Supreme Court along with his constitutional objections. It awaits to be seen if the court

\textsuperscript{78} For a comparison of the language of the different tax increment financing statutes, see discussion \textit{supra} note 73.
IV. CONSTITUTIONAL QUESTIONS

The constitutional question surrounding tax increment financing still remains and the Louisiana Supreme Court could still resolve some of the lingering questions if Denham Springs returns to the court. Even if the Denham Springs litigation does not reach the high court, the issues could return as other tax increment financing projects emerge around the state. This next section analyzes the two lingering constitutional issues in the context of the Denham Springs case.

A. Loaning, Pledging, and Donating

Denham Springs wants to spend fifty million dollars for the benefit of a multimillion dollar corporation. Naturally, a project like this raises eyebrows. However, the government is not prevented from helping a private entity simply because the project looks fishy. The Louisiana Legislature can enact any legislation that the state constitution does not explicitly prohibit. The question then remains whether the constitution prohibits the use of tax revenues to promote private economic development.

Louisiana Constitution article VII, section 14 places restrictions on when and how the government can spend money. In pertinent part, the article states "the funds, credit, property, or things of value of the state or of any political subdivision shall not be loaned, pledged, or donated to or for any person, association, or corporation, public or private." With respect to tax increment

79. Denham Springs Econ. Dev. Dist. v. All Taxpayers, 05-1684 (La. App. 1st Cir. 08/25/05), 2005 WL 2542593, petition for cert. filed, (La. 11/02/05) (No. 05-2274).
contributions of public funds to pension and insurance programs for the benefit of public employees; (3) the pledge of public funds, credit, property, or things of value for public purposes with respect to the issuance of bonds or other evidences of indebtedness to meet public obligations as provided by law; (4) the return of property, including mineral rights, to a former owner from whom the property had previously been expropriated, or purchased under threat of expropriation, when the legislature by law declares that the public and necessary purpose which originally supported the expropriation has ceased to exist and orders the return of the property to the former owner under such terms and conditions as specified by the legislature; (5) acquisition of stock by any institution of higher education in exchange for any intellectual property; (6) the donation of abandoned or blighted housing property by the governing authority of a municipality or a parish to a nonprofit organization which is recognized by the Internal Revenue Service as a 501(c)(3) or 501(c)(4) nonprofit organization and which agrees to renovate and maintain such property until conveyance of the property by such organization; (7) the deduction of any tax, interest, penalty, or other charges forming the basis of tax liens on blighted property so that they may be subordinated and waived in favor of any purchaser who is not a member of the immediate family of the blighted property owner or which is not an entity in which the owner has a substantial economic interest, but only in connection with a property renovation plan approved by an administrative hearing officer appointed by the parish or municipal government where the property is located; (8) the deduction of past due taxes, interest, and penalties in favor of an owner of a blighted property, but only when the owner sells the property at less than the appraised value to facilitate the blighted property renovation plan approved by the parish or municipal government and only after the renovation is completed such deduction being canceled, null and void, and to no effect in the event ownership of the property in the future reverts back to the owner or any member of his immediate family; (9) the donation by the state of asphalt which has been removed from state roads and highways to the governing authority of the parish or municipality where the asphalt was removed, or if not needed by such governing authority, then to any other parish or municipal governing authority, but only pursuant to a cooperative endeavor agreement between the state and the governing authority receiving the donated property; or (10) the investment in stocks of a portion of the Rockefeller Wildlife Refuge Trust and Protection Fund, created under the provisions of R.S. 56:797, and the Russell Sage or Marsh Island Refuge Fund, created under the provisions of R.S. 56:798, such portion not to exceed thirty-five percent of each fund.

(C) Cooperative Endeavors. For a public purpose, the state and its political subdivisions or political corporations may engage in cooperative endeavors with each other, with the United States or its agencies, or with any public or private association, corporation, or individual.

(D) Prior Obligations. Funds, credit, property, or things of value of the state or of a political subdivision heretofore loaned, pledged, dedicated, or granted by
financing programs, this limitation raises three questions. First, if the proposal uses revenue bonds, is the state illicitly pledging its credit to a private business? Second, can the government lease its facilities to private businesses or does such a lease equate to an unconstitutional loaning? Finally, does the limitation on donations of state property prevent the state from offering its property to private businesses as an incentive for locating in the state? The next portion of this comment addresses each of these questions separately.

1. Pledging the Credit of the State

For tax increment projects to work, the government must make an initial investment to encourage new growth. In the Denham Springs case, the city is issuing revenue bonds, using the proceeds to build the Bass Pro Shops facility and planning to pay off the bonds with the sales taxes the business will produce. This raises the issue of whether the state can pledge its credit for these purposes.

According to the late Professor Lee Hargrave, the limits of article VII section 14 extend only to the pledging of the credit of the state. The limitation does not extend to special districts created within the borders of the state. This loophole has allowed the state to create special districts which can offer their credit to secure revenue bonds.

The statute’s authorizing tax increment financing requires the creation of a special district, which is the body that issues the revenue bonds. The only credit being pledged is that of the special districts. The credit of the entire state is never promised,
therefore no constitutional violation exists when tax increment districts pledge their credit to finance these projects.

2. **Leasing the Property of the State**

The constitution also prohibits the loaning of state property to private businesses. Arguably, leasing a building is a type of loan and thus unconstitutional if done by the state. However, in his article on the constitutional limits on borrowing and donating, Professor Hargrave cites a series of cases which conclude lease agreements are not prohibited by article VII.  

If this rationale is followed and the lease portion of the agreement is not an unconstitutional loan, the city should be allowed to lease the building to Bass Pro Shops.

3. **Donating the Property of the State**

i. **The General Rule**

Article VII, section 14 is not new to the Louisiana Constitution. Prior constitutions contained similar restrictions, and the 1921 Constitution contained most of Paragraph A's language.


86. *See* Hargrave, *supra* note 82, at 137–41. *See also* La. Const. art. 113 (1845) ("The legislature shall not pledge the faith of the state for the payment of any bonds, bills, or other contracts or obligations for the benefit or use of any person or persons, corporation, or body-politic whatever."); La. Const. art. 108 (1852) ("The state shall not subscribe for the stock of, nor make a loan to, nor pledge its faith for the benefit of any corporation or joint-stock company, created or established for banking purposes, nor for other purposes other than those described in the following article."); La. Const. art. 56 (1879) ("The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private."); La. Const. art. 58 (1898) ("The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private."); La. Const. art. 58 (1913) ("The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, association or corporation, public or private; nor shall the state, or any political corporation, purchase or subscribe to the capital or stock of
Jurisprudence interpreting what constitutes a donation has found a donation occurs whenever the government gives up something of value without a corresponding legal obligation.\(^87\)

The Louisiana Supreme Court held article VII, section 14 requires a legal obligation in *City of Port Allen v. Louisiana Municipal Risk Management Agency, Inc.*\(^88\) The court's opinion found the state does not make a donation when the government is compelled by a legal obligation to give its revenues away.\(^89\) The case did little to define legal obligation, but a series of attorney general opinions since have helped give meaning to the term. The opinions require a legal obligation to "be created by any normative source of law, which has coercive and binding effect."\(^90\) The obligation must also serve a valid public purpose and the benefits the government will receive from the expenditure of funds must be proportionate to costs.\(^91\)

The District argues it has an obligation to promote economic development. Article I, section 1 of the Louisiana Constitution provides that the legitimate ends of government are to secure justice, preserve peace, protect rights, and promote the happiness and general welfare of the people. The District claims the project fulfills its constitutional obligation to promote the general welfare of its citizens. However, simply having a good cause does not make the its action constitutional. Article I, section 1 outlines the proper role of government, but it does not create a legal obligation. No law or constitutional provision compels the District to give the complex to Bass Pro Shops. Therefore, the constitution prohibits this type of transfer.

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any corporation or association whatever, or for any private enterprise."); *and* La. Const. art. 4, section 12 (1921) ("The funds, credit, property or things of value of the state, or of any political corporation thereof, shall not be loaned, pledged or granted to or for any person or persons, associations or corporations, public or private; nor shall the state, or any political corporation, purchase or subscribe to the capital stock or stock of any corporation or association whatever, or for any private enterprise.").


88. 439 So. 2d at 402.

89. *Id.*


91. *Id.*
Professor Hargrave criticized the legal obligation requirement as being out of line with other Louisiana jurisprudence. According to Professor Hargrave, the legal obligation standard makes no sense without distorting the meaning of the words. He pointed to the state’s ability to buy things it has no legal obligation to buy. If article VII, section 14 is read to require a legal obligation, then when a city buys a ream of paper its actions are unconstitutional.\footnote{Hargrave, supra note 82, at 155–56.}

Furthermore, \textit{City of Port Allen} is the only case in which the court used the legal obligation standard. In Hargrave’s opinion, this standard is probably only applicable to intergovernmental donations, like the one involved in \textit{City of Port Allen}. In all other cases a donation probably follows the traditional Civil Code definition—transfers based on gratuitous causes, not onerous causes.\footnote{Id. at 156.}

At first glance the District appears to have a gratuitous intention in giving its facilities to Bass Pro Shops at less than market value. However, the District argues the positive economic impact of the development gives it an onerous cause. Mr. Jones did not challenge the City’s findings of the impact Bass Pro Shops will have on the District. In the first year of operation, Bass Pro Shops is projected to generate $54 to $60 million in new spending.\footnote{Denham Springs Econ. Dev. Dist. v. All Taxpayers, 04-1013 (La. App. 1st Cir. 06/04/04), 885 So. 2d 1153, 1160.} Within a few years this figure is expected to jump to somewhere between $75 and $110 million.\footnote{Id.} The District argues the new sales taxes this project will generate is valid consideration. However, receipt of sales tax revenues is not valid consideration. The taxes must be paid to the government regardless of whether the project is financed by the District. Therefore, nothing is being paid to the District that is not already owed.

Additionally, the transfer of a nominal fee from Bass Pro Shops to the District in exchange for the building is not enough to create an onerous cause. According to the Civil Code, a sale for a nominal cost can be treated as a disguised donation.\footnote{La. Civ. Code art. 2464: Price, essential elements

The price must be fixed by the parties in a sum either certain or determinable through a method agreed by them. There is no sale unless the parties intended that a price be paid.} Therefore, the payment of a nominal fee does not create an onerous cause.
Jurisprudence has also found the prohibitions on donations to nongovernmental entities inapplicable when a nongovernmental entity is given money, but uses the money to fulfill an obligation of the government. In *State ex rel. Guste v. Nicholls College Foundation*, an alumni federation of a state university gave money to a foundation incorporated to support the college. The foundation used this money on programs designed to benefit the school. The Louisiana Supreme Court found the foundation was using the money to fulfill the college’s legal duties. Regardless of who spends the money, the money was being spent appropriately. Unlike *Nicholls*, the objectives of the parties involved in the Bass Pro Shops litigation are substantially different. Bass Pro Shops operates to earn a profit for its shareholders. The District operates as a local governing body. It is not within the power of the District to open an outdoor sporting goods store. Likewise, Bass Pro Shops cannot create and run its own city. These differences in the parties’ goals and objectives for this project are sufficient to preclude the court from finding that the District and Bass Pro Shops are essentially the same.

Even if a tax increment project is found to violate the general constitutional principle in article VII, section 14, the project may still be permissible. The Louisiana Constitution contains a list of exceptions which allow the government to donate resources in special circumstances. If a tax increment program falls under one of these exceptions, the project is constitutional.

*ii. Exceptions to the Rule*

The exceptions to the Louisiana Constitution’s prohibitions on loaning, pledging, or donating are new to the 1974 Constitution. Prior constitutions prohibited the state from giving its resources to private entities, but they contained no exceptions. The 1974 Constitution contains a laundry list of exceptions that have been continually amended since the adoption of the constitution. Of the

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97. 564 So. 2d 682 (La. 1990).
98. Before reaching the merits of this issue, the Court found the Federation involved in the case was a public body and subject to constitutional restrictions. *Id.* at 687.
99. *Id.* at 684–686.
100. *Id.* at 688.
exceptions, the only one applicable to Bass Pro Shops is the exemption on public purposes. It reads, "[n]othing in this section shall prevent . . . (3) the pledge of public funds, credit, property, or things of value for public purposes with respect to the issuance of bonds or other evidences of indebtedness to meet public obligations as provided by law."101 When this article was debated at the constitutional convention, the committee proposing it stated the "the term 'public purpose' is left to interpretation by the judiciary so that there is sufficient flexibility for a lasting and workable document."102 However, the jurisprudence surrounding this article has provided little assistance in defining public purpose.

The legislative findings accompanying the Cooperative Economic Development Act definitively express the legislature's belief that economic development, maintenance of local economies, and economic stability are valid public purposes.103 Additionally, the District repeatedly points to article I, section 1 stating the legitimate ends of government includes promoting the general welfare of the people.104

The Louisiana Constitution also uses public purpose in its takings provisions. In a recent second circuit opinion, public purpose was found to include economic development.105 In looking at the state and federal jurisprudence in this area, the opinion realized that public purpose is a political determination and is better left to the legislature than the courts.106 In this case,

102. Records of the Louisiana Constitutional Convention of 1973: Journal of Proceedings at 130 (July 6, 1973). These remarks were made in reference to an earlier draft of the article. Later revisions were more technical than substantive. Hargrave, supra note 82, at 144. The use of the phrase "public purpose" coincides with its function in the original draft, so it is presumable the drafters intended it for judicial construct.
104. Brief for Appellee at 21, Denham Springs Econ. Dev. Dist., 04-1013 (La. App. 1st Cir. 06/04/04), 885 So. 2d 1153.
105. City of Shreveport v. Chanse Gas Corp., 34,958, 34,959 (La. App. 2d Cir. 9/22/01), 794 So. 2d 962, 971–974.
106. The fifth amendment of the United States Constitution provides "No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." Historically, the Supreme Court has given deference to legislatures in defining what constitutes a legitimate public use. Buckley v. Valeo, 424 U.S. 1, 96 S. Ct. 612 (1976); Helvering v. Davis, 301 U.S. 619, 57 S. Ct. 904 (1937). However, the Court recently decided Kelo v. City of New London. 125 S. Ct. 2655 (2005). In that case, the city of New London wanted
the court also suggested the public purpose needed to expropriate land is the same as needed to pledge public funds. 107

These arguments fail to take into account the drafters' intent to have the court give meaning to public purpose. Under the second circuit interpretation, the legislature is given virtually unrestricted authority to determine how to spend public funds. By allowing the legislature free reign, the court is denying all meaning to constitutional limitations on state spending. Furthermore, it is questionable if even the legislature feels this type of state action is constitutional. Between 1989 and 2003, the legislature made six separate attempts to amend the constitution to allow financing economic development projects. 108 All six amendments were rejected by the voters. 109 The court should not shirk its to use its takings powers to develop the Pfizer global research facility. The city claimed promoting economic development was a sufficient public interest to warrant the takings. Id. at 2657. The Court found that economic development is a valid public purpose. The Louisiana Supreme Court could use Kelo to help define the contours of article VII, section 14.

107. City of Shreveport, 794 So. 2d at 975.
109. According to the Public Affairs Research Council, a non-partisan research group, each of the amendments were aimed at giving the legislature more maneuverability to promote economic development.

The 1989 amendment would have permitted local governments to give or lease land, improvements, or equipment to private firms for industrial expansion. At the time article 14, section 7 was viewed to only allow local governments to lease or transfer property to private individuals at their fair market value. Local governments wanted to offer incentives to new businesses by making donations below the fair market value. To be eligible for the donation, firms would have had to sign a contract agreeing to create a stated number of jobs for the residents of the locality.

A year later a much more expansive amendment was proposed. The 1990 proposal would have allowed the outright donation of money to private firms. The plan limited local governments to donating only revenues from taxes dedicated to industrial and economic development or from bonds secured by these taxes. Again the firms would have to agree to create a stated number of jobs within the community.

The 1991 approach aimed at allowing the legislature and local governments to use their funds to promote education and economic development. To prevent potential abuse, the amendment would have required a two-thirds vote of any body seeking to donate their revenues. The amendment coincided with a large initiative by the state to create the Louisiana
constitutional duties by giving deference to the legislature. Instead it should define public purpose.

The second reason the Bass Pro Shops project fails to meet the exception is that article VII, section 14(B)(3) has a requirement that the bonds be issued "to meet public obligations as provided by law." As discussed in the City of Port Allen analysis, the District has no obligation to finance this project. For this reason alone, this exception should not be used to allow the District to pledge its funds to the project.

Development Finance Corporation, which was tasked with using state money to boost the economy. When the amendment failed, so did the initiative.

The 1992 amendment was essentially a re-submission of the 1991 amendment. The language was directed more toward economic development and not education. At the time many state programs were operating under a constitutional cloud or uncertainty as to whether or not an illicit donation was being made. Additionally, the state sought to use its banks and the DED to encourage new growth. The amendment sought to ease concern about the constitutionality of these programs.

The desire to amend the constitution resurfaced again in 2000. The new amendment was essentially the same as the previous ones. It would have allowed parishes and municipalities to loan, pledge, or dedicate tax revenues, dedicated to industrial or economic development, or revenue bonds secured by these taxes to private corporations. The law would have required the benefitting business to agree to locate or expand an industrial enterprise in the area and hire an agreed upon number of employees. The agreement would be subject to the approval of the State Bond Commission.

The final attempt to constitutionalize economic development came in 2003. This amendment was a take back to the 1989 amendment. The change would have allowed local governments to purchase and maintain land and buildings. Local governments would then be able to enter into agreements with private businesses and allow them to use the facilities at no charge. Voters would have to approve any taxes to be used for these programs and the business would have to sign an agreement stating any consideration to be paid and the number of local residents to be employed. The State Bond Commission would have final approval of any program.

At trial, Mr. Jones argued each of these amendments represented a genuine effort by the state to constitutionalize government assistance to private business. The desire of the legislature to make these changes represents its concern that the constitution prohibits such donations. Further, because all six of the amendments have failed, the legislature does not currently have the constitutional authority to authorize tax increment incentives to private businesses.
B. Dedicated Taxes

The issue of whether the legislature has the authority to authorize the use of dedicated tax revenues for other purposes will most likely not be answered in the confines of the present tax increment statute. The court's holding in *Denham Springs Economic Development District* found that the tax increment financing statutes do not allow the use of dedicated taxes. The only way this issue could come back to the court in the confines of tax increment financing would be for the court to reverse itself or for the legislature to amend the statute. Regardless of what happens, the constitutional question is intriguing. This section examines this issue.

Article VII, section 1 of the constitution gives the legislature the unbridled power to tax. Before the supreme court ruled in the *Denham Springs* case, the District had argued this provision gives the legislature the authority to use dedicated taxes in any manner it chooses. However, article VI, section 29 gives local governments the power to impose sales taxes and Mr. Jones argued this article is a specific restriction on the legislature’s power.

110. La. Const. art. VII, § 1:

§ 1. Power to Tax; Public Purpose

(A) Except as otherwise provided by this constitution, the power of taxation shall be vested in the legislature, shall never be surrendered, suspended, or contracted away, and shall be exercised for public purposes only.

(B) The power to tax may not be exercised by any court in the state, either by ordering the levy of a tax, an increase in an existing tax, or the repeal of an existing tax exemption or by ordering the legislature or any municipal or parish governing authority or any other political subdivision or governmental entity to do so.

111. La. Const. art. VI, § 29:

§ 29. Local Governmental Subdivisions and School Boards; Sales Tax

(A) Sales Tax Authorized. Except as otherwise authorized in a home rule charter as provided for in Section 4 of this Article, the governing authority of any local governmental subdivision or school board may levy and collect a tax upon the sale at retail, the use, the lease or rental, the consumption, and the storage for use or consumption, of tangible personal property and on sales of services as defined by law, if approved by a majority of the electors voting thereon in an election held for that purpose. The rate thereof, when combined with the rate of all other sales and use taxes, exclusive of state sales and use taxes, levied and collected within any local governmental subdivision, shall not exceed three percent.
The Louisiana Supreme Court discussed the conflict of these articles in *BP Oil Company v. Plaquemines Parish Government*. At issue was whether the legislature had the power to define what a subdivision could tax. The court found, although the constitution authorizes subdivisions to impose certain sales taxes, the legislature's power to tax is so absolute that it can place restrictions on the subdivision's power to tax. However, the Bass Pro Shops case is distinguishable because the legislature is not creating a restriction. Instead, it is using its power to authorize local governing bodies to use dedicated sales taxes in any manner they choose. Article VI, section 29 permits government subdivisions to impose sales taxes provided the voters of the subdivision approve the tax and the aggregate of all local sales taxes is less than three percent. If the addition of a new tax will

(B) Additional Sales Tax Authorized. However, the legislature, by general or by local or special law, may authorize the imposition of additional sales and use taxes by local governmental subdivisions or school boards, if approved by a majority of the electors voting thereon in an election held for that purpose.

(C) Bonds; Security. Nothing in this Section shall affect any sales or use tax authorized or imposed on the effective date of this constitution or affect or impair the security of any bonds payable from the proceeds of the tax.

(D) Exemptions; Protection of Bonds. Except when bonds secured thereby have been authorized, the legislature may provide for the exemption or exclusion of any goods, tangible personal property, or services from sales or use taxes only pursuant to one of the following:

(1) Exemptions or exclusions uniformly applicable to the taxes of all local governmental subdivisions, school boards, and other political subdivisions whose boundaries are not coterminous with those of the state.

(2) Exemptions or exclusions applicable to the taxes of the state or applicable to political subdivisions whose boundaries are coterminous with those of the state, or both.

(3) Exemptions or exclusions uniformly applicable to the taxes of all the tax authorities in the state.

112. *BP Oil Co. v. Plaquemines Parish Gov't.* 93-1109 (La. 09/06/94), 651 So. 2d 1322.

113. *Id.* at 1328. The case involves a dispute between the legislature and a local taxing authority on how to quantify certain gases being taxed. The subdivision argued article VII, § 29(A) gives it the power to tax however it deems necessary. The Court's conclusion finds this power can and is checked by legislative decisions.
bring the aggregate of all local sales taxes above three percent, a governmental subdivision can only create the tax if the legislature gives the body permission to do so and the voters approve the tax. Underlying all parts of section 29 is the requirement that voters must approve local sales taxes.

Ultimately this constitutional issue revolves around the extent and breadth of the legislature's power over taxes. Before a local sales tax can be implemented, voters must approve of the tax and what the tax is intended to fund. To say the legislature’s taxing power allows it to rededicate taxes once they are approved would completely circumvent the constitution's clear intention of having voters approve sales taxes. Therefore, the constitution should be interpreted to require local governments to obtain voter approval before they can use dedicated taxes.

V. RECOMMENDATIONS

How the constitutional questions surrounding tax increment financing will finally be resolved is anyone’s best guess. Even if the Louisiana Supreme Court eventually strikes down projects, such as Bass Pro Shops, as a violation of article VII, section 14, the legislature could still attempt to amend the constitution. If Louisiana wishes to continue making tax increment financing available for economic development, then the state should carefully reexamine its laws. With forty-seven states having their own intricate tax increment financing statutes, Louisiana is in a great position to see which systems work and to design the best program in the country. To achieve these ends, two significant changes should be made. First, the statutes need to be consolidated and simplified.\textsuperscript{114} Second, the legislature should create a

\textsuperscript{114} This comment was originally written before the 2004 and 2005 amendments to Louisiana Revised Statutes 33:9038.1. Prior to the amendments, the Louisiana Revised Statutes 33:9038.1-10 only applied to municipalities and parishes with a population of less than 200,000 people. The amendments made these statutes applicable to most parishes and municipalities in Louisiana. However, the amendments did not create a completely level playing field. First, the amendments include specific limitations on the City of Shreveport and Rapides Parish. Second, Louisiana Revised Statutes 33:9033.3 still remains valid law. That statute creates special provisions for municipalities with a population between 190,000 and 215,000 and parishes with a population over 400,000. In light of these concerns, this comment’s recommendation that Louisiana’s tax increment financing regime should be overhauled and simplified remains relevant.
framework outlining when it is appropriate for local governments to use tax increment financing.

No good comes from having different rules for cities and parishes of different sizes. If the state wants to allow subdivisions to compete for new economic growth, it should put them all on a level playing field by making them follow the same rules. Under the current system, large and small cities can offer different incentives to businesses. The subdivisions are forced to compete with each other, which is an optimal situation for a business but not for the state. If all government bodies are bound by the same rules, then they can only offer the same incentives. Uniform rules will ensure government subdivisions can not undercut each other, which, in turn, will prevent the government from giving businesses too good of a deal.

Louisiana should also adopt a framework to create consistency in the use of tax increment financing. The current system gives no guidance as to when tax increment financing should be used, which means local governments may use tax increment financing in situations that transfer economic activity rather than creating new growth. For example, it is uncertain how much new business the Bass Pro Shops will generate. Unquestionably, Bass Pro Shops will draw customers from other sporting goods stores in Louisiana. Sales to these customers are not new sales, they are transfer sales. The new jobs Bass Pro Shops promises to create may be offset if the store puts other local companies out of business.

Tax increment financing should be reserved for programs that will create new jobs, develop the state’s tax base, and bring new wealth into Louisiana. To these ends, Louisiana should look at how other states restrict tax increment financing and develop a framework regulating when the program should be used. The first requirement in any framework should be a causation test. Local governments should be required to prove that the anticipated economic development will not occur unless tax increment financing is used to assist the project. This requirement is straightforward. The government should not spend money assisting businesses which will locate in Louisiana regardless of these incentives. To allow otherwise is illogical and results in the government needlessly wasting its resources.

The second part of the framework should limit the types of projects that can use tax increment financing. Many states only allow tax increment financing to be used in certain situations. Their standards work to ensure tax increment financing is used to further the legislature’s desired purposes. Louisiana has no such standards and no way to ensure tax increment financing is used appropriately. The state should draw from the experiences of its
neighbors and develop a criterion for tax increment financing. Generally, most state requirements allow tax increment financing when an area of land is unsuitable for economic development, although states differ in how they define when an area is unsuitable. Colorado requires a showing of inadequate street layout, faulty lot layout, unsanitary work conditions, site deterioration, unmarketable title, or danger to life or property. Among the factors Illinois uses are environmental problems, lack of community planning, and decline in the assessed value of the property. Two of California's standards which could be adopted concern buildings that are unsafe or unhealthy for people and subdivided lots in irregular shape that prevent economic development. By creating its own suitability requirements, the legislature can ensure tax increment financing is used appropriately.

Finally, the legislature should consider some unique requirements used by only a few states. Georgia, for example, requires voters to grant government subdivisions the power to use tax increment financing before it pursues these projects. At one point, Nebraska required businesses hoping to receive tax increment benefits to make a monetary investment and to commit to the creation of a minimum number of new jobs. In Idaho, tax increment financing can be used to assist local businesses in towns bordering neighboring states. The towns must prove that without the investment the business will move across the border, because the neighboring state is offering unfair advantages to the business.

If Louisiana focuses its tax increment financing laws on projects which will bring new business, new money, and new jobs into the state, then tax increment financing will actually benefit the state. Without these reforms, local governments will compete with each other for local business. The result will be needless expenditures by the state which only transfer wealth from one business owner to another—a result that is unfair and unconscionable.

116. 65 Ill. Comp. Stat. 5/11-74.4-3.
119. Talanker & Davis, supra note 5, at 18.
120. Idaho Code § 50-2902.
VI. CONCLUSION

The Louisiana Supreme Court’s decision in *Denham Springs Economic Development District v. All Taxpayers* failed to create the historic precedent that is needed to resolve the uncertainty around tax increment financing. A decision, defining exactly how far the government can go in the name of economic development, is necessary if Louisiana hopes to compete with its neighbors. However, the Louisiana Supreme Court cannot fix all of the problems associated with the program. Regardless of whether a decision is handed down by the court, the Louisiana Legislature needs to reexamine the state’s tax increment financing system and design a method that will achieve the system’s desired goals. Recent trends demonstrate that states with effective tools for economic development are capitalizing on new economic growth. If Louisiana hopes to jump on the bandwagon, it needs to carefully reexamine its laws and design a system that works.

*John Grand*

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