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Inequitable By Design: The Strategic Distribution of Costs and Benefits by Business Improvement Districts and Special Assessments

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Inequitable By Design: The Strategic Distribution of Costs and Benefits by Business Improvement Districts and Special Assessments

MOLLY GILLESPIE*

ABSTRACT

Business Improvement Districts (BIDs) are most commonly credited for their innovative strategies in rejuvenating the economic vitality in American cities. However, their implementation raises concerns about fairness and equity. The current practice of financing BIDs through special assessments, particularly applying the front footage method, disproportionately burdens certain property owners for the benefit of others. Consequently, property owners face a range of issues, including financial strain, involuntary annexation, and potential threats to property ownership. However, the existing framework of state constitutions lack the necessary provisions to adequately address these challenges, underscoring the need for significant reform.

This Note addresses these concerns within the context of national BID standards, with a specific focus on Ohio's BID framework. It asserts that Ohio should defend its property owners against unjust assessments and suggests integrating such protections into the State's Constitution. Through the inclusion of a provision requiring consent for taxation and clarifying the definition of "special benefit" in the assessment procedure, Ohio's Constitution will be better equipped to safeguard its residents from economic oppression imposed by BIDs.

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I. INTRODUCTION

Imagine a highly exclusive club that grants its members a variety of special services aimed at assisting their business ventures. To secure admission, each member must pay an annual fee that can reach up to tens of thousands of dollars. After some time, unfortunately, the club exhausts its finances, and in the hopes of generating more revenue through membership fees, it extends invitations to a new group of prospective members. However, these invitees are disinterested in the club's perks, and certainly cannot justify the exorbitant fees, so, they kindly decline their invitations. Now imagine that declining is not an option. The club will decide whether they join; in fact, it has already voted them in. Fees are due at the end of the year; and if the new members refuse to pay, their delinquency will result in additional fines, and eventually, foreclosure on their property. This scheme seems highly unrealistic and rife with legal problems. Nevertheless, it is happening to property owners in cities throughout the country.¹

In December of 2020, American businesses were amidst an economic crisis resulting from a global pandemic.² As many businesses scrambled to finance their payroll and cut expenses to remain in operation, a string of Cleveland businesses, largely goods-producing, industrial companies, on the Columbus Road Peninsula in the “Flats,”³ received news that a “special district,” known as the Downtown Cleveland Improvement District (“DCIC”), was imposing upon them a new local tax, referred to as a “special assessment,” for special services that they neither needed nor requested.⁴ These services included street cleaning and security, as well as other vague initiatives like “advocat[ing] for infrastructure and urban design,” “produc[ing] unique

¹ See Max Rivlin-Nadler, *Business Improvement Districts Ruin Neighborhoods*, NEW REPUBLIC (Feb. 19, 2016), <https://newrepublic.com/article/130188/business-improvement-districts-ruin-neighborhoods> (“What was once an emergency measure by business owners in cities with a diminished tax base has become a power play for the future of urban space. By removing the interests of small business owners as well as the community members from the equation, property owners can remake a neighborhood as they see fit. Already these actors wield enormous power, but have had to deal with democratic mechanisms that would temper their vision. If the BID model continues to proliferate, the commons that make a city great could be completely at the disposal of a single class . . .”).

² See Sharon Stang, *Impact of the Coronavirus Pandemic on Businesses and Employees by Industry*, U.S. BUREAU OF LAB. STAT. (July 2021), <https://www.bls.gov/spotlight/2021/impact-of-the-coronavirus-pandemic-on-businesses-and-employees-by-industry/home.htm>.

³ *Experience the Flats*, FLATS FORWARD, <https://www.flatsforward.org/experience-the-flats> (last visited Oct. 18, 2023) (describing the Flats as a Cleveland neighborhood that borders both banks of the Cuyahoga River and is the home to both industrial businesses and entertainment).

⁴ See Michelle Jarboe, *Downtown Cleveland Special Improvement District Wins Enough Support for Renewal After Campaign Complicated by Covid-19*, CRAIN'S CLEVELAND BUS. (Sept. 6, 2020), <https://www.crainscleveland.com/real-estate/downtown-cleveland-special-improvement-district-wins-enough-support-renewal-after> (discussing the Downtown Cleveland Alliance's (DCA's) success in expanding the Downtown Cleveland Improvement District (DCIC) to Columbus Road amidst a pandemic).

events,” “act[ing] as walking concierge,” and providing “education to rising leaders.”⁵ The district justified the expansion by asserting that the services would attract consumers into their community and stimulate their business profits.⁶

While this scheme was new to the Peninsula, the DCIC was already well established in Downtown Cleveland.⁷ In 2006, downtown property owners created a Business Improvement District (“BID”)⁸ in an effort to improve the appeal of their businesses.⁹ As a district, they could collectively contract for services beyond those offered by the local government, including street cleaning and safety initiatives.¹⁰ Shortly after, the DCIC emerged to manage the district and oversee the taxing mechanism which funds the district projects.¹¹ Alongside the DCIC arose the Downtown Cleveland Alliance (“DCA”), that employs a service team, known as the Downtown Ambassadors, to deliver the district-funded amenities.¹² In December 2020, the DCA and its proponents embraced the approval of an Emergency Resolution, allowing the Downtown Cleveland Improvement District to add over 200 properties in the East Bank of the Flats to its taxable service map.¹³

Although grouped in the same district, the Peninsula drastically differs from Downtown Cleveland, which, like every metropolitan area, flourishes with increased

⁵ *What We Do*, DOWNTOWN CLEVELAND, <https://web.archive.org/web/20221010172013/https://downtowncleveland.com/about> (last visited Oct. 22, 2023).

⁶ *See Public Policy Agenda*, DOWNTOWN CLEVELAND, <https://www.downtowncleveland.com/publicpolicy> (last visited Oct. 22, 2023).

⁷ *See Our History*, DOWNTOWN CLEVELAND, <https://downtowncleveland.com/about> (last visited Oct. 22, 2023) (discussing the 2006 origin of DCA and the different roles it has played since its creation).

⁸ *Id.*; *see* CLEVELAND CITY PLAN. COMM’N I, BUSINESS IMPROVEMENT DISTRICTS IN CLEVELAND 4 (2nd ed. 2004), <https://planning.clevelandohio.gov/maps/pdf/2004BIDManual.pdf> (“A district created in Ohio under . . . Chapter 1710 is legally referred to as a Special Improvement District or ‘SID.’ Nationally, such districts are referred to by several different names . . . the City of Cleveland has informally adopted the use of the acronym ‘BIDs’ to refer to such districts, given its more widely accepted use nationally.”).

⁹ CLEVELAND CITY PLAN. COMM’N I, *supra* note 8, at 3.

¹⁰ *Id.* at 29–30.

¹¹ DOWNTOWN CLEVELAND IMPROVEMENT CORP., COMPREHENSIVE SERVICES PLAN FOR THE CONTINUED OPERATIONS OF THE DOWNTOWN CLEVELAND SPECIAL IMPROVEMENT DISTRICT FOR THE PERIOD OF 2016-2020 at 3 (2015), https://s3.countyplanning.us/wp-content/uploads/2020/08/Downtown-Cleveland-Plan-of-Services_2015.pdf.

¹² *See Clean, Safe & Welcoming*, DOWNTOWN CLEVELAND, <https://www.downtowncleveland.com/clean-and-safe> (last visited Oct. 22, 2023).

¹³ CLEVELAND, OH., Res. 713-2020 (2020); CLEVELAND, OH., Legis. Summary for Res. 713-2020 (2020).

consumer foot traffic.¹⁴ Downtown businesses like hotels, restaurants, and retail shops require customers to arrive at their place of business to make a profit.¹⁵ In contrast, the Peninsula houses industrial and goods-producing businesses that dispatch their services away from their property to meet their customers.¹⁶ It is no coincidence that many have this characteristic in common; they collected in this area primarily for its industrial zoning.¹⁷ As a result, the Peninsula is largely free of the litter and crime in more densely populated urban areas.¹⁸ Because the DCA's sanitary and safety services were valueless and virtually inapplicable to this mainly industrial area, the property owners could not help but wonder if the expansion was a mere power grab by the DCA in a blatant effort to boost funding at their expense.¹⁹

While advocates of the expansion celebrated the awaited influx of assessment dollars that would fund downtown projects,²⁰ Peninsula property owners, who would soon help subsidize the nearly \$700,000 increase in the DCIC's annual revenue,²¹ grappled to amend their pandemic-torn budget to accommodate the new BID tax.²² This policy may strike many property owners as unsettling. However, Ohio

¹⁴ See *Foot Traffic: Definition, Examples, and How to Measure It*, INDEED, <https://www.indeed.com/career-advice/career-development/foot-traffic-definition> (Feb. 3, 2023).

¹⁵ See *id.*

¹⁶ See Letter from BSI Properties, LLC to the Div. of Assessments and Licenses (Nov. 9, 2020) (on file with author) (providing a Columbus Road Peninsula business's objection to the district's expansion and explaining that customer attraction is not conducive to its business); Telephone interview with Rob Johnson, President, Boiler Specialists, Inc. (Sept. 1, 2023).

¹⁷ See *Experience the Flats*, *supra* note 3 (describing the flats as originally being "an industrial district focused on maximizing Great Lakes shipping routes"); *Columbus Road Bridge*, BRIDGES & TUNNELS, <http://bridgestunnels.com/location/columbus-road-bridge/> (last visited Oct. 22, 2023) (referring to this area as a "commercial and industrial district at the oxbow bend in the flats").

¹⁸ See Richard Florida, *Does Commercial Zoning Increase Neighborhood Crime?*, BLOOMBERG (July 11, 2017, 12:00 PM), <https://www.bloomberg.com/news/articles/2017-07-11/does-commercial-zoning-increase-neighborhood-crime> (discussing the relationship between crime and nightlife); Ronald E. Wilson et al., *Preventing Neighborhood Crime: Geography Matters*, NAT'L INST. JUST. (June 14, 2009), <https://nij.ojp.gov/topics/articles/preventing-neighborhood-crime-geography-matters> (discussing the connection between densely populated areas and crime); Damon Cline, *Taking Out the Trash*, AUGUSTA CHRON. (Aug. 19, 2019, 10:59 AM), <https://www.augustachronicle.com/story/lifestyle/magazine/2019/08/19/taking-out-trash-downtowns-litter-problem-is-multi-faceted/4434508007/> (discussing the relationship between urban litter and nightlife).

¹⁹ See Letter from BSI Properties, *supra* note 16.

²⁰ See, e.g., Jarboe, *supra* note 4 (explaining that the increase in funding will allow the DCA to put \$400,000 a year toward Downtown Cleveland's Public Square maintenance).

²¹ See *id.* (explaining the DCA's budget increase after the 2020 expansion as "jumping from \$4.2 million to \$4.87 million. Assessments . . . are rising slightly. The other factor driving the increase is the district's footprint, which is growing to include more properties along the east bank of the Cuyahoga River").

²² Letter from BSI Properties, *supra* note 16.

legislation, like that of many states, provides private corporations, like the DCIC, with nearly unfettered authority to force property owners to join their district with a heavy tax for unwanted services.²³ In turn, this authority permits a private BID to put financial pressure on individuals whose noncompliance will eventually cost them their property.²⁴

The statute enabling Ohio BID creation provides the legal basis for this seemingly unchecked power of BIDs to expand their districts and oppressive assessments.²⁵ Surprisingly, very few legal safeguards against BID assessments currently exist.²⁶ Presently, the power that property owners, in any state, have to combat the assessment lies within their state's constitutional limitations on taxation.²⁷ However, as further explained in this Note,²⁸ this approach is limited in effect.²⁹ Ohio's Constitution does not specifically prohibit taxation without representation, nor does it provide any other form of protection against unfair BID assessments for its residents and their property.³⁰ It should.

This Note argues that Ohio should defend its property owners against unfair BID assessments and proposes that Ohio incorporate these defenses into its constitution. Part II describes the creation and operation of BIDs under Ohio state law. Part III explains how BIDs play both private and public roles and the subsequent harms created by this hybrid structure. Finally, Part IV proposes amending the Ohio Constitution by (1) incorporating a consent to taxation provision, and (2) revising the method for creating special assessments.

II. BACKGROUND

The name Business Improvement District seems self-explanatory, but this special district employs complex layers of state legislation and procedural requirements.³¹ Part II sifts through these complexities and provides an overview of BIDs, including how BIDs are formed, funded, and governed. Section A describes the origin of BIDs and the scope of urban problems that they intend to resolve. Finally, Section B unravels the legal basis for the BID model and the processes for BID creation, operation, and expansion.

²³ See OHIO REV. CODE ANN. § 1710 (LexisNexis 2023).

²⁴ ABRAHAM UNGER, *BUSINESS IMPROVEMENT DISTRICTS IN THE UNITED STATES: PRIVATE GOVERNMENT AND PUBLIC CONSEQUENCES* 7 (2016).

²⁵ See generally OHIO REV. CODE ANN. § 1710 (LexisNexis 2023).

²⁶ See generally *id.*

²⁷ Richard Briffault, *A Government for Our Time—Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 446 (1999).

²⁸ See *infra* Part III.

²⁹ Briffault, *supra* note 27.

³⁰ See generally OHIO CONST. art. XIII (showing an absence of defensive provisions protecting taxpayers from excessive taxes levied by special districts).

³¹ See generally CLEVELAND CITY PLAN, COMM'N I, *supra* note 8, at 8 (explaining the intricacies of BID formation and procedural requirements).

A. *The Origin and Mission of BIDs*

Privatization is an increasingly popular and widely promoted policy in redeveloping.³² Privatization generally refers to the public sector contracting certain services to providers in the private sector.³³ This concept became particularly attractive to urban property owners during the early 1980s.³⁴ During this time, many cities struggled to effectively apportion their tax base, which was eroding due to suburban growth and the decline of manufacturing.³⁵ As a result, property owners turned to privatization to address their diminishing business revenues, stemmed directly from their city's deteriorating safety and visual appeal.³⁶ Municipalities began teaming up with local businesses to supplement their government's role in providing city services with the goal of revitalizing urban neighborhoods.³⁷

From this concept evolved the Business Improvement District that funds improvements and services aimed at stimulating its members' business profits.³⁸ State legislation permits and guides BID activity, and while that legislation differs from state to state, it is markedly similar nationwide.³⁹ Therefore, this Note focuses on national BID standards and the specific legal framework for BIDs in Ohio, with the goal that the information will have general applicability elsewhere.

BIDs are nearly ubiquitous today. Currently, there are over 1,000 BIDs in the United States.⁴⁰ Twenty-three belong to Ohio,⁴¹ eight of which exist in Cuyahoga County, with three more under proposal.⁴² Chances are, anyone who owns

³² UNGER, *supra* note 24, at 1.

³³ Jeffrey R. Henig, *Privatization in the United States: Theory and Practice*, 104 POL. SCI. Q. 649, 663 (1989).

³⁴ *See* UNGER, *supra* note 24, at 1.

³⁵ *Id.*

³⁶ Heather Barr, *More Like Disneyland: State Action, 42 U.S.C. 1983, and Business Improvement Districts in New York*, 28 COLUM. HUM. L. REV. 393, 395 (1997).

³⁷ UNGER, *supra* note 24, at 2.

³⁸ *Id.* at 3.

³⁹ Briffault, *supra* note 27, at 377–78; *see* Wayne Batchis, *Business Improvement Districts and the Constitution: The Troubling Necessity of Privatized Government for Urban Revitalization*, 38 HASTINGS CONST. L. Q. 91, 102 (2010).

⁴⁰ U.S. DEP'T TRANSP. FED. HIGHWAY ADMIN., BUSINESS IMPROVEMENT DISTRICTS 1 (2018), https://www.fhwa.dot.gov/ipd/fact_sheets/value_cap_bid.aspx.

⁴¹ Brent Thomas, *Ohio Special Improvement Districts: Collaborating for Better Communities*, MS CONSULTANTS (Mar. 20, 2019), <https://www.msconsultants.com/ohio-special-improvement-districts-collaborating-for-better-communities/>.

⁴² *See Special Improvement Districts Examples and Resources*, CUYAHOGA CNTY. PLAN. COMM'N, <https://www.countyplanning.us/resources/guidebooks/special-improvement-districts-guidebook/special-improvement-districts-examples-and-resources/> (last visited Oct. 22, 2023).

commercial property in the Cleveland area currently pays a BID assessment.⁴³ And those who rent either commercial or residential property in Cleveland? They pay the BID tax to their landlords on a monthly basis.⁴⁴ While it is likely that many urban dwellers have never heard of a BID, they are integral contributors to the district's finances because commercial landlords shift the cost of the BID to their tenants.⁴⁵ To understand the extent of the BID's stronghold on American cities, it is important to understand the BID creation process and the authority they hold.

B. *How Do BIDs Work?*

Comprehending the role and structure of BIDs requires a general understanding of entities below the state level.⁴⁶ Local governments consist of five groups: county, municipal, township, special districts, and school districts.⁴⁷ The BID falls within the category of "special districts," which are governmental units established for a specific purpose.⁴⁸ Over the past several decades, BIDs have emerged as an increasingly popular special district for cities throughout the country seeking economic opportunities.⁴⁹ A fundamental characteristic of every BID is that property owners establish and fund the district in a specified area to serve their specific needs.⁵⁰

Although privately funded and managed, BIDs in every state require an authorizing state statute that permits and guides the BID's formation and taxing power.⁵¹ Section 1710 of the Ohio Revised Code serves as Ohio's authorizing legislation and requires that an existing nonprofit corporation create the BID, beginning with a petition signed by the property owners.⁵² The petition includes the district's boundaries, financial and service plans,⁵³ and the supermajority of the

⁴³ See *id.* (containing map showing areas in which BIDs operate).

⁴⁴ See Rivlin-Nadler, *supra* note 1.

⁴⁵ See *Business Improvement Districts Destroy Our Communities*, DENVER HOMELESS OUT LOUD (Sept. 19, 2018), <https://web.archive.org/web/20211019155422/https://denverhomelessoutloud.org/2018/09/19/business-improvement-districts-destroy-our-communities/>; see also David J. Kennedy, *Restraining the Power of Business Improvement Districts: The Case of the Grand Central Partnership*, 15 YALE L. & POL'Y REV. 283, 285 (1996) (explaining that there is a lack of general knowledge about "governmental entities below the state level").

⁴⁶ See Kennedy, *supra* note 45.

⁴⁷ *Are There Special Districts in Your Hometown?*, CENSUS (Oct. 29, 2019), <https://www.census.gov/library/stories/2019/10/are-there-special-districts-in-your-hometown.html>.

⁴⁸ *Id.*

⁴⁹ See Kennedy, *supra* note 45, at 284–85.

⁵⁰ See Briffault, *supra* note 27, at 368.

⁵¹ See U.S. DEP'T TRANSP. FED. HIGHWAY ADMIN., *supra* note 40, at 2.

⁵² OHIO REV. CODE ANN. § 1710 (LexisNexis 2023).

⁵³ Briffault, *supra* note 27, at 378.

proposed district must sign in approval of the district’s creation.⁵⁴ In accordance with Section 1710.02(E), there are two ways to achieve a supermajority.⁵⁵ First, the owners of property that collectively represent at least sixty percent of the district’s total front footage—that is, any property that abuts any street, alley, or public road—may sign in favor of the BID’s creation.⁵⁶ Alternatively, seventy-five percent of all real property owners within the proposed district may sign in favor of its creation.⁵⁷

After achieving the required number of signees, the BID creators submit the petition, alongside its Articles of Incorporation and a plan for services, to the city council and mayor for approval.⁵⁸ The Articles of Incorporation function as the charter for the BID’s operation, outlining matters like the district name, description of the territories, reasons for creating the district, and processes for amendment to the Articles.⁵⁹ Finally, approval by the city council commences the BID’s formation.⁶⁰

III. PROBLEMS WITH PUBLIC-PRIVATE AUTHORITY

Part III discusses three main problems created by BIDs. Section A identifies BID’s private nature as the basis of their ability to evade the restrictions imposed on public government. Section B identifies the BID’s broad, government-like authority to tax and impose financial burdens on businesses with few limitations. Finally, Section C recognizes that Ohio’s Constitution provides property owners with inadequate protection from oppressive BID assessments.

A. *Private Entity Advantage*

BIDs are commonly referred to as private entities, however, they function much more like “private governments.”⁶¹ Private governments enjoy coercive structures that mirror that of public governments but are relieved of “public safeguards for democratic government such as stringent oversight requirements”⁶² BIDs fit squarely within the characteristics of private governments; they employ their private identity as a nonprofit to avoid the impediment of standard voting requirements applying their public governmental authority to coerce property owners to pay assessments by threatening a lien on their property.⁶³

⁵⁴ See OHIO REV. CODE ANN. § 1710(4)(E) (LexisNexis 2023).

⁵⁵ See *id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ CLEVELAND CITY PLAN. COMM’N I, *supra* note 8, at 24.

⁵⁹ See *id.* at 25–26.

⁶⁰ *Id.* at 36.

⁶¹ UNGER, *supra* note 24.

⁶² *Id.* at 8.

⁶³ See *id.* at 7.

Because BIDs are private governments, they maintain several distinctive features of private corporations.⁶⁴ The first of which is management by a board of directors.⁶⁵ The board makes all decisions regarding how the BID serves its stakeholders, including the design and approval of the improvement projects.⁶⁶ The board is ultimately autonomous because no checks and balances exist between parties on the board of directors.⁶⁷ Additionally, unlike local governments that must bring new taxes to a vote before levying them,⁶⁸ the BID has the private, internal power to create new services and require additional funding without obtaining approval from its members.⁶⁹ Finally, because BIDs are private nonprofit corporations, they are only required to produce minimal reporting⁷⁰ and have no obligation to provide complete financial transparency.⁷¹ This element is crucial to a member's ability to cast an informed vote when the BID is up for reinstatement. Ultimately, nonprofit boards are delegated to manage the district's policymaking without the contribution of their constituencies in the decision-making process.⁷² As a result, the directors function much like a group of "ruling elites who control the policy-making mechanisms"⁷³

B. *The Public Entity's Power to Levy Special Assessments*

⁶⁴ See *id.* at 32.

⁶⁵ See *id.* ("BIDs' public-private hybrid character is woven into the fabric of its very design. BIDs are assigned by local government a geographic district to manage, yet that management is governed by a BID's private board.").

⁶⁶ See *Business Improvement District (BID) Boards of Directors: Roles and Responsibilities*, NYC SMALL BUS. SERVS., <https://www1.nyc.gov/assets/sbs/downloads/pdf/neighborhoods/bid-board-of-directors-responsibilities-final.pdf> (Nov. 7, 2016); see also Batchis, *supra* note 39 ("This 'board is officially the principal decisionmaker in a BID's management structure, just as a corporate board of directors is in a more conventional nonprofit company.'").

⁶⁷ See Briffault, *supra* note 27, at 456 ("Cities look to BIDs to provide the public services BIDs provide these services without burdening the local public fisc.").

⁶⁸ See OHIO CONST. art. XII, § 2 (providing that "laws may be passed authorizing additional taxes to be levied . . . when approved by at least a majority of the electors of the taxing district voting on such proposition").

⁶⁹ See, e.g., UNGER, *supra* note 24, at 32 ("[T]he board of directors 'must retain control over all BID funds' A BID is allowed to prioritize its own budget with complete board discretion, yet the budget itself is funded by local public taxation.").

⁷⁰ See *id.* ("BIDs maintain no regular oversight mechanism beyond performance reviews they construct themselves on an irregular basis.").

⁷¹ See *id.* at 39 ("Low reporting requirements to their municipal overseers further allows BIDs to make decisions independently and act as they see fit with minimal constraint and great flexibility. . . . Their transparency is . . . quite weak. It is allowed because there is no force compelling BIDs to respond to any particular constraint that might affect raising funds.").

⁷² *Id.* at 10.

⁷³ *Id.*

BIDs' general freedom from public oversight and minimal inclusion of district members in decision-making becomes much more troubling when considering the immense power that BIDs hold. The BID's authority to impose a coercive tax on the district constitutes the public "government" aspect of the private government model.⁷⁴ This tax is called a "special assessment," and it requires individual property owners to pay an amount based on the percentage that their property represents within the district.⁷⁵ The district allegedly assesses each property's value by examining factors such as tax value, front footage, and benefits of services received.⁷⁶ A property's assessed value equals its proportion of the district's total assessed value.⁷⁷ Each property is then responsible for that same percentage applied to the total annual cost of the BID's service plan.⁷⁸ Figure 1 illustrates this calculation.

$$\text{Property}_x \text{ Assessment Fees} = \frac{\text{Property}_x \text{ assessed value}}{\text{All Properties' assessed values}} \times \text{BID Service Costs}$$

Figure 1⁷⁹

After the BID establishes the assessment fees, the city government collects and remits them to the BID.⁸⁰ Special assessments qualify as a coercive tax mechanism because all property owners within the district are legally responsible for paying them, regardless of whether they support the BID's creation or feel that they individually benefit from the services it provides.⁸¹ If a property owner fails to pay the assessment on a voluntary basis, the local government will levy the assessment on the owner's property tax bill issued by the county.⁸² This means that a property owner's continued

⁷⁴ *Id.* at 34.

⁷⁵ CUYAHOGA CNTY. PLAN. COMM'N II, SPECIAL IMPROVEMENT DISTRICTS 6 (2020), https://s3.countyplanning.us/wp-content/uploads/2022/01/SID_GuidebookAddendum.pdf ("[A] special assessment . . . is determined by a formula that uses a combination of front footage, assessed land, and building values to determine each property owner's assessment."); see OHIO REV. CODE ANN. § 727.01 (LexisNexis 2023) (defining special assessment).

⁷⁶ *Id.* at 6.

⁷⁷ See CLEVELAND CITY PLAN. COMM'N I, *supra* note 8, at 85.

⁷⁸ See *id.*

⁷⁹ See, e.g., *id.* at 86 (illustrating the application of the assessed value methodology as set forth by BIDs in Cleveland, Ohio).

⁸⁰ Ingrid Gould Ellen et al., *The Impact of Business Improvement Districts on Property Values: Evidence from New York City*, 2007 BROOKINGS-WHARTON PAPERS ON URB. AFF. 1, 1 (2007).

⁸¹ *Id.*

⁸² CLEVELAND CITY PLANNING COMM'N I, *supra* note 8, at 33.

failure to pay the assessment constitutes a failure to pay property taxes, which will result in a county-issued lien on his property, and eventually, foreclosure.⁸³

Because BIDs package their taxes as “special assessments,” assessments ultimately function as a work-around for constitutional tax limitations.⁸⁴ There is only a subtle distinction between a special assessment and a tax.⁸⁵ Under the general tax model, taxes require all citizens of the local government to pay for services that benefit everyone.⁸⁶ Yet, under the special assessments model, assessments apply to property owners within a limited area to pay for special or local improvements that only benefit the area—not the general public.⁸⁷ The reasoning behind the special assessment is that the improvement project will provide a special benefit to the payer, thus obligating his financial contribution.⁸⁸

However, where traditional assessments serve to fund infrastructure improvements that directly benefit the district members, BID special assessments differ in that they fund indirect, intangible services like marketing, advocacy, and strategic planning.⁸⁹ This makes quantifying individual payer benefits exceptionally difficult for at least two reasons. First, the nature of BID activities is vague, thus assigning benefits from the activities is equally unclear.⁹⁰ Second, these services push the boundary from member-specific services to encompass services that benefit the non-member public.⁹¹ Blending public and private benefits is troublesome because the special assessment *must* exclusively benefit the district, rather than the public, to avoid the limitations imposed on general taxes.⁹²

⁸³ See UNGER, *supra* note 24 (“BIDs are able to coerce a property owner to pay assessments through the threat of a lien on a non-compliant member’s property.”).

⁸⁴ See Briffault, *supra* note 27, at 446–47; Eric Luper, ‘Special Assessments’ and Taxes—A Distinction Without a Difference, CITIZENS RSCH. COUNCIL OF MICH. (June 7, 2019), <https://crcmich.org/special-assessments-and-taxes-a-distinction-without-a-difference>.

⁸⁵ See Briffault, *supra* note 27, at 447 (noting how courts tend to treat special assessments more like service fees than taxes going into government coffers).

⁸⁶ See *id.*

⁸⁷ *Laskey v. Hilty*, 91 Ohio App. 136, 145, 107 N.E.2d 899 (6th Dist. 1951) (“Assessments, as distinguished from other kinds of taxation, are special and local impositions upon property in the immediate vicinity of governmental improvement, which are necessary to pay for the improvement, and are laid with reference to the special benefit which the property is supposed to derive therefrom.”); see Briffault, *supra* note 27, at 447.

⁸⁸ *Laskey*, 91 Ohio App. at 145.

⁸⁹ Briffault, *supra* note 27, at 450.

⁹⁰ See *2nd Roc-Jersey Assocs. v. Town of Morristown*, 731 A.2d 1, 12 (N.J. 1999) (“The classical method of apportionment is not applicable . . . where . . . the nature of the benefit is general and intangible and the quantum of the benefit is imprecise.”).

⁹¹ See *id.* at 7–8.

⁹² See generally Briffault, *supra* note 27, at 451 (discussing the differences between taxes and assessments).

Article XVIII, Section 11 of the Ohio Constitution provides that, for the purpose of funding improvement projects, BIDs may impose special assessments on benefited property owners, under the condition that the cost never exceeds the value of the benefit provided.⁹³ Yet, like many other states,⁹⁴ Ohio’s Constitution neglects to define “benefit.”⁹⁵ Looking elsewhere for meaning, the Federal Highway Administration considers “benefit” to mean an increase in property value.⁹⁶ But the utility of “property value” is similarly hard to quantify. BID advocates insist that BIDs raise property value,⁹⁷ yet there are minimal studies showing that BID activity directly produces an increase in property value.⁹⁸ However, even if BID activity is responsible for this gain, business improvement and profit do not necessarily result from rising property values.⁹⁹ For many businesses, especially those in the industrial and goods-producing sector, property is essential to their operation.¹⁰⁰ Thus, increased property value only becomes beneficial to the owner at the time of sale.¹⁰¹ This suggests that the assessment largely ignores property owners’ actual benefit, consequently creating an arbitrary and unjust distribution of costs among district members.

The coercive taxing structure is especially problematic because the district maintains the power to force new areas into its taxable map.¹⁰² The process for

⁹³ OHIO CONST. art. XVIII, § 11 (“Any municipality appropriating private property for a public improvement may provide money therefor in part by assessments upon benefited property not in excess of the special benefits conferred upon such property by the improvements.”).

⁹⁴ See, e.g., W. Joseph Shoemaker, *What Constitutes “Benefits” for Urban Drainage Projects*, 51 DENV. L.J. 551, 563 n.50 (1974) (“No statutory definition of benefit in other jurisdictions has been discovered.”).

⁹⁵ See OHIO CONST. art. XVIII, § 11 (showing no definition of the word “benefit”).

⁹⁶ See, e.g., U.S. DEP’T TRANSP. FED. HIGHWAY ADMIN., *supra* note 40.

⁹⁷ See, e.g., *id.*

⁹⁸ See Amy Ellen Schwartz et al., *What Do Business Improvement Districts Do for Property Owners?*, 99 NAT’L TAX J. 431, 435 (2006) (“[V]irtually no studies have examined the impact of BIDs on property values.”).

⁹⁹ See *id.* (discussing that profits from commercial property sales decreased after the formation of BIDs).

¹⁰⁰ See *Real Property Tax—General*, OHIO DEP’T TAX’N, <https://tax.ohio.gov/help-center/faqs/real-property-tax-general/real-property-tax--general> (last visited Oct. 17, 2023) (suggesting higher appraisal values result in higher taxes which is implicitly not good for businesses which seek to minimize non-business expenditures); see also Bakry Elmedni et al., *Business Improvement Districts (BIDs): An Economic Development Policy or a Tool for Gentrification*, 5 COGENT BUS. & MGMT. 1, 15–16 (2018).

¹⁰¹ See Casey Bond, *Assessed Value vs. Market Value: What’s the Difference?*, FORBES, <https://www.forbes.com/advisor/mortgages/assessed-value-vs-market-value/> (Nov. 11, 2022) (explaining that an increase in property value leads to an increase in property taxes for the owner).

¹⁰² See OHIO REV. CODE ANN. § 1710.02 (LexisNexis 2023) (explaining that amendments must be accompanied by a petition signed by a certain number of owners within the proposed

expanding the district merely involves amending the BID's Articles of Incorporation to reflect new, expanded boundaries.¹⁰³ Pursuant to Section 1710.02 of the Ohio Revised Code, amending the articles requires the same supermajority approval required for the BID's creation, that is, sixty-percent of the front footage of all real property within the district.¹⁰⁴ To be clear, the supermajority required for annexation does not mean the supermajority of the proposed expansion area, but rather that of the *entire* district.¹⁰⁵ This means that even if none of the owners within an annexed area approve their own annexation, the district may simply elect to subsume them as long as the annexed area is small enough to not outnumber the existing supermajority.¹⁰⁶ In other words, property owners have no say as to whether they join the BID.¹⁰⁷

With such broad and effective authority to annex new properties, how can Ohio make certain that the BID will not manipulate this authority to pad its budget at the expense of non-beneficiary small businesses and property owners? Currently, no such guarantee exists.¹⁰⁸ In fact, it appears that BIDs may already be engaging in this behavior. For example, property owners on the Columbus Road Peninsula have paid the DCIC's assessments for two consecutive years, and many report a sparse presence of DCA Ambassadors in the area, no visual or safety improvements, and, unsurprisingly, no improvement to their business profits.¹⁰⁹ Yet, the 2020 annexation largely supported the near million-dollar increase for the DCA's annual funds, hundreds of thousands of which went to fund a single project in Downtown's Public Square, not the Flats.¹¹⁰ It appears that the DCIC intentionally redistributed funds from property owners in one area to those in another. Ohio should provide its residents with protection against the BID's power to manipulate their district maps.

C. *Ohio's Limited Protection for Property Owners Against Special Assessments*

Ohio legislation pays considerable attention to the creation and operation of BIDs, yet provides no protection for property owners against the undue economic hardships

district, and then the municipal corporation or township has sixty days to approve or disapprove).

¹⁰³ *See id.*

¹⁰⁴ *Id.* (“[T]he articles or amendments shall be accompanied by a petition signed either by the owners of at least sixty per cent of the front footage of all real property located in the proposed district . . .”).

¹⁰⁵ *See id.*

¹⁰⁶ *See id.*

¹⁰⁷ *See id.*

¹⁰⁸ *See Kessler v. Grand Cent. Dist. Mgmt. Ass'n*, 158 F.3d 92, 114 (2d Cir. 1998) (stating that a report “concluded that the BIDs’ freedom to administer their programs largely without City supervision had resulted in patterns of abuse and mismanagement”).

¹⁰⁹ Telephone interview with Rob Johnson, *supra* note 16.

¹¹⁰ *See Jarboe*, *supra* note 4.

imposed by BID assessments.¹¹¹ Currently, there are three available avenues for a payer to resist a special assessment: formal objections, state constitutional tax limitations, and state constitutional prohibitions on the taking of private property.¹¹² This subsection addresses these options and explains why each is insufficient in providing protection to property owners.

1. Objecting to the Assessment

Filing a written objection with the clerk of council is the first option for an Ohio resident to challenge a special assessment.¹¹³ As provided by state statute, the owner may file this objection within two weeks after the district provides him with notice of the assessment.¹¹⁴ The council then appoints an Assessment Equalization Board to hear the objections.¹¹⁵ This approach is primarily ineffective at combating an unfair assessment.¹¹⁶ As explained further in Section IV of this Note,¹¹⁷ front footage is the only criterion for assessing special benefit; thus, successfully challenging the assessment based on individual utility is unlikely.¹¹⁸

2. State Constitutional Tax Limitations

The second and more viable option for the payer to legally challenge the assessment is to invoke the state's constitutional provisions restricting taxation; this is true for every state, not only Ohio.¹¹⁹ Constitutional protections often appear in provisions like a consent to tax clause, which requires consent of the people or their representatives before any governmental entity may levy a tax upon them.¹²⁰ Another restriction appears in a tax uniformity clause which prohibits any tax that is not equally

¹¹¹ See OHIO REV. CODE ANN. § 1710 (LexisNexis 2023) (excluding defensive provisions protecting taxpayers from excessive taxes levied by special districts).

¹¹² See OHIO REV. CODE ANN. § 727.15 (LexisNexis 2023) (explaining the requirements for formal objections); Briffault, *supra* note 27, at 446–47 (discussing the state constitutional tax limitation challenges); OHIO CONST. art. I, § 19 (regarding the state constitutional property taking challenges).

¹¹³ See OHIO REV. CODE ANN. § 727.15 (LexisNexis 2023) (providing that the property owners have the right to submit a written objection).

¹¹⁴ *Id.*

¹¹⁵ See OHIO REV. CODE ANN. § 727.16 (LexisNexis 2023).

¹¹⁶ See *infra* Part IV.B.2.

¹¹⁷ See *infra* Part IV.

¹¹⁸ See *infra* Part IV.

¹¹⁹ Elinor Haider, *How Pennsylvania's Uniformity Clause Affects Property and Wage Taxes in Philadelphia*, PEW CHARITABLE TRS. (Mar. 9, 2022), <https://www.pewtrusts.org/en/research-and-analysis/fact-sheets/2022/03/how-pennsylvanias-uniformity-clause-affects-property-and-wage-taxes-in-philadelphia>.

¹²⁰ *Weaver v. Recreation Dist.*, 492 S.E.2d 79, 81 (S.C. 1997).

applied to all citizens throughout the state.¹²¹ Both of these limitations appear applicable to the BID tax because the property owners have not directly consented to the tax, nor is the tax uniform to every property owner throughout the entire state.¹²² However, as previously noted, the BID's tax is not technically a tax, but rather a "special assessment," meaning that tax restrictions are generally inapplicable.¹²³ This is the fundamental reason why constitutional challenges to BID assessments are largely ineffective, not only in Ohio, but nationwide.¹²⁴

3. State Constitutional Prohibition on the Taking of Private Property Without Just Compensation

The third basis for challenging special assessments is embedded within the Eminent Domain provision in Article I, Section 19 of Ohio's Constitution.¹²⁵ This provision prohibits the taking of private property without just compensation.¹²⁶ The issue of unconstitutional takings is complex and beyond the scope of this Note. However, it is important to acknowledge that the Eminent Domain provision is another potential avenue for challenging special assessments.¹²⁷ Furthermore, it is important to identify the general reasons for why this provision is ill-equipped to combat special assessments—specifically BID assessments.

Article 1, Section 19 provides that "private property shall ever be held inviolate, but subservient to the public welfare."¹²⁸ The Supreme Court of Ohio has adopted the understanding that "[t]he provisions of the Constitution forbid, not only the taking of the private property of one, but as well the laying of an imposition upon it, for the sole benefit of another."¹²⁹ Furthermore, in *Laskey v. Hilty*, the Sixth District of Ohio Court of Appeals struck down a special assessment imposed on a landowner that was designed to fund the construction of a waterline.¹³⁰ The Sixth District found that the assessment was an unconstitutional taking of private property because it was created solely by evaluating front-footage and demonstrated no "consideration or determination of the actual benefit conferred upon the landowner's property by the

¹²¹ See OHIO CONST. art. XII, § 3(B) ("Laws may be passed providing for: . . . (B) [t]he taxation of incomes, and the rates of such taxation may either be uniform or graduated, and may be applied to such incomes and with such exemption as may be provided by law.").

¹²² See *supra* Part III.A (discussing the autonomous board of directors and its ability to raise the BID's budget without input from the district members).

¹²³ Briffault, *supra* note 27, at 446–47; see *McGowan v. Capital Ctr.*, 19 F. Supp. 2d 642, 649 (S.D. Miss. 1998).

¹²⁴ See Briffault, *supra* note 27, at 375–76.

¹²⁵ OHIO CONST. art. I, § 19.

¹²⁶ See *id.*

¹²⁷ See *id.* (requiring compensation to the owner when private property is taken for the purpose of making or repairing roads which shall be open to the public).

¹²⁸ *Id.*

¹²⁹ *Alma Coal Co. v. Cozad*, Treas., 79 Ohio St. 348, 348, 87 N.E. 172 (1909).

¹³⁰ *Laskey v. Hilty*, 91 Ohio App. 136, 155–56, 107 N.E.2d 899 (6th Dist. 1951).

proposed improvement.”¹³¹ In fact, plenty of Ohio case law has declared that special district assessments that exceed their benefit are unconstitutional under Article 1, Section 19.¹³² However, these cases almost always involve special districts dedicated to infrastructure, not business improvement projects.¹³³

Unlike infrastructure-based special districts, such as those dedicated to water, sewer, electric, or community facility projects,¹³⁴ BIDs are special districts that deliver very few tangible goods or services, which makes their value to individual property owners difficult to quantify.¹³⁵ While not binding precedent in Ohio, the Supreme Court of New Jersey expressed a similar conclusion when it held that a BID assessment on commercial properties did not constitute an unconstitutional taking because the benefit conferred was “general and intangible, and the quantum of benefit was imprecise.”¹³⁶ This holding illustrates that, while courts recognize that an assessment exceeding special benefit establishes an unconstitutional taking, the ambiguity of the “general” benefit created by BIDs greatly impedes on property owners applying the Eminent Domain clause as a defense to BID assessments.¹³⁷

Despite the various grounds for challenging special assessments, none serve as a practical option for defending property owners against BIDs and their immense power.¹³⁸ Ohio should establish stronger safeguards against this excessive power to prevent BIDs from serving certain property owners at the expense of others.

IV. CREATING CONSTITUTIONAL PROTECTIONS AGAINST SPECIAL ASSESSMENTS

The common thread among each issue identified in Part III of this Note is the financial burden created by the BID’s special assessment. This section proposes two solutions to these issues: (1) amending the Ohio Constitution to include a consent to tax provision, and (2) amending the Ohio Constitution to accurately define “special benefit” and lay the groundwork for its calculation of special assessments. Ohio should implement both of these solutions; however, as discussed further in this section, the latter approach will provide the most effective remedy.

A. *Consent to Tax Provision*

¹³¹ *Id.*

¹³² *See, e.g.,* *Domito v. Maumee*, 140 Ohio St. 229, 231, 42 N.E.2d 984 (1942); *Walsh v. Barron*, 61 Ohio St. 15, 24–25, 55 N.E. 164 (1899).

¹³³ *See, e.g.,* *Domito*, 140 Ohio St. at 231, 42 N.E.2d 984; *Walsh*, 61 Ohio St. at 24–25, 55 N.E. 164; *In re Joint County Ditch*, 122 Ohio St. 226, 227, 171 N.E. 103 (1930) (demonstrating case law regarding infrastructure-based special districts).

¹³⁴ *Federal Advocacy Platform*, NAT’L SPECIAL DISTS. COAL., <https://www.nationalspecialdistricts.org/advocacy/platform> (last visited Feb. 9, 2023) (listing different types of infrastructure that special district facilities provide).

¹³⁵ *2nd Roc-Jersey Assocs. v. Town of Morristown*, 731 A.2d 1, 12 (N.J. 1999).

¹³⁶ *Id.*

¹³⁷ *See id.*

¹³⁸ *See Janet Rothenberg Pack, BIDs, DIDs, SIDs, SADs: Private Governments in Urban America*, BROOKINGS REV. 18, 18 (1992).

As provided in Section II of this Note, the strongest legal bases for challenging BID assessments are state constitutional provisions restricting local taxation.¹³⁹ Provisions that require consent by the people or their representatives are among the strongest restrictions available.¹⁴⁰ Ohio's Constitution does not include such a provision.¹⁴¹ However, South Carolina case law illustrates the potential benefit if Ohio were to adopt this constitutional protection.¹⁴²

Article X, Section 5 of South Carolina's Constitution provides that "no tax . . . shall be established, fixed, laid, or levied, under any pretext whatsoever, without the consent of the people or their representatives lawfully established."¹⁴³ The South Carolina Supreme Court held this provision to mean that the legislative power to tax may only "be conferred upon a body which stands as the direct representative of the people, to the end that an abuse of power may be directly corrected by those who must carry the burden of the tax."¹⁴⁴ In 1995, the court applied this rule in *Weaver v. Recreation District*.¹⁴⁵ In *Weaver*, a taxpayer challenged the state constitutionality of a statute which enabled a county recreation commission, run by a board of directors, to levy a tax on all district properties for creation and maintenance of recreational facilities.¹⁴⁶ Because the recreation commission was an unelected board, and thus, did not represent the district taxpayers, the court determined that the commission's complete discretion to establish an annual budget and levy taxes was an unconstitutional violation of the consent to tax provision.¹⁴⁷

The commission in *Weaver* has several similarities to the board of directors that run BIDs. Like BID directors, the *Weaver* commission established its own budget, levied its own taxes, and applied coercive governmental authority to enforce payment.¹⁴⁸ However, in regard to the issue of BID taxes, such an amendment would likely produce little effect on property owners. This is because BID taxes, as previously discussed, are not technically taxes, but rather special assessments that are immune to constitutional tax limitations.¹⁴⁹ Thus, even if Ohio's Constitution incorporated a consent to tax provision, it would likely not apply here, and the BID

¹³⁹ See Briffault, *supra* note 27.

¹⁴⁰ See *id.* at 430–31.

¹⁴¹ See OHIO CONST. art. XII (demonstrating the exclusion of a consent tax provision).

¹⁴² See *Weaver v. Recreation Dist.*, 492 S.E.2d 79, 81 (S.C. 1997).

¹⁴³ *Id.*

¹⁴⁴ *Id.* (citing *Crow v. McAlpine*, 285 S.E.2d 355, 358 (S.C. 1981)).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 85.

¹⁴⁷ *Id.*

¹⁴⁸ See OHIO REV. CODE ANN. § 1710.02 (LexisNexis 2023) (describing the requirements for a Special Improvement District, detailing formation and organization under the Ohio Revised Code Structure); *Weaver*, 492 S.E.2d at 81.

¹⁴⁹ Briffault, *supra* note 27, at 446–47.

tax remains under the governance of Article XVIII, where an assessment is constitutional as long as it does not exceed the “benefit” provided.¹⁵⁰

However, a consent to taxation clause could provide protection in the future, even if not directly applicable today. BID activities continue to blur the line between services designed to directly serve their members and those that serve the general public.¹⁵¹ Plenty of BID services, such as event planning and acting as a concierge for visitors,¹⁵² extend to reach the public and thus exist somewhere in between public and private benefits. This crossover may redefine the assessments as a tax because the qualifying characteristic of a special assessment is providing a *private*, rather than public, benefit.¹⁵³ In this situation, the consent to tax clause is crucial to hold the BID assessment unconstitutional as a tax without proper consent.¹⁵⁴

Ohio’s consent to tax provision should mimic that of South Carolina, which prohibits the levy of a tax without the consent of the people or their representatives.¹⁵⁵ But it should also proactively consider challenges posed to other states regarding similar provisions. In *Larson v. Monorail Authority*, the plaintiffs challenged a special district’s tax on the grounds that it violated Washington State’s consent to tax provision.¹⁵⁶ The plaintiffs pointed out that the district’s seven-member board only consisted of two elected members.¹⁵⁷ Therefore, they argued that the board did not have the authority to levy the tax because it did not constitute a valid representation of the people.¹⁵⁸ The Washington Supreme Court upheld the tax’s constitutionality because state legislation governing the district allowed for the delegation of taxing power to the board.¹⁵⁹ Thus, the voters approved both the board selection process (by means of election and appointment) and the board’s authority to levy taxes.¹⁶⁰ To avoid a similar loophole, Ohio’s proposal for a consent to tax clause should assert that the State may only delegate ministerial functions to nonrepresentative bodies, but never legislative taxing power.

¹⁵⁰ See OHIO CONST. art. XVIII, § 11.

¹⁵¹ See Briffault, *supra* note 27, at 455 (“BIDs often provide benefits to people outside the districts and to their cities as a whole.”).

¹⁵² See *Public Policy Agenda*, *supra* note 6 (describing the goals of Downtown Cleveland, including simplifying event permitting and enhancing quality of health and safety for residents and visitors).

¹⁵³ See Briffault, *supra* note 27, at 451 (noting the legal test of a BID assessment to be whether the benefit is distinctive to the district (private) rather than the broader community (public)).

¹⁵⁴ See *Weaver v. Recreation Dist.*, 492 S.E.2d 79, 81 (S.C. 1997).

¹⁵⁵ See *id.* (describing the relevant portion of the South Carolina Constitution).

¹⁵⁶ See *Larson v. Monorail Auth.*, 131 P.3d 892, 896 (Wash. 2006).

¹⁵⁷ *Id.* at 894.

¹⁵⁸ *Id.* at 896.

¹⁵⁹ *Id.* at 898.

¹⁶⁰ See *id.* at 894.

Opponents may challenge this approach, arguing that lawmakers are representatives of the people, and should retain authority to delegate its power. However, the main issue here is a lack of direct representation of the individual taxpayers, and therefore, for the amendment to succeed, it must ensure a greater degree of direct representation of the people and prohibit subsequent legislation from nullifying its very purpose.

B. *Reforming Special Assessments*

Ohio should also amend its constitution to better define “special benefit” and lay the groundwork for its calculation of special assessments. California adopted a similar amendment, Proposition 218,¹⁶¹ which serves as a useful model for predicting whether this solution might produce equitable BID assessments in Ohio. Because special assessments are legally distinguished from general taxes, California taxpayers grappled with an influx of special assessments that evaded the state’s constitutional tax limitations.¹⁶² Proposition 218 offered taxpayer protection by restricting the ways in which local governments could generate revenue from them without their explicit consent.¹⁶³ Specifically, the amendment requires that the assessing agency justify that the BID activity does in fact produce a special benefit to property owners.¹⁶⁴

Under Proposition 218, the local government is required to assess whether property owners would receive a special benefit from the project, otherwise, that project cannot receive financing through the assessment.¹⁶⁵ In this context, “special benefit” requires a benefit to the land and buildings, not a general benefit to the public or a general increase in property values.¹⁶⁶ Next, the local government must employ a professional engineer’s report to estimate the level of special benefit that landowners would obtain, as well as the amount of “general benefit.”¹⁶⁷ This step is necessary because only the costs to produce special benefits may be recouped by the assessment, and the local government must apply other revenues to finance the remaining “general benefits.”¹⁶⁸ Finally, the local government establishes assessment charges for each individual payer, ensuring that each payer is responsible for no more than their proportionate share of the costs.¹⁶⁹

Currently, the DCA offers numerous vague services, like “advocat[ing] . . . for urban design,” “connec[ting] people in crisis with . . . shelter,” and providing

¹⁶¹ *Understanding Proposition 218*, LEGIS. ANALYST’S OFF. (Dec. 1996), https://lao.ca.gov/1996/120196_prop_218/understanding_prop218_1296.html.

¹⁶² *See id.*; *Text of Prop. 218 With Analysis*, HOWARD JARVIS TAXPAYERS ASS’N, <https://www.hjta.org/propositions/proposition-218/text-proposition-218-analysis/> (last visited Oct. 20, 2023).

¹⁶³ *Understanding Proposition 218*, *supra* note 161.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

“education to rising leaders.”¹⁷⁰ It is difficult to determine if any district member benefits from these services at all, much less how to apportion that benefit by front footage. If Ohio adopted an amendment similar to Proposition 218, it could better restrain BIDs from using assessments to fund activities that do not provide direct or easily apportioned benefits to the district properties. Under this framework, the DCA might have to abandon several of its ambiguous services, thus lowering the BID’s budget and ultimately reducing costs for property owners.

1. Distinguishing Special and General Benefits

Ohio should follow Proposition 218 as a model but should take additional steps to distinguish between special and general benefits. First, unlike Proposition 218, which requires the elimination of services that only present an *exclusive* public service,¹⁷¹ Ohio should call for the elimination of any BID service where at least half of the provided benefit serves the general public. This strategy would place an impetus on the BID to carefully plan projects to assure landowner benefits, otherwise, the BID may risk losing the project’s funding entirely.

Critics of this approach may argue that projects which mainly serve the general public are still of value to the BID, and therefore, should be immune to elimination. However, it is important to preserve the original, and *only*, distinction between the special assessment and a general tax: assessments may only fund activities specifically beneficial to the district, not the general public.¹⁷² If the general public absorbs a substantial portion of the overall benefit derived from the activity, then accordingly, Ohio should regard payment for that service as a general tax, subjecting it to the state’s constitutional uniformity requirement.¹⁷³

Second, Proposition 218 grants too much discretion to local government in deciding what constitutes a special benefit.¹⁷⁴ While the current BID assessment process apparently leaves determining “special benefit” entirely to the judgement of the BID itself,¹⁷⁵ a transfer of this power to the local government might yield little improvement for several reasons. First, local government gives final approval of BID creation, amendment, and assessments,¹⁷⁶ which suggests that the local government

¹⁷⁰ *What We Do*, *supra* note 5.

¹⁷¹ *See id.*

¹⁷² *See* Briffault, *supra* note 27, at 447 (explaining the public / private benefit difference between a tax and a special assessment).

¹⁷³ *See generally* OHIO CONST. art. XII, § 2.

¹⁷⁴ Briffault, *supra* note 27, at 447–48.

¹⁷⁵ CLEVELAND CITY PLAN. COMM’N I, *supra* note 8, at 17 (explaining that BID creators are responsible for creating “property inventory database,” which is used for calculating assessments based on front footage); *id.* at 31 (explaining that the “front footage method of assessment cannot be used if any properties within the BID boundary do not have frontage that will benefit from the BID services and improvements” yet including no method for determining when that is the case; suggesting that if the BID provides a property’s front footage in its database, this is assumed to be representative of that property’s benefit because no further steps exist to question whether it is improper).

¹⁷⁶ *Id.* at 24.

has already waived its opportunity to reform the current assessment scheme.¹⁷⁷ Furthermore, board members work closely with local government,¹⁷⁸ bringing into question whether government officials are willing or able to sympathize with small businesses and local property owners who oppose the board's decision making. Therefore, Ohio should transfer the power of determining "special benefit" to the district members themselves.

To implement this plan, Ohio's amendment should require that the BID provide its members with a proposed annual budget and clear details of the projects that the budget will fund. After the members review the BID's plans, the BID should bring each project to a district-wide vote, where members will relay whether they feel that their individual property benefits from each service. The BID should eliminate all services that fail to garner support from a simple majority of the district's members because anything short of majority support clearly indicates that many of the district's stakeholders will not benefit from the project.

Increased involvement from all district members will simultaneously address other previously identified problems regarding BID's private-public power. Because the BID leaves most property owners uninformed as to what activities they are funding,¹⁷⁹ this change would increase BID transparency and compel the organization to communicate with its members regarding budget and spending plans. Furthermore, the voting process will supply the necessary checks and balances on the currently autonomous board because it will require the BID to revise its service plans as a direct response to its members' disapproval.

Moreover, this approach will address the issue of annexation as well. Consider that the BID yields its highest revenue from collecting assessments on the properties that benefit the least, given that those properties will cost the least to serve.¹⁸⁰ Currently, this incentivizes BIDs to annex territories that are substantially clean, safe, and in need of little or no assistance from the BID (*i.e.*, territories where the businesses derive the lowest benefit). Requiring BIDs to hold a district-wide vote on the utility of each service discourages BIDs from annexing territories solely for the purpose of increasing BID funding. This is because, as the BID further saturates its voting pool with property owners that find certain projects unbeneficial, the BID increases the probability that those projects will face complete elimination from the district's service plan.

2. Assessing Individual Benefit

¹⁷⁷ See generally *id.* at ch. 4.

¹⁷⁸ Margy Judd, *Downtown CLE Grows as a Residential Neighborhood*, EXEC. ARRANGEMENTS (Mar. 28, 2017), <https://executivearrangements.com/downtown-cle-grows-residential-neighborhood/> (describing the Downtown Cleveland Alliance as acting "as a liaison to City Hall").

¹⁷⁹ See UNGER, *supra* note 24, at 39 ("Low reporting requirements to their municipal overseers further allows BIDs to make decisions independently and act as they see fit with minimal constraint and great flexibility. . . . Their transparency is . . . quite weak. It is allowed because there is no force compelling BIDs to respond to any particular constraint that might affect raising funds.").

¹⁸⁰ Will Kenton, *Profit Definition Plus Gross Operating, and Net Profit Explained*, INVESTOPEDIA, <https://www.investopedia.com/terms/p/profit.asp> (June 2, 2022) (explaining that the gross profit recognized is the sales minus cost of products).

After restraining the services that BIDs may fund under the assessment, the problem of apportioning the costs persists. The current assessment calculation for Ohio BIDs involves evaluating the “benefits or services/improvements received.”¹⁸¹ But this calculation improperly assumes that “benefits” and “services” are synonymous, when in fact, every business will receive a different benefit from the same service depending on the nature of that business.¹⁸² For example, late-night security delivers a greater benefit for bars and nightclubs than for industrial businesses with hours of operation between nine and five.

California’s Proposition 218 provides a model for addressing this issue as well. It requires that the local government set the individual payer’s assessment, holding each payer responsible for no more than their proportional share of the costs.¹⁸³ However, Proposition 218 does not clearly indicate the method for achieving this individualized assessment.¹⁸⁴ To avoid introducing similar uncertainty, Ohio should set forth an assessment theory that determines special benefits based on two main factors: location and business type.

In addressing location, the district must consider the main problems that the BID seeks to address and then determine the areas where those problems persistently emerge. Yet, making such an identification for certain services may prove difficult for the BID. Consider an example where the services include sanitation and security. After close empirical evidence reveals how much waste was removed and how many security efforts were made in each area, the district can assess which areas derive the highest benefit from those services. On the other hand, an evaluation of the utility for services, like development advocacy, will require a different approach. To measure the benefit of these less-tangible services, the district should evaluate the activity as specifically as possible. For example, development advocacy that involves promoting a change from industrial to mixed-use zoning should acquire its funds specifically from the areas demonstrating a need for that advocacy (*i.e.*, areas with residential developers), rather than the district as a whole. After measuring the specific allocation of services per area, the BID should subdivide the district and assign to each subdivision a proportion of the BID’s budget based on need.

This area-specific valuation will certainly provoke concern about overcomplicating the assessment process. However, a complex assessment should not outweigh the benefits of a thorough and objective review, especially because BID assessments are capable of financially crippling property owners and putting them out of business.¹⁸⁵

¹⁸¹ CLEVELAND CITY PLAN. COMM’N I, *supra* note 8, at 30.

¹⁸² See U.S. DEP’T TRANSP. FED. HIGHWAY ADMIN., *supra* note 40 (explaining that the services BIDs provide do not equally benefit all of their property owners); *Foot Traffic*, *supra* note 14 (showing that only certain types of businesses benefit from increased foot traffic); *Public Policy Agenda*, *supra* note 6 (showing that increasing consumer foot traffic is a goal of BID services).

¹⁸³ *Understanding Proposition 218*, *supra* note 161.

¹⁸⁴ See *id.* (explaining that some important provisions in Proposition 218 “are not completely clear”).

¹⁸⁵ See, e.g., Chris Tomlinson, *Texas Small Businesses Need a Property Tax Break Too, The Legislature Should Spend Big*, HOUS. CHRON. (Jan. 23, 2023), <https://www.houstonchronicle.com/business/columnists/tomlinson/article/texas-high-business->

The second and most important special assessment reform requires that the district look to the type and nature of the business occupying the property when assessing the individual benefit derived from BID services. The Downtown Cleveland Improvement Corporation made assessment calculations for each parcel of property, and these calculations reveal that the district relies solely on front footage in the final assessments.¹⁸⁶ In other words, the BID assesses all commercial properties within the district equally under the improper presumption that these businesses absorb the same benefit, per front foot of property, from each service provided by the DCA.¹⁸⁷

To avoid the continuation of this inequitable distribution of costs, the assessment process should identify each property by the business occupying it. Specifically, the BID should separate properties into two categories: those owned by businesses within the goods-producing sector and those owned by businesses within the service-producing sector. The prior group, consisting of those who do not entertain customers at their places of business,¹⁸⁸ should not pay more than a minimum baseline charge, completely eliminating the front footage factor from their assessments. Because these businesses draw revenue from either distributing goods or dispatching services, they draw no benefit from projects designed to attract customers to their property.¹⁸⁹ Therefore, the front footage factor lends no weight to assessing their benefit.

To prevent manipulation of the baseline charge, the BID fees should apply to every property within the district and determine its cost through another district-wide vote. The voting process will ensure that the district has proper representation in establishing the cost, and the uniform application will prevent the weaponization of the baseline charge against goods-producing businesses because every member will hold responsibility for paying it.

The BID's assessment should then turn to businesses that fall within the service-producing sector, and it should individually assess those properties based on several factors such as the number of customers they accommodate, the hours of operation, and front footage. These factors are relevant because they directly reflect the likelihood that each business will profit from an increase in consumer foot traffic. Furthermore, while this Note strongly opposes the front footage-based assessments, footage should remain merely a factor here because, if all properties benefit from the service, it can help quantitatively distribute the cost.

A common challenge to relieving any property owner from a BID assessment is the free-rider issue.¹⁹⁰ BID proponents argue that many services, like sanitation of

taxes-break-17725821.php (showing how special assessments that provide little value can lead to small businesses being driven out of business).

¹⁸⁶ See *Special Improvement District Assessment Table*, DOWNTOWN CLEVELAND ALLIANCE (Nov. 5, 2020), <https://docs.google.com/spreadsheets/d/1XCkpQFyZCTGgRojw-HAV63cbdoSRjZoq/edit?rtopf=true#gid=110101366> (showing that the assessment uses the exact same calculation on each property).

¹⁸⁷ See *id.*

¹⁸⁸ See generally *Foot Traffic*, *supra* note 14 (discussing how benefits are realized differently by businesses that rely on foot traffic and those that do not).

¹⁸⁹ See *id.* (showing the types of businesses that benefit from foot traffic are those that “rely on people coming to their establishment to buy products or services,” and thus, not businesses that distribute goods or dispatch services).

¹⁹⁰ Briffault, *supra* note 27, at 394.

public areas, will naturally benefit the entire district, and relieving any member from funding those services will allow him to enjoy the benefit without contributing.¹⁹¹ This argument suggests that free riding will lead to a concentration of costs on certain members, who will eventually revoke their support of the BID.¹⁹² However, free riding is already taking place under the current BID model.¹⁹³ Property owners who do not benefit from the BID are still obligated to pay for its services, and therefore, they are subsidizing the benefits received by other businesses.¹⁹⁴ Therefore, to fairly resolve this issue, the interest of property owners should come first. The BID should absorb the negative externalities of free riding that results from the BID's existence, rather than shifting that encumbrance on to its members.

3. Consequences of a Benefits-Based Assessment

Under the proposed model, the BID will have to abandon its front-footage based assessment strategy responsible for the unjust distribution of the BID tax. Moreover, service-based corporations that seek to increase customer foot traffic will hold responsibility for a larger burden of the tax.¹⁹⁵ This solution will directly address the fundamental problem identified in this Note, which is the unfair distribution of BID costs and the subsequent harm inflicted on non-benefiting businesses.

This solution addresses the issue regarding BID expansion as well. If assessments are closely tied to actual benefit rather than front footage, BIDs will have little incentive to annex new territories that reap little benefit from their services. In fact, BIDs might find an incentive to *avoid* annexation of new territories that will not substantially benefit from the services because the expense of surveying the area may outweigh the minimal financial gain.

Consider this solution in regard to the annexation of the Columbus Road Peninsula. After approval of the DCIC's expansion, property owners on the Peninsula continue to report that DCA Ambassadors rarely appear in their area.¹⁹⁶ This is likely a result of the low demand for street cleaning and security, which are main services provided by the DCA.¹⁹⁷ This begs the question of whether the DCIC annexed the Peninsula merely for its promise of increased BID revenue in exchange for a very minimal

¹⁹¹ *See id.*

¹⁹² *Free Rider Problem: Explanation, Causes, and Solutions*, INVESTOPEDIA, https://www.investopedia.com/terms/f/free_rider_problem.asp (Dec. 29, 2020) (“Free riding prevents the production and consumption of goods and services through free-market methods. . . . As a consequence the producer of the resource cannot be sufficiently compensated. The shared resource must be subsidized in some other way, or it will not be created.”).

¹⁹³ *See* Briffault, *supra* note 27, at 465 (discussing how free-riders take advantage of BIDs special assessments while not buying in).

¹⁹⁴ *See generally* CLEVELAND CITY PLAN. COMM’N I, *supra* note 8, at 17 (showing that front footage is the method for assessment, so property owners will pay according to their footage even when the service entirely benefits others).

¹⁹⁵ *See* Batchis, *supra* note 39, at 93 (explaining how certain businesses benefit to a greater extent than others); *see also* Jarboe, *supra* note 4.

¹⁹⁶ Telephone interview with Rob Johnson, *supra* note 16.

¹⁹⁷ *Id.*

expenditure of DCA resources. But, if Ohio defined benefit based on utility and location, as proposed here, the DCIC likely would not have annexed this territory because the nature of the businesses on the Peninsula would have rendered the area much less valuable to the district.

Additionally, this solution would have likely rendered the Peninsula's annexation unconstitutional under Article XVIII, Section 11, which requires that assessments not exceed benefits received.¹⁹⁸ Ohio would have been able to identify that the assessments exceeded benefit because benefit would have reflected value rather than merely front footage.

It is important to consider the possibility that this reform will cause Ohio BIDs to lose revenue, and in response, BIDs might increase assessments to recoup the deficit. However, as assessments rise to an unreasonable rate, those members that absorb the highest benefit, and thus, the highest costs, will naturally begin to retract their support for the BID.¹⁹⁹ Therefore, this solution will trigger a self-regulating effect and the BID will have to reduce its assessments in order to receive enough support for reinstatement.²⁰⁰

It is possible that this new structure might cause the BID to become overly exclusive. Nevertheless, it is important to note that BIDs first emerged to address the local government's inability to address the unique and specific needs of property owners within a defined area.²⁰¹ As a single BID expands over diverse territory, the exact same problem arises *within* the BID as well, and the one-size-fits-all services cannot address the specific needs of every member.²⁰² Therefore, the areas that BIDs might exclude under this proposed framework have the opportunity to create their own districts and tailor services to specifically meet their unique demands. This result is directly in line with the original mission of BIDs.²⁰³

V. CONCLUSION

Business Improvement Districts have generated nationwide acclaim for their innovative approach to resurrecting economic vitality in struggling American cities.²⁰⁴ Nevertheless, what constitutes improvement for some property owners

¹⁹⁸ OHIO CONST. art. XVIII, § 11.

¹⁹⁹ Andy Schmitz, *Introduction to Economic Analysis*, SAYLOR ACAD., https://saylordotorg.github.io/text_introduction-to-economic-analysis/index.html (last visited Oct. 22, 2023) (explaining, in Sec. 5.1, the impact of taxation on supply and demand).

²⁰⁰ Shawn Leininger et al., *Special Improvement Districts*, CUYAHOGA CNTY. PLAN. COMM'N, https://s3.countyplanning.us/wp-content/uploads/2022/01/SID_GuidebookAddendum.pdf (Sep. 2, 2020) (providing that Ohio special districts must be reauthorized every five years following the same steps required to create the district).

²⁰¹ See Kennedy, *supra* note 45, at 284.

²⁰² See generally U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., *supra* note 40, at 2 (explaining that services are directed to improve the entire district, implying that there are no individualized services for members).

²⁰³ See Kennedy, *supra* note 45, at 284.

²⁰⁴ See Nicole Stelle Garnett, *Governing? Gentrifying? Seceding? Real-Time Answer to Questions about Business Improvement Districts*, 3 DREXEL L. REV. 35, 35 (2010).

comes at a cost to others.²⁰⁵ Currently, the special assessments used to finance BID projects rely on a front footage method that poorly distributes costs among members.²⁰⁶ Consequently, special assessments present a host of issues for property owners, including financial burdens, forced annexation, and a threat to the ownership of their property.²⁰⁷ In its present state, the Ohio Constitution is ill-prepared to safeguard against these injustices. Therefore, the Ohio Constitution needs considerable reform.

Reform should begin by defining “special benefit” and applying a new procedure for conducting special assessments. BIDs will more justly distribute costs among members if they are required to consider both location and business type in the assessment process. Moreover, requiring members to vote on the need for services will not only improve transparency, but also develop the BID’s accountability to its members.

As BIDs throughout the country continue to grow in both number and size, so does the resistance from property owners who question the consequences of BIDs on their communities and businesses.²⁰⁸ The solutions addressed here will provide a means for these conflicting values to coexist and will promote urban development with proper consideration of a larger set of interests.

²⁰⁵ See *supra* Part III.B.

²⁰⁶ *Supra* Part III.B.

²⁰⁷ *Supra* Part III.B.

²⁰⁸ See Letter from BSI Properties, LLC, *supra* note 16; Telephone interview with Rob Johnson, *supra* note 16.